CIRCUIT COURT SUPPLEMENT 2 for VOLUME II of VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

The following Circuit Court dispositions have become available since the publication of our first Circuit Court Supplement incident to Volume II.

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14 Sutton, Calvin, WCB #67-1170; Award increased to 25% loss arm.

18 Winchester, Charles H., WCB #68-165; Affirmed.

27 Knight, S. M., WCB #68-4; Dismissed.

39 Gouker, Elmer Lee, WCB #67-741; Piper, J: (October 31, 1969). "The above entitled matter came before the Court August 25, 1969, on the issues presented by the appeal by the claimant from an Order on Board Review. The claimant appearing by Mr. David R. Vandenberg, Jr., of his attorneys; the employer appearing by Mr. Darylle E. Klein, of its attorneys; and the Court having heard the arguments of counsel and examined the record and now being fully advised in the premises, FINDS:

"On January 11, 1966, Klamath Moving & Storage Company then had and for the six years immediately prior thereto had had in its employ a laborer with a personality trait disturbance, with a congenital anomaly of his low back and who had since the Korean War been rated 50% disabled from a head wound. That this man sustained accidental injury to his low back in the area of the congenital anomaly arising out of his employment is not questioned, as his claim was accepted. The claimant finished unloading the truck and reported to Dr. Garrison, a chiropractor, at 1:00 P.M. the same day. He was treated by Dr. Garrison continuously to the date of the hearing, October 17, 1967, and up until that time had not returned to work for the same employer or for anyone else on any kind of a regular basis. At the hearing he testified that his condition was worse and that pain is spreading to other parts of his back and legs.

"The Board fixed the date at which his condition became stationary at March 27, 1967, and fixed the amount of his permanent partial disability at 20% of an arm for unscheduled disability. The claimant appealled from that determination. The Hearing Officer fixed the date at which he was medically stationary as November 15, 1966, and fixed the degree of his permanent partial disability at 35% of an arm for unscheduled disability. The employer appealled from this determination, asserting that the claimant's condition had become stationary earlier than that and that the disability award was excessive. The Workmen's Compensation Board concluded that the initial determination was correct and did not discuss the matter of when the claimant's condition became stationary, but reinstated the determination of disability at 20% of an arm. The Court presumes that since no disposition of the Hearing Officer's findings as to the date on which claimant became medically stationary was made by the Board, that the date, November 15, 1966, was affirmed by the Board.

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"The claimant appealled from the Board decision to this Court contending that the claimant has suffered permanent partial disability in excess of the 35% of an arm and contending that as of the hearing, the claimant was still temporarily totally disabled, and that his condition had not to that point become medically stationary. Claimant likewise contends in argument that the Board erred in fixing the degree of disability when it rejected loss of earning capacity as a major deciding factor.

"In addition to the treatment by Dr. Garrision, the claimant has been examined successively by one orthopedic specialist in Klamath Falls within two weeks of the injury; one orthopedic specialist in Eugene within six months of the injury; one neurological surgeon in Medford within about ten months of the injury; one orthopedic specialist in Medford within about fourteen months of the injury; another neurological surgeon from Medford within eighteen months of the injury; about which time a mylogram was performed on claimant's spine which was negative for protruded lumbar or cervical disc, and examined by a psychiatrist at the behest of the Hearing Officer, apparently on November 3, 1967.

"Various of these doctors reports as time elapsed hinted that it was felt that the claimant was exaggerating his injury and the Board Order relates a finding that a substantial degree of functional overlay appears to be present. Dr. Luce, one of the neurosurgeons had found in this respect, 'anxiety tension state, primarily situational, motivated by non-medical factors', and it appears that this factor gave rise to the examination by the psychiatrist. The Hearing Officer recognized this element of the case when he stated, 'that the present subjective complaints are very real to the claimant and are not of a voluntary nature.' It is not clear from the Order on Review whether the Board considered this element to be a disabling factor, although certainly the Order indicates that the Board recognized that this element is present.

"Dr. Gardner, the specialist in this area, in describing the personality trait disturbance that he found, diagnosed it as 'passive, aggressive type with many features of a conversion reaction..... I do not recommend further medical procedures as this would only serve to focus more attention on the target organ. There are some soft signs of organicity which could be traced to his head injury, which also militates against any treatment. The Court's understanding of a conversion reaction is gained from Dorland's Medical Dictionary, 24th Edition, as follows: 'a freudian term for the process by which emotions become transformed into physical (motor or sensory manifestations.' This finding was on November 3, 1967, after all of the other medical examinations. Presumably the precise information was not available to the other doctors. This finding was not explored with Dr. Luce during his deposition of April 24, 1968.

"From the whole record the Court finds the Hearing Officer took the psychiatric findings into account in fixing the degree of disability and that the Board did not.

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39 "The law in this field after a time was able to regard disabling pain which could be traced to objective physical findings as compensable. The question now is whether disabling pain when emotionally based and without apparent objective physical findings should be compensable. The Court recognizes that it is very difficult to determine the existance of a true emotional state of this kind and to distinguish it from malingering. Where as here a qualified medical doctor has found this man's emotional make-up to have, 'many features of a conversion reaction,' and 'organicity which could be traced to his head injury,' there seems to be a sufficient scientific basis for believing that the claimant is not merely malingering.

"Based upon the Romero case the Court makes no effort to evaluate the extent of disability when a consideration of the claimant's emotional state is included, but rather affirms the Hearing Officer's determination; accordingly, it is,

"ORDERED that the determination by the Workmen's Compensation Board of October 17, 1968, be and the same is hereby reversed and the Findings and Award by the Hearing Officer are reinstated and the date on which claimant's condition became medically stationary is declared to be November 15, 1966, and the degree of permanent partial disability sustained by the claimant herein is fixed at 35% loss of an arm by separation for unscheduled disability to his low back."

61 Weimer, Jack, WCB #67-750; Dismissed.

71 Tatum, Robert E., WCB #68-701; Affirmed.

105 Shuey, LeRoy M., WCB #68-471; Permanent total disability allowed based on loss of both hands.

111 Entler, Geanella V., WCB #68-949; Reversed: Employer found to be non-subject employer.

129 Sommerfelt, Edward K., WCB #68-700; Dooley, J: (September 22, 1969).

"Claimant at the time of testifying was 59 years old, had done manual labor during his entire working life, had an eighth grade education, and had worked at heavy carpenter labor for approximately one year following the accident out of which this claim arose.

"The medical reports from three reputable orthopedists are in agreement that the claimant has a real and substantial disability to his back, based upon admittedly pre-existing conditions which were probably aggravated or activated by claimants injury of March 14, 1966. Psychological reports indicate opinions that claimant 'has probably psychologically retired from the active work force' while at the same time it is acknowledged that claimant sustained 'a substantial occupational handicap caused by a compensable injury.'

"From the psychological report and a five minute motion picture film of the claimant on a fishing expedition, the defense would imply that this claimant is a malingerer who simply has no desire to work. Such an implication is not acceptable to this court in view of claimant's history as an active member of the work force and, particularly, in light of the fact that claimant continued to work for almost one year following his injury. This is certainly not the action to be expected from one who wants to retire on a pension fraudulently obtained.

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129 "The evidence shows a substantial injury. In accordance with the statutory provision of a trial de nova and the statutory direction to the court to enter such judgment as to the court seems proper, and notwithstanding the language of Romero vs. S.C.D. 86 Ore. A.S. 815, (440 P.2d 866), I find the claimant is entitled to an award for permanent partial disability equal to 90% loss by separation of an arm."

130 Simonsen, Neils V., WCB #68-730; Claim remanded for acceptance.

145 Young, Isaac M., WCB #68-673; Affirmed.

164 Low, Fred C. (Deceased), WCB #68-1281; Claim allowed.

177 Elliott, Sandra, WCB #68-1525; Affirmed.

184 Majors, Robert R., WCB #67-1370; Dismissed because of action, did not survive death of claimant.

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3 Klinski, George A. (now deceased), WCB #67-1672; Settled for $6,500.00

4. Barth, Steven W., WCB #67-1250; Award increased to 10% loss arm.

6 Donahue, William C., WCB #67-1552; Claim reopened by stipulation.

8 Pierce, Richard D., WCB #68-17; Remanded for rehearing.

9 Davidson, Ivan W., WCB #67-1598; Settled with $150.00 to claimant's atty.

10 Blevins, Fred O., WCB #67-1659; Award increased to 15% loss arm.

10 Place, Howard R., WCB #68-164; Dismissed for no jurisdiction.

17 Melius, Robert, WCB #67-561; Williams, J. "Upon the conclusion of the arguments upon the appeal of the above entitled cause from the Workmen's Compensation Board order, I took the matter under advisement and have reached my decision.

"First, I apologize for the long delay in rendering this opinion, however it has taken me considerable time to review the transcript and all of the exhibits.

"The question submitted to the Court for determination was limited solely to a determination to whether or not the claimant suffered injury to the low back area as a result of his fall while working on the green chain at the Boise Cascade Mill in Valsetz, Oregon, and further whether there is sufficient causal connection between the condition of the claimant's lower back and the fall at the Boise Cascade mill on January 6, 1966.

"The testimony revealed that the claimant suffered an industrial accident on January 6, 1966 while employed at the Boise Cascade mill in Valsetz when he was thrown from his feet while walking across a green chain and that he landed on his back and right shoulder on lumber described as four by fours. The claimant continued work at the Valsetz mill and did not consult a doctor until January 27, 1966 at which time he consulted Dr. Bruce Flaming, an osteopathic physician in Dallas. The Court finds from the testimony that at that time the claimant did related to Dr. Flaming that he was having some pain in the low back area but that such was minor in nature. At the examination Dr. Flaming found tenderness in the low back area but he believed the same was just a muscle strain and did not treat that area. Dr. Flaming examined the claimant again on January 28 and April 7, 1966, and in neither of these instances did the claimant complain of low back pain. On April 14, 1966 the claimant was involved in a motorcycle accident with a vehicle wherein he sustained injury to his left leg, and he was hospitalized for a period of seven days in connection with that accident, and he was released to return to work on May 9, 1966. Dr. Flaming saw the claimant again in July and three times in the month of August, 1966, and at none of these conferences or examinations did the claimant complain of low back problems. The claimant however testified that he did mention and complain of low back pain to the nurse in Dr. Flaming's office during the month of July, 1966 and the nurse related to the claimant that such was connected with the entire injury to the shoulder and upper thoracic injury. This testimony was not contradicted. The claimant further testified that he did complain directly to Dr. Flaming of the low back pain persisting in August, 1966. In May, 1966, the claimant quit his employment at the Boise Cascade mill in Valsetz because the work was

becoming increasingly difficult and the speed of the chain increased, and he thereafter sought employment at Willamette Valley Lumber Company in Dallas. On May 10, 1966, Dr. Bossatti, the examining physician for Willamette Valley Lumber Company performed perfunctory examination upon the claimant as to limitations in the back and found none. At that examination the claimant did not disclose any prior industrial accidents nor did he disclose the alleged condition of the low back area on the employment forms supplied him by the prospective employer. The claimant did in fact obtain employment at Willamette Valley and worked until the latter part of September, 1966 at which time entered the hospital for traction to the pelvic area at the request of Dr. Flaming after consultation with Dr. Anderson. It was at this time that Dr. Flaming formed an opinion that the continued pain in the upper thoracic region and the right shoulder was the result of an injury to the lower back area and he was treated for the low back injury and pain for some nine days with no apparent results. The claimant was thereafter referred to Dr. Anderson and it was then discovered that the claimant had a congenital defect at the last vertebra at the base of the spine. At the time of the hearing, Dr. Flaming testified that he was of the opinion that the claimant suffered an injury or strain to the low back area and that such was superimposed upon the congenital defect manifesting itself in pain in the upper thoracic region. Such opinion was based upon subjective findings and subsequent x-rays. The claimant was thereafter subjected to surgery and a laminectomy was performed on January 11, 1967 to correct the condition in the low back area.

"The testimony of Dr. Anderson may be summed up by saying that he was unable to form an opinion as to the cause of the claimant's low back condition. However, Dr. Anderson did testify that had he conducted a physical examination immediately after the accident in January and obtained a complete history of complaints of pain in the low back area, and had he further made the same subjective findings as Dr. Flaming, then he would concur that the injury at Boise Cascade mill may have been a more probable cause of the low back condition being aggravated, as opposed to numerous other possible causes.

"Much emphasis has been placed upon the failure of the claimant to complain of pain in the low back area to the examining and treating physician until some time had elapsed and his further failure to disclose low injury or pain on the application form for employment at Willamette Valley Lumber Company and his further failure to disclose prior industrial injuries or pain to Dr. Bossatti, the examining physician for Willamette Valley Lumber Company. It is a matter of common knowledge that various individuals withstand varying degrees of pain, and some are more prone to complain than others. There is ample reason for the claimant to fail, neglect or even intentionally withhold information from the prospective employer or the employer's examining physician relating to prior back injuries. It is apparent that a disclosure of the prior injuries would have resulted in his being denied the employment he sought. Furthermore the evidence is uncontradicted that the claimant did express to Dr. Flaming on his first examination the feeling of pain in the low back area and that he also further complained of pain

17 to Dr. Flaming's nurse and that the nurse related the cause therefor to the claimant. There was a subjective finding of tenderness in the low back area by Dr. Flaming upon his first examination, and such subjective findings together with the complaints substantiates the claim of injury manifested by pain in the area in question. Therefore it is the finding of the Court that the claimant did sustain an accidental injury described as a 'serious trama'(sic) to his low back area on January 6, 1966 and that such was superimposed upon the pre-existing congenital defect in the fifth lumbar vertebra. It is of course the law that a workman need not present a perfect body in order to entitle him to the benefits of the Workmen's Compensation Law of this state, and whether an accident directly causes a condition, or whether it lights up, accelerates, or aggravates a pre-existing condition, the resultant disability is chargeable to the accident and is therefore compensable. Therefore the claimant in this is entitled to recover compensation for the aggravated condition notwithstanding the effects of the accident in question were unusually severe because of the pre-existing condition of the claimant's lumbar spine, unless the mill accident was not the proximate cause of the subsequent aggravated condition, or state another way, unless the motorcycle accident was such an intervening cause as to break the chain of causation.

"Relative to the motorcycle accident, the testimony is uncontradicted that the portion of the body receiving injuries was the left leg and primarily a bruise to the left thigh. Dr. Flaming testified the motorcycle accident aggravated the pre-existing condition, but on the whole I am of the opinion that the evidence establishes that the more probable cause of the low back condition was the Boise Cascade injury and that the motorcycle accident was not such an intervening cause as to break the chain of causation. Such was established to a reasonable medical certainty.

"Therefore it is the finding of this Court that the injury to the low back area suffered in the industrial accident on January 6, 1966 was a compensable injury, and the order of the Workmen's Compensation Board dated September 9, 1968 is therefore reversed.

"At the time of the hearing it was stipulated that the Court would allow claimant's attorneys' fees in the sum of $300.00 for this claim and to be payable to both attorneys, and such an order may be entered.

"Mr. Bliven may prepare an order accordingly and submit the same for my signature and filing, forwarding copies thereof to Mr. Joseph and Mr. Emmons."

17 Glover, Max L., WCB #813; Wilkenson, J. "This matter comes before the court for review.

"Claimant suffered an industrial accident on November 11, 1965, while working in the woods. He fell across a log and injured his chest and damaged his heart. He was treated for this injury and according to the medical reports, made a complete recovery, particularly from the heart damage.

"In February of 1966, claimant complained of pain which the medical testimony and reports would indicate were symptoms of cervical arthritis and, lager, lumbar arthritis. These symptoms were called to the attention

of the treating doctors after a fall in the snow which occurred on January 5, 1966, when he was shoveling snow out of the driveway. At the time of the accident of November 11th, he complained of some pain to the neck and head, but this subsided shortly after that accident. The symptoms of aggravation to the arthritis did not appear until after the fall in the snow.

"The sole question to be determined by this review is whether or not the record supports a finding that the aggravation of the arthritis was caused by the industrial accident of November 11, 1965, or whether it was caused by the fall in the snowbank on January 5, 1966.

"The report of the treating doctor, Dr. Hoffman, does not disclose any complaints or symptoms of aggravation of the arthritis until in February of 1966. He did testify, however, that he did not believe that the fall in the snow injured claimant in any way and that the aggravation complained of was caused by the original injury.

"However, there is the further testimony of Dr. Taylor, who is a recognized specialist in this field, which indicates that it is more probable that the arthritis aggravation was caused by the snowbank rather than the original accident. Dr. Dennis stated that either the original accident or the snowbank fall could have caused the aggravation. However, since the symptoms of pain to the spine did not occur until after the snowbank fall, causation from the symptoms would be more related to the fall in the snow.

"I have considered all the testimony and exhibits in this case and have given particular attention to the work history of the claimant, his physical condition prior to the accident of November 11, 1965, his complaints as to pain as a result of that injury, his complaints after the fall in the snow bank and the medical testimony of all the doctors, together with their reports. It is my opinion that the evidence preponderates in favor of the findings of the hearing officer who originally heard this case and of the opinion of the majority holding of the Workmen's Compensation Board.

"In coming to this conclusion, I have given careful consideration, as stated, to the testimony of the various witnesses, as I realize it is a close question of fact. I cannot ignore the testimony of the medical history of claimant's complaints following the snowbank incident as reflected by Dr. Hoffman's testimony and notes, as against the findings and opinions of Dr. Taylor and Dr. Dennis, whom I consider to be experts.

"It is, therefore, my opinion that the majority holding of the Workmen's Compensation Board should be affirmed."

21 Lisoski, Colleen, WCB #68-299; Award increased to 30% loss arm for unscheduled disability.
23 Wright, Larry D., WCB #68-328; Award increased to 20% loss arm.
25 Beazizo, Robert, WCB #67-725; Award increased to 25% loss arm.
26 Weidner, Albert W., Jr., WCB #68-917; Remanded by stipulation for more evidence.
26 Walsh, Margaret K., WCB #67-965; Affirmed - Order of September 24, 1968.
33 Craghead, Clarence, WCB #68-396; Reopened for further medical care.
34 Warden, Kenneth, WCB #68-418; Affirmed.

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35 Barrett, Richard, WCB #68-8; Affirmed.

36 Sills, Leonard D., WCB #67-610; Affirmed.

37 Misterek, Elmer L., WCB #67-1540; Bradshaw, J. "Please be advised that it is the court's decision that the ruling by the Compensation Board denying the receipt in evidence of Dr. Steele's letter of July 3, 1968, was a proper ruling, and further that this court cannot consider Dr. Steele's letter of July 3, 1968, as evidence in this hearing since it appears that such evidence was available at the time of the hearing before the Hearings Officer, and the statute permits the court on appeal to hear such evidence that was unavailable at the time of the hearing.

"It is further the opinion of this court that the opinion of the Hearings Officer and the subsequent opinion by the Board on Review were not in error and that the findings of fact and conlusions therein made were without error, and therefore such decision by the Hearings Officer as affirmed by the Board on Review of the allowance of 10% loss of use of the foot will be approved and affirmed by this court and a judgment entered accordingly."

38 Johnson, Donald R., WCB #68-428; Award increased to 30% loss arm.

38 Essy, Victor M., WCB #68-105; Affirmed.

40 Lilly, Roscoe F., WCB #68-134; Affirmed.

41 Clark, Ray E., WCB #68-77; Affirmed; claimant's attorney allowed $350.00.

42 Buscumb, George R., WCB #68-569; Dismissed in Multnomah County for want of jurisdiction.

44 Hill, Robert C., WCB #68-220; Affirmed.

45 Anderson, James P.; WCB #68-126; Woodrich, J. "There are two issues tendered for decision in this appeal. First, this Court must determine the extent and duration of claimant's temporary disability as a proximate result of the accidental injury in question.

"The hearings officer determined that the claimant continued to be partially disabled, temporarily, through March 1st, 1968. This Court agrees with this finding as to duration of temporary disability and it is affirmed.

"This Court disagrees, however, with the hearings officer as to the extent of temporary disability. An examination of the record discloses that the opinion of Doctor Larson in his letter of August 11, 1967, that claimant's condition was then stationary is refuted by the subsequent developments of claimant's case. Claimant received an extensive course of treatment from his family medical doctor which substantially improved his physical condition. The treatments were performed at three and four day intervals until Doctor VanDermark released him for work on March 1, 1968. That the treatments were necessary and beneficial is corroborated by claimant's improved recovery. (See Claimant's Exhibit No. 9) Surely temporary disability compensation is intended to aid an injured workman in obtaining the medical treatment necessary to maximize his recovery. The frequency of the necessary treatment program, of itself, would render claimant unable to perform work at a regular occupation during this treatment period. Claimant should have been awarded temporary total benefits to March 1, 1968.

"The second issue concerns the extent of claimant's permanent disability. A careful examination of the record convinces this Court

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45 that the hearings officer correctly determined and assessed claimant's permanent disability at twenty-five per cent loss of use of claimant's right arm. The Court is of the opinion that claimant's injury is limited to his right arm according to the preponderance of the evidence. If claimant in fact, suffers from subjective symptoms in other areas of his body, this Court does not feel that the causal relation thereof to the injury has been sustained. The permanent disability award should be affirmed."

46 McConnell, Ellis E., WCB #68-377; Affirmed.

47 Jackman, Robert R., WCB #68-446 and WCB #67-1447E; Hearing Officer Order reinstated.

49 Gill, William, WCB #67-1663; Dismissed on claimant's motion.

50 Coltrane, Glen, WCB #68-194; Case dismissed for want of jurisdiction, May 14, 1969.

50 Fillpot, Frank J., WCB #68-878; Affirmed.

51 Chambers, Lulla, WCB #68-490; Affirmed.

52 Baker, Florence M., WCB #67-1388; Award increased to 30% loss arm.

52 Bradley, Cecil R., WCB #68-647; Affirmed.

54 Williams Robert L., WCB #68-283; Jones, J. "This matter coming on before the Court for determination and the records and exhibits received by the Hearings Officer were received and the Court having reviewed the same, hereby finds that the decision of the Hearings Officer was supported by the evidence, received at the hearing, and conclusions drawn were correct in law. The findings of the Hearings Officer will therefore be affirmed."

55 Elizarras, Robert S., WCB #68-486; Award increased to 30% whole man by stipulation.

56 Dickinson, Willie C., WCB #68-555; Foster, J. "After a review of the record and your arguments the Court came to the opinion that the decision of the Workmen's Compensation Board in the above entitled matter should be affirmed. I have therefore made a short order in compliance with ORS 656.298, subsection 6, merely stating that I have affirmed that order. I do not feel that ORS 17.431, subsection 1 as to the making of special findings of fact and conclusions of law apply or should apply in this type of case when particularly all the Court desires to do is to affirm the order of the Workmen's Compensation Board.

"It would appear to me that it would be a considerable waste of time to go through all of the procedures for objections to findings and end up with the same decision as I am now making from which an appeal can certainly be made."

56 Bealer, Leonard, WCB #67-1213 and WCB #67-1322; Back award increased to 30% loss arm by stipulation.

57 Dixon, Linford James, WCB #68-145; Affirmed.

57 Rising, Robert C., WCB #68-768; "(1) On March 23, 1968, Rising was a subject workman of Apex Enterprises, Inc., a noncomplying employer subject to the Oregon Workmen's Compensation Act, and on that date Rising did sustain compensable injuries in the course and scope of his employment by Apex Enterprises, Inc."

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57 "(2) The compensable injuries sustained by Rising on March 23, 1968 are compensable to the same extent as if his employer, Apex Enterprises, Inc., had complied with ORS 656.001 to 656.074 and such compensation shall be paid by the State Compensation Department out of the Industrial Accident Fund as provided for in ORS 656.054, and such compensation to include temporary total disability payments from and after March 23, 1968, less time worked, and to continue to such date as claimant's attending physician determines that claimant is able to return to his regular employment, or until termination of such payments is authorized by the Workmen's Compensation Board following examination of the medical reports submitted to the Board in accordance with ORS 656.268 and to include medical services and payment for the same as provided in ORS 656.245 and 656.248.

"(3) Estoppel may not be invoked against the subject workman in this case any more than may the common law principles pertaining to contributory negligence, fellow servant doctrine and assumption of risk without doing violence to the language, purpose and intent of the Workmen's Compensation Act."

59 Berg, James, WCB #68-462; Affirmed.

62 Milburn, Earnest F. (Deceased), WCB #67-1212; Widow and children's benefits allowed.

63 Brennan, Daniel W., WCB #68-149; Affirmed.

65 Bates, Robert, WCB #68-790; Dismissed for improper notice of appeal.

66 Palumbo, Leonard P., WCB #68-829; Award increased to 25% loss arm.

72 Scott, Johnnie S., WCB #68-596; Affirmed.

72 Hedrick, Wade, WCB #68-294; Claim remanded for acceptance.

73 Hopkins, Eila A., WCB #67-1230; Wolff, J. "The State Compensation Department appealed to the above entitled Court from an Order on Review entered by the Workmen's Compensation Board which was filed in Salem, Oregon by the Board on the 20th day of December, 1968, in the above cause. The other parties who appeared in the review proceedings are: Eila A. Hopkins, claimant, represented by Banta, Silven & Young, Attorneys at Law, 1950 Third Street, Baker, Oregon 97814 and the Royal Cafe, 1910 Main Street, Baker, Oregon 97814, employer. On this appeal the State Compensation Department requests that the Workmen's Compensation Board's Order of December 20, 1968, be reversed and that the Hearing Officer's Order of May 24, 1968, dismissing the Request for Hearing be reinstated for the reasons (1) the Board was obviously speculating that the Department denial was based on late filing since its Opinion itself notes the denial was not made on that basis; (2) the only substantive basis for the Board's Order 'the injury alleged is consistent with the treatment sought' disregards the fact that there was sharply conflicting and inconsistent testimony concerning what area of claimant's body was injured; and (3) the Board, though having de novo jurisdiction, points to nothing in the record as its reason(s) for preferring claimant's testimony to the defendant's, i.e., for believing the former and disbelieving the latter.

"The chronology in this matter is as follows:

1. Alleged accident to claimant on the job at the Royal Cafe in Baker, Oregon, on June 6, 1967.

2. Notice of denial by the State Compensation Department, dated August 30, 1967.

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3. Opinion and Order of H. Fink, Esqu., Hearing Officer, dated May 24, 1968.
4. Order on Review of the Workmen's Compensation Board, dated December 20, 1968.
5. Notice of appeal filed in Baker County Circuit Court January 13, 1969.
6. Oral argument before this Court on the 6th day of March, 1969.

"Was the claimant injured on the job at the Royal Cafe on June 6, 1967?

"We have read the records, files and transcript. We understand this is de novo hearing. We understand that this Court is the sole trier of the fact and has the sole and exclusive responsibility of determining the weight, effect and value of the evidence and the credibility of each and every witness. The Uniform Jury Instructions relevant to civil matters have been read by this Court. See also ORS 17.250. We understand the proof has to be in terms of probability, i.e., the party saddled with the burden of proof must convince the trier of fact by competent evidence that a thing asserted is more likely to be true than not true. See civil Uniform Jury Instructions relevant to defininig preponderance of the evidence. See also such sections of ORS 41.360 as are applicable.

"We have read In the Matter of the Compensation of Jerry F. Coday, Claimant, Coday, Respondent, vs Willamette Tug & Barge Company, Appellant, decided May 1, 1968, Volume 86 Advance Sheets (Or) No. 12, pages 751-762. See also Romero, Respondent, vs State Compensation Department, Appellant, decided May 15, 1968, Volume 86 Advance Sheets (Or) No. 13, pages 815-819.

"We conclude that the Legislature has not authorized us to comment upon the action taken by any previous adjudicatory body in the processing of this claim. We must decide this case without benefit or the burden of prior decisional activity and without anxiety as to what the Supreme Court might do.

"Justice O'Connell points out in Coday, supra, 761: 'By the same token, we recognize that another trier of fact examining the evidence in the present case might reasonably reach a conclusion opposite to ours.' We may choose what witness or witnesses we wish to believe, and what weight, effect and value we wish to give to the testimony of any witness. The matters of credibility and evidentiary weight are solely and exclusively for this present trier of fact, regardless of what any other trier of fact heretofore or hearafter may have done or may do. We believe Mrs. Hopkins when she testified positively that she was injured on June 6, 1967, on the job at the Royal Cafe in Baker, Oregon. We think that her testimony and that of her medical witness, the chiropractor, Dr. Poulsen, clearly meet the tests of Coday, supra, namely that the 'activity in the present case involved exertion sufficient to establish legal causation', and that the claimant has proven medical causation.

"We reject the implied suggestion that we must, line by line, rule on the truth or falsity of each and every witness and resolve all the inconsistencies. A trier of fact does not have to furnish reasons for the resolution of inconsistencies, actual or apparent. No jury does. Were the ultimate facts proven? These are the findings we must make. We think that the provisions of ORS 17.431 and ORS 17.435 require only

the finding of sufficient ultimate facts. Counsel have asked for permission to request Findings of Fact. That's a legitimate request. The Findings of Fact refer to ultimate Findings of Fact, not to Findings of Fact as to each and every single line of testimony and as to the extent to which we believe one witness and do not believe another witness. We emphasize that ORS 17.431 and ORS 17.435 do not require any statement of our reasons for credibility or any explanation of inconsistencies.

"We simply recite that we believe the claimant when she tells us she was injured on June 6, 1967, on the job at the Royal Cafe, Baker, Oregon, and that the suffering and injury which she described and which her doctors, Poulsen and Smith, treated her for, was a result of that job accident of June 6, 1967.

"We humbly suggest to the Oregon Legislature, as did the Supreme Court in Coday, supra, that something be done legislatively to eliminate de novo on de novo on de novo on de novo. We suggest a Compensation Court of the State of Oregon made up of three judges, and a division thereof composed of as many hearing officers as are needed to do the hearing officer's work. The hearing officers would do as they are presently doing but they would be under the control of the Compensation Court, which obviously would have a good administrative assistant to ride herd on the hearing officers to see that they hear all the cases. This would place the adjudicatory functions in a purely adjudicatory body of law trained persons. The State Compensation Department would either deny a claim or allow a claim and fix the compensation. If any interested party did not like that result, the party would ask for a hearing before the hearing officer who is under the jurisdiction of the Compensation Court of three judges. If the hearing officer's result displeased any party, there would be a de novo appeal to the Compensation Court. (Compare role of State Tax Court) The scope of that hearing would be as broad as the present scope of review as described in Coday, supra. If any party was displeased with the Compensation Court's determination, then there would be an appeal to the Supreme Court. The power of review on this last mentioned appeal would be the narrow one described in Olson vs State Industrial Accident Commission, 222 Or 407, 352 P2d 1096 (1960). Obviously, the Olson case presupposed a recognition of the substantial evidence rule. If a reasonable trier of fact could have made the determination based on the evidence in the record, then the Supreme Court on review would not upset the decision, if my suggestion ever receive legislative authorization.

"We take the liberty of suggesting immediate legislative revision in this area because the de novo appeal provisions as presently authorized drag out the claim far too long and possibly do not meet constitutionally imposed due process requirement. See Section 10, Article I, Constitution of Oregon, and Section 1, Amendment XIV, Constitution of the United States. Inherent in the very nature of the existing system there is a built-in delay. The prolonged litigation and relitigation of the same fact issues invite a type of social and economic injustice and unfairness that might eventually cause the Supreme Court of the United States to take the position that the very procedure itself and the undue and unjustifiable postponement of finality in the resolution of the issues involved in

compensation cases constitute a denial of due process of law, based on an obvious discrimination against certain types of litigants arising out of the time factor itself and the failure to render justice without delay.

"Apply Coday, supra, to this situation. First, the State Compensation Department has to decide what it's going to do with the claim. Then, the hearing officer has to decide what he's going to do with it, if there is a request for a hearing. Then, the Board has to decide, on review, what it's going to do with the claim. Then, the Circuit Court has to decide what it's going to do with the claim if there is an appeal. And then the Supreme Court has a right to decide whatever it wants to do with the claim if there is an appeal to it. That unreasonable length of time in reaching finality invites constitutional disapproval if one adheres to fundamentals of due process of law -- meaning an adequate, reasonable remedy heard within a reasonable time at a reasonable legal cost and achieving early finality.

"It may very well be that the threat of constitutional prohibition against unreasonable delay caused by the use of the prolonged sequence of four de novo hearings really is warranted by the U. S. Constitutional guarantee of equal protection of the law. Also, our Oregon constitution, Article 1, Section 10 thereof, addresses itself to the obligation of state government to provide an adequate remedy for the redress of grievances to be secured to any litigant without delay, certainly without unnecessary and unreasonable delay inherent in that system of sequential adjudication statutorily imposed upon a class of parties. Should it be determined that the statutorily established sequence of four de novo hearings creates a psychological and economic burden upon claimants in compensation cases unreasonably heavier, as a consequence of the built-in delay in reaching finality of resolution of one's rights under the compensation act, and disproportionately more difficult than the burden, upon parties in other classes of litigation, of the procedural requirements for the resolution of issues and the reaching of finality of determination in such other classes of litigation, then the four de novo hearings procedure probably is a denial of both equal protection of the laws and due process of law. Implicit necessarily in these propositions is a challenge to the necessity of the four de novo hearings requirement. A finding of want of necessity for such a scheme of prolonged litigation would cause one to focus on the issue of whether the required procedure is a denial of the state and federal constitutional guarantees. See generally Archibald Cox's 'The Warren Court: Constitutional Decision As An Instrument of Reform', Harvard University Press (1968), and particularly chapter 2 thereof on 'Civil Rights: Judicial Innovation', pages 24-50, inclusive. The point is that the Legislature perhaps ought to take a look at the present adjudicatory scheme involved in compensation cases instead of waiting until the Supreme Court of the United States or the Supreme Court of the State of Oregon find it necessary to resolve the issue, when a constitutional issue is raised. James Bradley Thayer's life of 'John Marshall', Houghton Mifflin Company (1901), pages 102-110, points out the necessity of greater legislative concern for the constitutionality of the measures it adopts, to reduce the demand for judicial interference with legislation. This admonition

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73 may very well be levelled at this writer for even suggesting the existence of a possible problem, but a problem does exist if one should find that the effects of the prolonged litigation upon the claimants as a class are adversely and unjustifiably harsh as a consequence of the unreasonable length of time required of one to pursue one's remedy through the scheme of sequential adjudicatory acts statutorily imposed by the Legislature.

"I can see need for the hearing officer. He takes the testimony and makes findings. Obviously, the Oregon Supreme Court, although the final and real adjudicator, has not the time to take the testimony. But the de novo roles of the Board and of the Circuit Court are mere testing grounds or dress rehearsals, as you prefer, for the litigants on their way to the final unlimited battle de novo in the Supreme Court. Can one rationally justify, to a claimant or to any other litigant in compensation cases, that course of procedure in the light of the ancient constitutional mandate of justice without delay? I doubt it. When a course of procedure offends the concept of basic fairness implicit in due process and in equal protection of the laws, lawyers and judges have a tendency to undertake in the judicial branch what ought really to be resolved legislatively.

"It is better, I believe, to suggest legislative review of the present adjudicatory scheme than to subject the United States Supreme Court, as a consequence of legislative default or inaction, to the demand to involve that judicial body in supra-legislative action in matters that more properly ought to be considered and resolved by the people's own policy-making representatives in the Legislature. While the possibility of a successful attack upon the constitutionality of the four de novo hearings procedure may be minimal, it is not mere idle speculation. The obviously prolonged litigation possibilities in these compensation cases suggest the constitutional weakness of the procedure itself. Perhaps we cannot escape d'Tocqueville's generalization: 'Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question', but judicial intrusion into and innovation in constitutional matters could be substantially reduced if both the legislative and judicial bodies paid more heed to Thayer.

"The claimant is directed to prepare Findings of Fact in accordance with ORS 17.431 and ORS 17.435, and cause the submitted Findings of Fact and Conclusions of Law to be filed with the Clerk for presentation to the Court in accordance with those provisions, and the appellant is also requested to follow the provisions of those two sections."

74 Freitag, Lane, WCB #67-1631; Award increased to 50% loss arm.

78 Anthony, Fred S., WCB #387; Award increased to 50% loss arm by stipulation.

78 Kappert, Lorene Z., WCB #67-1419 and WCB #67-1363; "Claimant is awarded 20% loss of an arm by separation for unscheduled disability to her back for the accident of May 19, 1966, less the overpayment of temporary total disability paid by Aetna Casualty & Surety Company, and Claimant is further awarded 20% loss function of an arm for unscheduled back disability arising out of the injury on June 5, 1965,..."

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78 "IT IS FURTHER ORDERED AND ADJUDGED that that portion of the decision of the Workmen's Compensation Board affirming the Hearing Officer and requiring Aetna Casualty & Surety Company to pay to State Compensation Department an amount equal to overpayment of permanent partial disability made by the State Compensation Department is hereby reversed."

81 Derbyshire, Thea Rose, WCB #67-1423; Warden, J. "The Claimant is a forty-one year old woman. She has no formal education beyond the sixth grade in elementary school. She is not presently married. She has little work experience other than as a waitress. She was injured on March 19, 1966 while working as a waitress. As a result of her injury of March 19, 1966, she suffers a chronic cervical strain syndrome with a cervical cephalgia and right shoulder arm syndrome. The accident of March 19, 1966 did not cause injury to her lower back or legs nor did it cause the nervous condition from which she has suffered since said accident. The injuries sustained in the accident of March 19, 1966 and the resulting chronic cervical strain syndrome, cervical cephalgia and shoulder arm syndrome on the right result in permanent partial disability of this claimant greater than 5% loss of an arm by separation for unscheduled disability, to-wit: 15% loss of an arm by separation for unscheduled disability.

"The court concludes on the basis of the above findings of fact that the order heretofore made on January 3, 1969 by the Workmen's Compensation must be modified to provide that claimant be granted an award of permanent partial disability equal to 15% loss of an arm by separation for unscheduled disability."

82 Burns, Phillip L., WCB #68-925; Affirmed.

84 Hannan, Howard H., WCB #68-781; Award increased to 90% loss arm.

85 Wheeler, John R., WCB #68-406; Reversed; claim for herniated disc allowed.

86 Stark, Francis, WCB #68-821; Low back strain compensable.

86 Weeks, Nellie G., WCB #67-1638; $600 paid to executor by stipulation.

87 Hickey, Calvin R., WCB #68-359; Claim remanded for acceptance.

90 George, Marion, WCB #68-95; Affirmed.

92 Saul, Roy R., WCB #68-964 and WCB #68-722; Appeal dismissed on jurisdictional grounds for want of service on Workmen's Compensation Board.

98 Blackmore, Lester W., WCB #68-222; Attorney fee of $728.39 allowed.

99 Potter, Roy, WCB #68-436; Hay, J. "The above entitled matter is an appeal from the Order of the Workmen's Compensation Board of the State of Oregon dated January 17, 1969 which affirmed the Order of the hearing officer made and entered on August 6, 1968 denying the workman's claim.

"The sole basis upon which the hearing officer affirmed the denial of the workman's claim was a finding of lack of credibility on the part of the claimant. The Board affirmed the Order of the hearing officer denying the claim by a divided decision, two members of the three concurring with the hearing officer. The Court, after reviewing the evidence, adopts the findings of Commissioner Callahan in his dissenting opinion as the Court's findings. The foregoing findings are supported by the preponderance of the evidence.

"The alleged accidental injury was unwitnessed and the claimant is an ex-felon and was at the time of the claimed injury employed on the work release program. The Court senses from the record that

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99 these facts created in the minds of the hearing officer, as well as a majority of the Board, a presumption of falseness which the claimant was obliged to overcome. This is a basic fallacy in the law of evidence as every witness is presumed to speak the truth. That the majority of the Board failed to apply the presumption of truthfulness is evidenced by the Order itself in which the majority states 'There is no presumption of truth in favor of the claimant'.

"The Court, based upon the foregoing, finds that the Board erred in affirming the hearing officer and finds that this claim is compensable and that this matter should be remanded to the State Compensation Department for acceptance and payment of benefits as provided by law. Counsel for claimant may prepare Findings and Judgment consistent with the foregoing."

101 Lowe, John R., WCB #68-1150; Affirmed.

103 Galvin, John E., WCB #68-994; Affirmed.

103 Lee, Cecil B., WCB #67-1586; Award increased to 100% loss arm.

106 Franklin, Wesley J., WCB #68-353; Affirmed.

107 Spenst, Orvel A., WCB #68-352; Affirmed.

108 Robinson, Jack, WCB #68-611; Affirmed.

113 Groseclose, Cecil V., WCB #68-797; Allen, J. "This matter comes on for hearing before the Court upon the claimant's Notice of Appeal from the Order on Review of the Workmen's Compensation Board dated January 27, 1969, the matter having been submitted to the Court upon the record transmitted to the Court by the Workmen's Compensation Board, none of the parties herein involved having chosen to accept the opportunity offered to them by the Court to present oral argument, briefs or additional evidence on the issue of disability pursuant to the Order of the Court made and entered herein on February 11, 1969.

"Claimant suffered an accidental injury arising out of and in the course of his employment on September 21, 1966. Under mailing date of April 4, 1968 the Workmen's Compensation Board by and through its Closing and Evaluation Division made a Determination Order awarding claimant compensation for temporary total disability to May 1, 1967 and no award for permanent disability.

"Claimant being dissatisfied with said Determination Order requested a hearing before the Workmen's Compensation Board and on September 6, 1968, a hearing was held before H. Fink, Hearing Officer of the Workmen's Compensation Board. At said hearing claimant called eight witnesses in support of his contention that he was permanently and totally disabled as a result of his accident of September 21, 1966. (Tr 2 thru 111)

"The State Compensation Department offered no testimony and based their case entirely upon the documents admitted in evidence. (Tr 115) The Hearing Officer on October 10, 1968 entered his Opinion and Order ordering the State Compensation Department to pay certain medical expenses, granted claimant an award of permanent partial disability equal to 25% loss of an arm by separation for unscheduled disability, and awarding claimant's attorneys fees to be paid out of said award."

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"Claimant requested a review of the Order of the Hearing Officer and on January 27, 1969 the Workmen's Compensation Board entered its Order on Review and affirmed the findings and conclusions and Order of the Hearing Officer.

"At the time claimant was injured he was 63 years old and at the time of the hearing before the Hearing Officer he was 65 years old. (Tr 2) He had an 8th grade education and had no other courses or educational training beyond the 8th grade. (Tr 3) He has followed the occupation of a painter practically all of his adult life except during World War II, when he served as a radar technician in the Signal Corps, attached to the Air Force. (Tr 3) He was last employed in October, 1967, (Tr 11), drew unemployment compensation from October 24, 1967 to January 19, 1968, (Tr 16), and on January 25, 1968 cancelled his unemployment compensation as he was unable to work. (Tr 17)

"Claimant testified that he had no work skills except painting. (Tr 22), and that he could think of no job he could work at on a regular basis based upon his experience, age, sex, current education and physical capacity, and that he was a permanent total. (Tr 22 and 23)

"Arthur Ronald Summers, who had been a fellow employee of the claimant before and after his accident of September 21, 1966, testified as to the change in claimant's work habits and performance before and after the accident, and testified that in his opinion claimant was not now able to do painting work. (Tr 38-46)

"Donald Burch, a painting foreman for the University of Oregon for fifteen years and for whom claimant worked subsequent to his accident for about 3 months, terminating in October 1968, testified as follows in response to this question by claimant's attorney, 'Would the complaint that he has, and the condition that he has, would he be a candidate by employment by your organization at the present time, in his present condition?' 'No, I don't think I could conscientiously hire him. I have quite often this come up where I turn down a fellow that I don't think can make it any more.' (Tr 52)

"B. T. Webster, called as a witness for the claimant, a painter for 23 years in this community (Tr 65) and foreman on the job when claimant was injured (Tr 67), testified that claimant is permanently disabled as far as performing work as a painter and that he would not hire him as a painter on a regular basis. (Tr 71-72)

"Claimant called Dr. Mylon F. Buck, a physician and surgeon, whose training, experience, qualifications and expertese were set out in the record. (Tr 84-85) Dr. Buck had seen the claimant as a patient since February, 1964 and was the first treating physician to treat the claimant after his accident of September 21, 1966. He had periodically treated claimant since that time until the time of the hearing before the Hearing Officer, claimant's last visit to Dr. Buck having been on September 4, 1968. (Tr 85,90)

"Dr. Buck testified that in his opinion claimant was totally and permanently disabled as far as physical labor and painting were concerned. This opinion was given in response by a question by claimant's

attorney, asking Dr. Buck for his opinion based upon the assumption that a person is permanently totally disabled if he is unable to engage in any gainful, suitable occupation, based on his health, age, sex, work experience and education, on a regular basis. Dr. Buck further testified that claimant's condition of total permanent disability was the result of the accident of September 21, 1966. (Tr 92,93) In response to a question by counsel for the State Compensation Department, Dr. Buck testified that claimant was no longer physically able to perform the duties of a painter or any other heavy manual labor. (Tr 197, 198)

"The Court has carefully examined both the Opinion and Order of the Hearing Officer and the Order on Review of the Workmen's Compensation Board, and has been unable to ascertain by an examination thereof any mention of the aforementioned testimony of Summers, Burch and Webster, which is in the record, and both specifically fail to mention the testimony given by Dr. Buck that the claimant is now permanently and totally disabled within the meaning of the Oregon Workmen's Compensation Act.

"In particular, the Hearing Officer has found to base his Opinion and Order almost entirely upon the claimant's testimony and the documentary evidence in the file to the exclusion of the Oral testimony of the other persons heretofore mentioned, and the other witnesses called at the hearing by the claimant. The reasons for these glaring omissions does not appear from either the Opinion and Order of the Hearing Officer or the Order on Review of the Workmen's Compensation Board. In particular the Hearing Officer states after referring to the report of Dr. Stainsby (claimant's Ex. B) 'Outside of that one statement, there is a dearth of expert medical testimony for the substantiation of claimant's position.' It is incomprehensible how the Hearing Officer could reach such a conclusion in light of the sworn testimony of Dr. Buck given at the hearing before the Hearing Officer as set out heretofore.

"The Workmen's Compensation Board claims to have thoroughly reviewed the record in the following language: 'The Board review of such matters, however, is no less thorough', but then goes on to state 'It is noted that a complaint of inability to continue outdoor painting was one of the complaints. If this is a fact, it still falls short of inability to regularly work at a gainful and suitable occupation.' (Emphasis Supplied) Even the Hearing Officer could ascertain from the record that one of the claimant's chief complaints was his inability to do overhead painting, not outdoor painting. Is this a 'thorough' review of the record?

"The Court would concur with the Workmen's Compensation Board that inability to continue outdoor painting falls short of inability to regularly work at a gainful and suitable occupation, but the court feels that it is only fair to say that the testimony in the record reveals that the claimant is unable to continue in the only occupation in which he has any training, skill and experience, that is, painting, whether it be indoors or outdoors, or any other work that would require heavy lifting, twisting, etc. (Tr 108)

"Under the law this court is compelled to review this case de novo. This Court chooses to base its decision upon the sworn testimony presented before the Hearing Officer by the witnesses called by the claimant.

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113 However, this does not mean that this court has not fully and thoroughly reviewed all of the evidence contained in the entire record including all of the exhibits which are made a part of the record, and the Opinion and Order of the Hearing Officer and the Order on Review of the Workmen's Compensation Board.

"Based upon the foregoing the Court finds that as a direct and proximate result of claimant's accident of September 21, 1966, that the claimant is now permanently incapacitated from regularly performing any work at a gainful and suitable occupation, and that he is totally and permanently disabled and that he has been since January 25, 1969.

"The Court further finds that a reasonable fee to be allowed Sahlstrom and Starr, attorneys for claimant, is an amount equivalent to 25% of the increase in the compensation awarded to the claimant by virtue of this appeal, said fee, which together with the fees previously awarded to said attorneys, shall not exceed the sum of $1,500.00, and that said fee so awarded shall be a lien upon and payable out of said additional compensation awarded to claimant and to be paid by the State Compensation Department to claimant's attorneys, Sahlstrom and Starr.

"In accordance with the letter received by the Court dated February 26, 1969, from Allan H. Coons, Assistant Attorney General, of attorneys for the State Compensation Department, requesting the court make written Findings of Fact and Conclusions of Law, Claimant's attorneys, Sahlstrom and Starr are requested to prepare written Findings of Fact and Conclusions of Law and a Judgment Order in accordance with the foregoing opinion of the Court, submit the same to Mr. Coons for approval as to form only, and when so approved as to form to submit the same to the Court for signature."

114 Conner, Don S., WCB #68-143; Affirmed.

115 Boles, Maurice, WCB #68-683; Award increased to 50% loss arm.

117 Fagaly, Clifford, WCB #68-213; Affirmed.

118 Flaxel, Ben C., WCB #67-1283; Reversed and claim ordered accepted.

119 Hanlon, Robert L. (Deceased), WCB #67-892; Mengler, J. "The factual question before this Court on review is whether conditions and circumstances of the decedent's employment were a causal factor in producing the heart attack which caused his death.

"The medical witnesses were agreed that the activity pattern described in the hypothetical question was not appropriate for one who had the symptoms of a coronary. The witnesses were not agreed that stress and exertion from the physical activity of the employment were a causative factor in the heart attack.

"Our Supreme Court has rejected the view that exertion or stress can never be a legal causative factor in this kind of case, Clayton vs. State Compensation Department (unpublished opinion, filed May 21, 1969)" (88 AD. Sh. 457) "The medical wintess upon whose testimony the trial examiner relied, because he had greater 'expertise', took the view that exertion or stress is not a medical causative factor in a coronary.

"By a weighing of all the evidence, we find that the employment in which the decedent was engaging on the day of his death was a material contributing factor in causing the death.

"The Plaintiff may prepare an appropriate order.
"Dated this 26th day of June, 1969."

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121 Workman, Albert H., WCB #68-871; Affirmed.

123 Viles, John W., WCB #68-516; Blanding, J. "The Court is of the opinion after examining the transcript of testimony, exhibits and a review of the memoranda that the opinion of the hearings officer should be affirmed."

124 Williams, Marlin, WCB #67-1007; Allen, J. "After due consideration of the original transcribed record prepared pursuant to the provisions of ORS 656.295, all exhibits, copies of all Decisions and Orders entered during the hearing and review proceedings, the briefs of the parties submitted on review before the Workmen's Compensation Board dated February 3, 1969, which is the subject of this judicial review, and after hearing and considering the testimony presented by the claimant in the hearing before the undersigned, of Sheldon Wagner, M. D., presented pursuant to the provisions of ORS 656.298 (6), the Court is of the opinion and so finds that the Order of Review of the Workmen's Compensation Board dated February 3, 1969 should be affirmed."

127 Larson, Carl Edward (Deceased), WCB #67-1562; Heart attack claim ordered accepted.

129 Gullixson, Herb M., WCB #68-542; Award increased to 30% loss function of left foot.

129 Cleveland, Mildred F., WCB #68-1064; Affirmed in result.

130 Hutson, Kathryn, WCB #68-151; Award increased to 15% loss arm.

131 Otto, Norbert, WCB #68-577; Remanded for further medical care and treatment.

132 Puckett, Buddie L., WCB #68-522; Wells, J. "Plaintiff herein has appealed from an Order On Review of the Workmen's Compensation Board denying his claim for a back injury. The opinion of the hearing officer which was affirmed by the Board states:

> 'The evidence is clear that the claimant has sustained an injury to his low back but the evidence is far from clear that the injury arose out of and in the course of his employment.'

The sole question presented on this appeal is whether the injury was sustained on the job.

"Claimant detailed in his testimony the matter in which injury to his back is alleged to have occurred. Immediately upon leaving the job on December 8th he proceeded to a doctor for treatment. The denial of the plaintiff's claim apparently rests upon the fact that he failed to call as witnesses others whom may have told of his injury at the time it occurred. The Commission presented no testimony to contradict plaintiff's claim of injury on the job.

"For this Court to sustain the position of the Board it would be necessary to speculate that the claimant suffered some injury to his back at some other time or place without testimony upon which to draw such an inference. This Court can not guess or conjecture as to other occurrences which might have occasioned the injury. The record fails to present any evidence contradicting plaintiff's claim of injury on the job. In the absence of some evidence on the part of the State Compensation Commission to refute the plaintiff's claim, this Court must overrule the Order On Review and direct the Commission to accept plaintiff's claim."

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134 Rawlings, Loretta M., WCB #68-419; Reversed, additional compensation allowed for children, also $750 atty. fee.

135 Faulkner, L. A., WCB #68-637; Wells, J. "While working as a custodian for the Corvallis School District, L. A. Faulkner on April 22, 1966 fell from a ladder and injured his back. His claim was allowed and he was awarded temporary total disability to February 6, 1967 and permanent partial disability equal to 15% loss of an arm by separation for unscheduled disability due to the aggravation of a pre-existing back condition. His claim was subsequently reopened for the payment of additional temporary total disability and again closed on March 28, 1968 with no increased award.

"From this determination the claimant has appealed and the Hearing Officer recommended an increase in disability by an award of permanent partial disability equal to 50% of an arm by separation for unscheduled disability due to the aggravation of a pre-existing condition in his low back and a further award of a permanent partial disability of 10% loss function of his leg. This order of the Hearing Officer was appealed to the Workmen's Compensation Board which affirmed the order but noted that it was doing so reluctantly in view of the 'rather generous increase .....even though it is apparent that his gross disability does not equal the accumulation of awards'. From that order an appeal has been perfected to this court.

"This court has made an extensive review of the record and has noted that claimant's memory both respect to past injuries and awards and his conferences with treating doctors are hazy. Most of his complaints appear to be consistent with those referable to his former injuries where permanent awards had been made. Dr. Robert J. Fry and Dr. Douglas G. Cooper both were unable to find any neurological symptoms of a ruptured disc but did find indications of a 'voluntary guarding' by the claimant during examinations.

"The Court is convinced that the award made by the Hearing Officer, and affirmed by the Board is adequate and that there is no evidence to support any increase over that already allowed. The evidence did not disclose any effort by the claimant to become reemployed. To the contrary, because of his age and attitude, little motivation to do so was evident."

137 Flaxel, Ben C., WCB #68-1469; Stipulation entered on attorney fees.

137 Rosencrantz, Rodney (Deceased), WCB #68-806; Affirmed, with additional $1,500 attorney fees allowed for total of $3,000.

140 Spencer, Charles R., WCB #68-1027; Award increased to 50% loss arm.

144 Chambers, Paul, WCB #68-1015; Claim reopened for aggravation benefits.

147 Stewart, Donald Paul, WCB #68-1025; Affirmed.

150 Pacheco, Richard, WCB #68-1927; Abatement order reversed, remanded for hearing on merits.

152 Creamer, Eugene, WCB #68-375; Award reduced to 50% loss arm.

154 Darby, John R., WCB #68-1089; Reopened for medical care by stipulation.

156 Dodge, Joe D., WCB #68-929; Affirmed.

160 Audas, Troy M., WCB #68-1752; Reversed, Determination reinstated.

161 Linton, Fred Max, WCB #68-400; Dismissed "for the failure of claimant to comply with the provisions of ORS 656.295, 656.298 and 656.810 (4)."

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163 Gregory, Gerald L., WCB #68-1403; "IT IS HEREBY ORDERED AND ADJUDGED that the Order of the Workmen's Compensation Board dated March 24, 1969 be and the same is hereby reversed and the claimant is hereby awarded a permanent partial disability proximately arising from his accident on October 16th, 1965 equivalent to 65% loss of the workman for unscheduled disability in accordance with Richard Renn, the Hearing Officer's Opinion and Order dated November 27, 1968 and it is ordered that the State Accident Insurance Fund, formerly known as the State Compensation Department, provide said benefits pursuant to the Workmen's Compensation Law as hereinabove ordered."

166 Johnson, William H., WCB #68-1401; Award increased to 40% loss workman.

173 Boutillier, Russell A., WCB #68-866; Affirmed.

175 Tolbert, Garland, WCB #68-612; Remanded for acceptance of claim.

178 Mumpower, Clark L., WCB #68-1119; Penalties and attorney fees allowed. Board reversed.

182 Heckard, Charles H.(Deceased), WCB #68-603; Heart attack claim settled for $500.00.

186 Adams, Darrell I., WCB #68-974; Affirmed.

186 McManus, Eldon D., WCB #68-882; Award increased to 50% loss function of a leg.

192 Frank, Richard L., WCB #68-1252; Remanded because: "CONCLUSIONS OF LAW

1. The Hearings Officer made an error in law in excluding evidence of claimant's wages following his return to work after the accident, and such evidence is relevant on the issue of claimant's capacity to work.

2. The Hearings Officer engaged in speculation in concluding that the scavenging of metal 'would undoubtedly require some considerable effort in lifting' since there is no evidence to support such conclusion and such conclusion may have affected the Hearings Officer's judgment in this case.

3. The Hearings Officer erred in disregarding claimant's testimony and that of his wife, which was uncontradicted, on the subject of the affect of claimant's continued pain and discomfort upon claimant's ability to work."

197 Loudon, Opal G., WCB #67-1368; "...remanded to the Workmen's Compensation Board for review by a Medical Board of Review..."

VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

Robert VanNatta, Editor

VOLUME II

--Edited Reports of Workmen's Compensation Cases--

August 1968 - May 1969

Published by Fred VanNatta

VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

P. O. Box 135, Salem, Oregon 97308 Phone: 585-8254

Price: $25.00

PREFACE

Since our initial volume was published the first of this year, several forces have come to bear on our effort to provide timely reporting of the Workmen's Compensation cases.

First, the administrative process has matured considerably. The Board opinions have become more informative and, consequently, we have been able to quote from them more extensively.

Second, it has been possible for us to make the necessary arrangements to obtain copies of a goodly number of Circuit Court orders and opinions. This has enabled us to produce a Circuit Court Supplement.

Third, the volume of litigation before the Workmen's Compensation Board has increased beyond our expectations. This has necessitated some revisions in our format. Our first volume containing about 320 decisions was completely filled in an attempt to cover a full year. Publication of our Circuit Court Supplement overfilled our binder.

Consequently, in this volume we have initiated printing on both sides of heavier paper. This has permitted us to report an additional 20 cases and still have binder space for a forthcoming Circuit Court Supplement. We expect to be completely current with Board decisions with publication of our third volume early in 1970.

Your many favorable comments about our first volume have been most heartening.

Robert VanNatta

Fred VanNatta

October 1969

WCB #67-685 August 21, 1968

Mark J. Throop, Claimant.
John F. Baker, Hearing Officer.
Carl Burnham, Claimant's Atty.
Ray Mize, Defense Atty.
Request for Review by Employer.

Appeal from a notice of denial. Claimant, a 50-year-old employee, officer and shareholder, sustained injury to his left ankle and foot in a hyster accident. On Saturday, about 9:00 a.m., claimant went to the plant and did some paper work. About 9:45 a.m. claimant walked into the production portion of the plant and noticed that scrap wood around a saw had not been cleared up. Claimant put the wood in a tote bin and took the bin outside, where he discovered that three other tote bins were also full. It would be necessary to have at least one empty tote bin before beginning production on Monday morning. Employer is a small company and claimant as well as other salaried personnel are expected to and on numerous occasions have worked in the production department. It was not unusual for these people to work evenings and weekends to avoid paying overtime to hourly employees. Three of the seven production employees had quit the week previously, so the employer was shorthanded. Claimant put one of the tote boxes on the hyster and was headed toward his house with it. The injury occurred when he was about half-way home. Claimant's foot became caught between a wheel and the tote box. Scrap wood was customarily given free to members of the community and deliveries were often made by forklift. If no one took the wood, it had to be hauled to a dump five miles distant, which was more expensive. The Hearing Officer found that the activity was for the benefit of the employer, and the type of duty which was expected of the employee, and ordered the claim accepted and $500.00 attorney's fees paid. WCB affirmed, commenting, "If the claimant had undertaken to drive the hyster to the city dump or to some other area, no question would have been raised. It is only because the claimant chose to take some personal advantage that the claim was denied. If the workman's activity is in the employer's interest, the workman is not denied compensation because personal interest is concurrently being served unless there is a deviation from the course of employment."

WCB #67-1666 August 21, 1968

Garnett A. Linville, Claimant.
John F. Baker, Hearing Officer.
W. A. Franklin, Claimant's Atty.
William M. Holmes, Defense Atty.
Request for Review by Claimant.

Claim for penalties on temporary total disability. Claimant suffered a back injury in January 1966, which was closed in December 1966, with an award of 15% loss of an arm. Claimant suffered another back pain in January 1967, which was accepted and treated as an aggravation claim. There was no time loss. Claimant's problems again became acute in October 1967, causing him to obtain further medical care. The claimant contacted the employer's insurance carrier on or about October 30th, again in early November and then contacted the Compliance Division. The first time loss was paid December 21st, seven weeks after notice, and the second payment was made some six weeks later. It appears that

payment was made some six weeks later. It appears that the employer changed insurance carriers on August 1, 1967. The demands were made to the insurance company insuring prior to this date. The Hearing Officer allowed no penalties. The WCB reversed, commenting, "However, the insurance carrier apparently delayed action upon the October 1967 renewal of disability largely because the insurer ceased insuring the employer on August 1, 1967. The expiration of the insurance is nowise (sic) limits the primary responsibility of the employer to promptly pay compensation and this responsibility extends to the insurer for accidents occurring during the effective period of coverage. When the claimant is first injured, compensation must be instituted within 14 days under possibility of imposition of increased compensation for delay. No lesser standard should apply when a subsequent period of total disability related to the accident occurs." Attorney's fees in the amount of $250.00 were allowed.

WCB #67-496 and 67-571 August 21, 1968

Frank M. Hilton, Claimant.
John F. Baker, Hearing Officer.
Harl H. Haas, Claimant's Atty.
Lloyd W. Weisensee, Defense Atty.
Request for Review by Employer.

Appeal from a notice of denial. Claimant has been a carpenter since 1934 and has preexisting degenerative arthritis, but has filed no prior back claims. Claimant was working on a dam construction project on the Snake River between Oregon and Idaho. Claimant was removing forms from a wall which was about two feet from another wall. Claimant's back felt fine when he commenced, but after two and one half hours of prying and chiseling in this restricted area, claimant began to suffer numbness of the left leg and difficulty in straightening up. He went to the first aid shack. Fellow employees carried his tools, and eventually a laminectomy was necessary.

As to the issue of coverage under Oregon law, the claimant was hired in Oregon, worked 80% of the time in Oregon, and was in fact working in Oregon when the difficulty arose. The employer seeks to rely on the Reciprocity Agreement in re Extraterritorial Jurisdiction between Oregon and Idaho. It was not applied in this case. The Board noted that the fact that the claimant was paid the Idaho wage rate was not determinative of jurisdiction.

On the issue of timely filing of notice of injury, it was held that the report to the first aid station and subsequent medical diagnosis of a disc problem constituted actual notice.

The issue of the timeliness of the request for hearing turns on the effectiveness of an attempted denial of December 20, 1966. This letter was in conformance of the Idaho law and not Oregon law. It did not advise the claimant that he had 60 days in which to appeal, nor did it contain the name or address of the Workmen's Compensation Law. The only reason set forth for the denial was "no indication of an accident." It appears that Idaho does not recognize the accidental

result theory, but rather requires some overt incident. Oregon, of course, does: Olson v. SIAC, 222 Or 407; Kinney v. SIAC, 423 P2d 186. The Hearing Officer found "that the work activities performed in the form on the date in question were a substantial contributing factor in precipitation of the condition of the disc involved, to the point that significant symptoms became manifest." A valid notice of denial was issued April 27, 1967, and this hearing is pursuant to a timely request pursuant to this notice, as the December notice was held inoperative. The Hearing Officer ordered the claim accepted, but refused penalties. Attorney's fees of $1,500.00 were allowed. WCB affirmed, allowing $250.00 additional attorney's fees.

WCB #67-82 August 21, 1968

William Schuster, Claimant.
Martin P. Gallagher, Claimant's Atty.
Don How, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 15% loss function of the left forearm. Claimant developed a bump on his forearm while stacking sugar sacks. The first diagnosis was acute tenosynovitis of the left wrist from excessive use strain. Later Dr. Baranco repaired an arterio-venous fistula and excised a large ganglion on the left wrist. Two months later a large recurrence of the ganglion excised. The scar is now well healed with no recurrence of either the arterio-venous fistula nor ganglion. The only loss of motion is 20 degrees of dorsiflexion. There is also an area of hyperaesthesia and a small area of anaesthesia in the skin distal to the wound scar which is along the radial aspect of the volar surface of the wrist. The Hearing Officer affirmed as did the WCB.

WCB #67-1672 August 21, 1968

George A. Klinski, Claimant (now Dec.)
Page Pferdner, Hearing Officer.
A.J. Johnson, Claimant's Atty.
Thomas S. Moore, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial on the grounds that, "...you were not an employee of the Nortwest School, Inc., but were an independent contractor." Claimant, age 66, was a saelsman of home study courses for the defendant. Paragraph 1 of a boilerplate agreement between claimant and defendant provided, "Northwest Schools, Inc, authorizes the Representative to act as their agent in the sale of their Home Study Courses; not as an employee, but solely as an independent contractor." Claimant urges that the conduct of the parties was that of an employee-employer. The claimant was returning from contacting a prospective student when injured in an auto accident. There were no deductions made from the claimant's earnings. He furnished his own car, set his own hours, and had no expense account. He was expected to adhere to policies and procedures set up in defendant's Manual. Down payments were deposited in the claimant's bank account, and then the balance due was turned over to Northwest. The Hearing

Officer affirmed the denial. Following a request for Board review, the Claimant committed suicide, but the Board considered on the merits. The Board comments, "While the contract states that the relationship is that of independent contractor, this is a legal conclusion, at best, of the parties. The entire structure of workmen's compensation could be destroyed by the simple device of executing contracts denominating the workman to be an independent contractor. The Board concludes that where a segment of employer's business such as sales is thus contracted to a full-time individual, that the relative nature of the work makes the contract one of employment even though some degree of independence is delegated to the person so contracting. There is further reason for holding the claimant to be a workman in this case. He was employed as a licensed salesman for a vocational school pursuant to ORS Ch 345. ORS 345.010 defines such salesmen as "any person employed by or for a vocational school to procure students." It would appear that the very license pursuant to which the parties were operating contemplated employment. The school could not delegate to an independent contractor functions contemplated by statute to be performed by the school and its employees." Accordingly the Board reversed and ordered the claim accepted and allowed $500.00 attorney's fees.

WCB #67-1250 August 21, 1968

Steven Walter Barth, Claimant.
H. Fink, Hearing Officer.
Vincent G. Ierulli, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 5% loss of an arm for a fracture of the left clavical (collarbone). Claimant, age 23, sustained the injury in a fall. Surgical reduction was necessary. Claimant is still working as a truck driver but has difficulty lifting heavy weights with the shoulder. Claimant still suffers some pain, but is able to work 50 to 60 hours a week. There is no limitation of motion. The Hearing Officer affirmed; WCB affirmed.

WCB #67-590 August 21, 1968

Elmer N. Wagenaar, Deceased.
H. L. Pattie, Hearing Officer.
Charles R. Paulson, Claimant's Atty.
James A. Blevins, Defense Atty.
Request for Review by Beneficiaries.

Appeal from a denial of a claim. The decedent, age 62, had arthrodisis of the hip. He had been a warehouseman for 40 years. His hip had been pinned in January 1966. The pins broke in September 1966. On March 27, 1967, while still on temporary total disability claimant was operated on for a tumor. He did not survive the surgery. It is not alleged that the death is a result of the injury but it is alleged that the decedent was totally and permanently disabled at the time of his death. The medical evidence indicates that the decedent would not have been able to return to heavy work, but Dr. Marxer indicated that the decedent could return to light work in about one year IF his hip continued to

improve. The Hearing Officer affirmed the denial. WCB affirmed, commenting, "Mr. Wagenaar's injury was limited to the hip and essentially involved only the one leg. If Mr. Wagenaar could be said to have permanently lost the use of that leg, the greatest award would have been 100% loss use of the leg. Only speculation and conjecture surrounded the possible future use of the leg and return to employment with the limitations of use on that leg."

WCB #67-1076 August 21, 1968

Robert Jervis, Claimant.
H. L. Pattie, Hearing Officer.
Edwin A. York, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant, age 44, is a tire salesman with a history of a prior heart attack in 1960. He suffered a myocardial infarction on July 5, 1967. He had done no particular exertion on that day, perhaps not even walked upstairs. It is contended that the causal factor was on June 30, 1967, when the claimant exerted himself in unloading a large truck load of tires. The claimant apparently experienced some pain at that time. The medical evidence is such that no significance can be attached to that incident with respect to the infarction some five days later. The Hearing Officer affirmed the denial. On review the Board commented: "The claimant would have the Board rely upon earlier case of Olson v. SIAC, 222 Or 407. However, the Board concludes that in examining this case in light of the recent decision of Coday v. Willamette Tug & Barge, 86 Adv 751, the weight of testimony with regard to both legal and medical causation is such that the claim was properly denied."

WCB #68-88-E August 26, 1968

Clarence Giltner, Claimant.
H. L. Pattie, Hearing Officer.
Robert L. Olson, Claimant's Atty.
Richard L. Lang, Defense Atty.
Request for Review by Claimant.

Appeal from a refusal to pay for a spinal fusion. Claimant sustained a back injury on January 30, 1967. The claim was accepted and the first surgery was performed on April 11, 1967, to relieve nerve root adhesion and compression at the fourth lumbar level. The claimant reflected some improvement, but commencing in September, 1967, he began to complain to doctors that his condition was becoming worse. He eventually talked his doctor into performing a spinal fusion on February 10, 1968. The defendant's detectives took some revealing movies in September 1967, and on February 6, 1968. They tended to reveal that the claimant had a full range of motion with no apparent pain. This was somewhat contrary to what claimant had told his doctor. For example, there was an alleged inability to squat. The movies showed claimant squatting and arising from the position easily. His bare back was exposed, which demonstrated he was not wearing a back brace. There was also evidence that claimant was able to collect $928.06 per

month tax free as long as he was disabled, and that immediately prior to his injury he had been making only $600.00 per month, and, further, he had testified in domestic relations court that his income had not been more than $379.00 per month. The Hearing Officer concluded that the cause of this surgery was something akin to intentional misrepresentation and not the compensable accident. Accordingly the carrier was relieved of the responsibility, therefore, and directed to cease making time loss payments as well. WCB affirmed.

WCB #67-1552 August 27, 1968

William G. Donahue, Claimant.
H. L. Seifert, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Scott M. Kelley, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 40% loss use of the right leg. Claimant, age 63, struck his right knee while moving a cart of dishes. He was a restaurant manager. As the result of the compensable injury, claimant had a chronic internal derangement of his right knee consisting of a chronic synovitis and probably some degenerative change or tearing of the medial meniscus. Claimant had a preexisting left knee disability dating back to a high school fracture which had complications. Prior to the injury the claimant was able to walk almost normally with a slight limp. Now he hobbles and his pace is slow and unsteady. Claimant has not worked since the injury and cannot walk as much as two blocks without pain in the right leg. Apparently the right leg had absorbed a degree of extra usage as a protection to the left leg. The Hearing Officer affirmed the determination. The Board modified, commenting: "The problem of activating latent disability in the uninjured knee is not common. The Board in this instance, however, looks upon the disability in the left leg in the same manner as it would an arm disability, for instance, caused by use of crutches in connection with an injured leg. But for the injury to the favored leg, the other leg would have continued its useful function without increased disability. The Board concludes from its de novo review of the evidence that the disability in the right knee is equal to a loss of use of 50% of the leg and that the new burden cast upon the left leg by injury to the right leg has caused compensable disability to 50% of the left leg."

WCB #68-79 August 27, 1968

Edward C. Walter, Claimant.
Mercedes F. Deiz, Hearing Officer.
Clifford B. Olsen, Claimant's Atty.
Stanley E. Sharp, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 15% loss of an arm for unscheduled disability. Claimant is a 71-year-old farmer who snapped his back while attempting to lift a heavy disc so as to hitch it. Claimant has been a farmer most of his life. When he was 65, he gave the farm, which he owned and operated, to his nephew and has worked for others during the harvest since. X-rays revealed a compression

fracture of the fourth lumbar vertebra and a spur thereon, as well as a marked narrowing and sclerosis of the L5, S1 space, and also mild generalized osteoporosis. Claimant has an eighth grade education and is now unable to return to any farm work, even tractor driving. Claimant alleges total disability and has not looked for other work, explaining, "I'd hate to hurt it over. What could I do, I just have an eighth grade education -- I can't work in a sewer, that too hard." (sic) Claimant is wearing a chair type brace. Dr. Eckhardt explained that while claimant is precluded from all heavy labor, he is able to do sedentary or light work which might involve occasional lifting up to 25 pounds without endangering his back. The Hearing Officer increased the award to 40% loss of an arm for unscheduled disability. WCB affirmed.

WCB #68-308 August 29, 1968

Harold D. Skinner, Claimant.
H. L. Pattie, Hearing Officer.
Wesley A. Franklin, Claimant's Atty.
Scott M. Kelley, Defense Atty.
Request for Review by Claimant.

Appeal from determination awarding 20% loss of an arm for unscheduled disability. Claimant, a 61-year-old auto mechanic, wrenched his back while working on an automotive transmission. Claimant cannot return to being an auto mechanic, and an attempt to be a parts man failed as some of the parts are heavy and claimant has a limited ability to read and write. Claimant failed as a dishwasher also. The doctors think claimant can do light work, but he is not qualified by training or education for any. Claimant can walk short distances with a cane. Vocational rehabilitation was considered impractical in view of claimant's age and education. In reliance on Marvin H. Funk, WCB #67-471, the Hearing Officer concluded that such a situation would warrant a substantial award of permanent partial disability but not total disability. Accordingly the Hearing Officer awarded 75% loss of an arm by separation for unscheduled disability. The claimant on review seeks to be classified as permanently and totally disabled. The Board commented, "The claimant is 61 years of age, but from the medical evidence, it would appear that physically he is older than would be expected at this age. The injury in this instance was limited to a back strain. The claimant did return to work, but it appears that he voluntarily left his former employer and subsequent employment in Nebraska. The claimant's own testimony, particularly on pages 32 to 34 of the transcript, reflect a continuing ability to work, but a motivation which precludes working. The progression of premature seniality after the accident, unless precipitated by the accident, would not qualify the claimant for permanent total disability." The Board reinstated the determination allowing 20% loss of an arm by separation for unscheduled disability.

WCB #67-673 August 29, 1968

John H. Keeler, Claimant.
John F. Baker, Hearing Officer.
Eugene K. Richardson, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination of May 12, 1967, allowing 40% loss function of an arm for unscheduled disability, resulting in a total award equal to 50% loss function of an arm for unscheduled disability. Claimant had a history of prior back injuries. Claimant twisted his back while working in a saw mill in November 1964. Claimant's back is presently stiff and sore and he is unable to do any work. The medical evidence indicated that the total disability is not necessarily permanent, but "is a reversible process." Dr. Anderson states, "The attempt to rehabilitate and restore this patient to some degree of normalcy would necessitate curing him of his narcotic addiction. The two problems seem to be so closely intertwined at this time, that it is difficult to visualize any immediate benefit that could be gained." He adds, "With proper psycho-emotional physiological program, that this patient is still salvageable, although the attainment of such a goal would be a very, very difficult thing." The drugs to which the claimant is addicted are painkillers which have been and are being prescribed by a physician for the injury in question. The Hearing Officer directed the claim to be reopened for further care and that temporary total disability payments be made from the date of the hearing, until the claimant is medically stationary. The order of review approved a stipulation allowing temporary total disability retroactively from the hearing date to the date that the determination terminated temporary total disability.

WCB #68-17 August 29, 1968

Richard D. Pierce, Claimant.
Mercedes F. Deiz, Hearing Officer.
Virgil E. Dugger, Claimant's Atty.
Request for Review by Department.

Appeal from a ntoice of denial. Claimant was a gas station attendant. Claimant alleges a back sprain while handling the engine of his own automobile in the back of the service station. The treating doctor initially diagnosed low back strain based on the objective findings of low back pain and paravertebral spasm. Form 827 recites,it was "unknown if the condition was from the injury." Later medical evidence connected the treatment to the incident. As to the engine, it appears that it was there with knowledge and permission of the employer, but that the claimant was supposed to work on it only on off-duty periods, but that claimant was moving it allegedly to prevent it from falling off a table in connection with his duties to clean the place up. The Hearing Officer ordered the claim accepted and assessed $350.00 attorney's fees. On review, the WCB affirmed, commenting, "Though claimant was supposed to only work on the motor on his own time, it appears that the motor was being moved as part of a cleanup activity, when work at the station was slack." WCB assessed $200.00 attorney's fees.

WCB #68-116 August 29, 1968

Stanley R. Mansfield, Claimant.
Page Pferdner, Hearing Officer.
John G. Holden, Claimant's Atty.
Robert E. Joseph, Defense Atty.
Request for Review by Claimant.

Appeal from a detrmination allowing 50% loss use of the left leg and 10% loss of an arm for unscheduled disability. Claimant was injured, when he fell out of a truck and a box of fish landed on him. Dr. Pasquesi diagnosed "severe strain of left knee with hydroarthrosis and lumbosacral strain." He later added "hemarthrosis." The knee required surgery. Postoperatively the wound became infected and many blood transfusions and a great variety of other treatments were necessary. The laboratory studies were consistent with Laennec's Cirrhosis. The claimant survived. Now claimant's knee is very unstable and he must wear a knee brace as well as a back brace. Dr. Pasquesi's closing examination revealed, "The patient has obviously lost the anterior--posterior cruciate ligaments of the left knee inasmuch as there is considerable anterior and posterior play and the stability is poor in this direction. The patient can extend and flex fully. He has 20 degrees increased play in the left knee as compared to the right. The significant (sic) of this is that the medial collateral ligament obviously no longer is intact. . . .This patient probably would be better off with a fused left knee, if his general condition would warrant, however his deneralized conditions...would...preclude further surgery in this case." The psychology center report was not helpful to claimant's case. The Hearing Officer increased the leg disability award to 75%. WCB affirmed, commenting: "Poor motivation does not justify conversion of partial disabilities to total disabilities."

WCB #67-1598 August 30, 1968

Ivan W. Davidson, Claimant.
H. L. Pattie, Hearing Officer.
A. W. Metzger, Claimant's Atty.
James F. Larson, Defense Atty.
Request for Review by Department.

Appeal from an award of 25% loss of an arm for unscheduled disability. Claimant hurt his back on the job in a "slipping while lifting" type accident. This was in 1966. The determination was issued in October 1967, after a laminectomy was performed. Claimant greatly exacerbated his back when he bent over in March 1968. He was not working at the time. He now needs more back treatment. The Hearing Officer remanded for further medical care and time loss payments beginning in March 1968. WCB affirmed, commenting, "If the March 1968 incident was a subsequent intervening event, it could well be said that the results are noncompensable. If the personal garbage incident had happened in the course of employment, it would clearly be compensable. If it were not for the report of Dr. Rask under date of February 22, 1968, reciting the possible need for a laminectomy, one might well conclude that the condition was in fact stationary and that a subsequent nonindustrial incident could break the chain of liability. Though the Hearing Officer and the briefs do not discuss this aspect, this is in fact a claim for aggravation and no requirement is found than an aggravation occur in the course of employment. It is sufficient that the aggravation be found to be on the basis that, "but for the industrial accident there would be no need for the further medical care or compensation."

WCB #67-1658 August 30, 1968

Fred O. Blevins, Claimant.
H. Fink, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing no permanent partial disability. Claimant, a 60-year-old laborer, fell when he stepped on a filbert. The subjective complaints include the inability to do any work, except sit on the bed and take pain pills. At the time of the injury claimant was only working by request of his son-in-law as the Nut Exchange was short of help. The most favorable medical evidence shows pain in bending and extension only at the extremes and a slight tenderness in the lumbar spine area. The Hearing Officer found no permanent partial disability. WCB affirmed, commenting: "With only subjective complaints supported by a growing description of the trauma originally involved and surrounded by a long established motivation to greatly limit productive activity, the Board concludes that there is in fact no permanent partial disability."

WCB #68-164 August 30, 1968

Howard R. Place, Claimant.
Page Pferdner, Hearing Officer.
James J. Kennedy, Claimant's Atty.
Frederick T. Smith, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 30% loss of an arm for unscheduled disability. Claimant alleges an injury in a fall into a log pond. The circumstances are clouded. Claimant had received an injury in 1957, which was settled by Union Pacific Railroad for $18,000. Claimant alleges serious back and arm symptoms, such as complete atrophy of an arm. The medical evidence does not concur. Claimant minimizes the nature of the injuries with Union Pacific. The Hearing Officer concluded, "Claimant's actions during the Hearing convinced me that he was consciously and deliberately endeavoring to perpetrate a fraud. There is some question he sustained an injury at Friesen Lumber Co., but his claim was accepted and that issue is not before me....I do not believe he has any residual effects of his injury of January 19, 1966." The Hearing Officer set aside the determination and declared there was no permanent partial disability.

On review it was argued that the Hearing Officer could not reduce the award because only the claimant had asked for the hearing. "There is no provision for parties to state issues or otherwise limit the proceedings. Any party seeking hearing, review or appeal subjects the matter to a de novo consideration. ...The argument is much ado about nothing since the award could be reduced without hearing by the same processes as provided in ORS 656.268(656.325(3))."

WCB #67-502 August 30, 1968

J. Elmer Osborn, Claimant.
Page Pferdner, Hearing Officer.
Robert V. Chrisman, Claimant's Atty.
Quintin B. Estell, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. This is a heart attack case. Claimant, age 64, was working as a tail sawyer. He suffered a "coronary occulusion with thrombosis, anterior and septal in area." Claimant handled some green 2 x 12's or 2 x 10's and took a pickup load of trash to the dump and was unloading it, when the heart attack set in. Claimant would have the boards be green and weigh 6 pounds per board foot or a total of 288 pounds each. The defendant alleged the boards were partially dry and would weigh only 100 pounds. The medical testimony was conflicting also. The Hearing Officer affirmed the denial of the claim. The majority of the WCB affirmed, commenting, "The Majority of the Board, without choosing between schools of thought in the medical profession and without written analysis of what are unimportant conflicts, simply turns, as did the Supreme Court in the recent Coday case, (Coday v. Willamette Tug & Barge, 86 A.Sh. 751) to a reliance upon the testimony of the internist as a specialist as against that of the general practitioner. It appears from the testimony of Dr. Bittner, an internist, that the heart attack in this case was probably not precipitated by the work effort." Mr. Callahan dissents. He adds, "It is also apparent that the doctor is part of the group that hold that heart attacks should not be attributable to the work effort. * * * There was testimony that the temperature was between 10 and 20 degrees above zero, and that the wind was blowing. No one states how strong the wind was blowing, but a wind strong enough to be remembered would have the effect on a person of temperature lower than recorded by a thermometer. It is scientifically and commonly accepted that low temperatures have an additional effect on a person predisposed to heart problems. When asked about this, Dr. Bittner passed it off without a good answer." Mr. Callahan would have ordered the claim accepted.

WCB #68-392 August 30, 1968

Melvin Stainbrook, Claimant.
Request for Review by Department.

Appeal from a determination allowing permanent partial disability equal to 10% loss of an arm for unscheduled neck injury and cervical strain. The Hearing Officer awarded total and permanent disability. The injury occurred on June 20, 1966. The claimant suffered a violent and vivid seizure and convulsion on August 3, 1966, while reading the newspaper. Its cause was never determined. The most recent medical report of record is that of Dr. Storino of July 28, 1967, over a year before this Board Review. It indicates a need of further neurological evaluation including an electroencephalogram, brain scan and spinal fluid examination to aid the diagnosis of claimant's problem. Whereupon the case was remanded to the Hearing Officer with directions to have a current neurological examination performed so as to see if there was a way to salvage this workman as a contructive member of society.

WCB #67-891 August 30, 1968

W. B. Coleman, Claimant.
H. L. Pattie, Hearing Officer.
Tyler Marshall, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant.

Claimant suffered a back injury, which required a laminectomy. This claim was accepted and paid. While convalescing at home, claimant visited his doctor from time to time. Claimant alleges that while on his way to the doctor's office, he was stricken with an attack of diarrhea and the use of a public restroom was essential. He sought refuge in the Trailways Bus Depot. There he was assaulted and has since required further back surgery. The department insists that the claimant was not going to the doctor, or he was deviating from the most direct route. Claimant states the attack took place while he was driving up by the Park blocks. He has no explanation as to why he didn't use the public restrooms up there. There were various conflicts in the claimant's story also. WCB affirmed, stating, "There is no authority to compensate a case founded upon the quicksands of inconsistency demonstrated in this record."

WCB #67-786 September 5, 1968

Ted Foreman, Claimant.
John F. Baker, Hearing Officer.
John J. Haugh, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

Appeal pertaining to temporary total disability. Claimant, a laborer, sustained a back injury in October 1966. The claim was accepted and some benefits were paid. Claimant returned to work in January 1967, but was laid off on March 22, 1967, when he did not show up for work because of illness. The claim was subsequently reopened and temporary total disability has been paid since August 3, 1967. Claimant seeks time loss payments for the interim. Claimant did not see his doctor immediately after being laid off, although he lived across the street from the doctor's office. He did apply for reemployment, however. The Hearing Officer found that temporary total disability should be commenced from the date that the claimant notified the carrier and requested a hearing, which was June 30, 1967. No penalties or attorney's fees were allowed. WCB affirmed.

WCB #67-1657 September 5, 1968

David S. Montgomery, Claimant.
Mercedes F. Deiz, Hearing Officer.
Don G. Swink, Claimant's Atty.
Ray Mize, Defense Atty.
Request for Review by Claimant with
Cross Request by Employer.

Appeal from a determination awarding 10% permanent partial disability for unscheduled low back disability. A laminectomy operation was performed on the claimant in 1961, wherein a massive protrusion of the fourth intervertebral disc was found without rupture. The doctor reported: "There was a definite and marked impingement of the nerve roots, definitely more marked on the left than on the right side. A total extirpation of the disc was done. It was markedly softened and necrotic and indicated a definite degenerative process. The patient's space was also checked at L5-S1. This was entirely normal." Claimant held various employments in the timber industry until he suffered the back injury in question while working as a offbearer in a plywood plant on February 9, 1967. Dr. Lynch's August 15, 1967 examination revealed: "Range of motion of the lumbar spine is as follows: Flexion 75% of normal; extension 75% of normal. Right lateral flexion 100%; left lateral flexion 80%. * * * There is a mile hypestesia over the lateral aspect of the left leg and foot." Claimant was taking vocational rehabilitation as a barber. The carrier's doctor found on March 14, 1968, a slight bilateral muscle tenderness to firm palpation, percussion over the spinous processes caused discomfort at the L5-S1 level, ability to bend forward 90 degrees, laterally 30 degrees and hyperextend 30 degrees. Straight-leg raising could be accomplished to 90 degrees bilaterally; there was a 2+ hamstring tightness and some hip pain at the extremes of motion. Sensation to pinprick was slightly decreased over the lateral aspect of the left foot. X-Rays indicated slight narrowing at the L5-S1 level with minimal sclerosis. Some settling of the facets at both the L5-S1 and L4-5 levels with sclerosis about the margins of the facits. There was mild low back instability. The Hearing Officer increased the award to 25% loss of an arm for unscheduled disability. WCB affirmed.

WCB #68-367 September 5, 1968

Frank W. White, Claimant.
Mercedes F. Deiz, Hearing Officer.
Marvin S. Nepom, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Department.

Appeal from a determination award of 10% loss of an arm for unscheduled low back strain. Claimant, age 44, has been a truck driver and freight handler for 15 years. He has no back history. Claimant strained his back on March 4, 1966, while loading a truck. He continued working at the time, but his back became progressively worse. Claimant has continued in the same general occupation as it is the only one he knows. He is making more money now than he did before the accident. The physical findings included a minimal discomfort to palpation over

the musculature, ability to bend forward about 70 degrees, laterally 25 degrees and extend 30 degrees, straight-leg raising caused some lumbosacral discomfort, tight hamstrings, some low back pain on the left with crossleg test, excellent flexion and extension of the great toes and normal sensation to pinprick. X-rays indicated slight narrowing in the L5-S1 space. Dr. Exkhardt indicated an opinion that claimant would be unemployable in his present occupation in five years.

Pursuant to medical recommendation the Hearing Officer found that occasional physiotherapy would be necessary to keep the claimant in a working condition. These treatments were found to be not pallative and payment was therefore ordered. An additonal award of 10% loss use of the right leg was also ordered. On review the WCB disagreed with the Hearing Officer's suggestion that the Tooly v. SIAC, 239 Or 466 decision had been in effect repealed by the 1965 Act. The Board also modified the opinion to express all the award in unscheduled disability, which was found to be equal to the loss by separation of 30% of an arm. Vocational Rehabilitation was also ordered, made available to the claimant.

WCB #67-287 September 5, 1968

Frank A. Simmons, Claimant.
Lynn Moore, Claimant's Atty.
Earl Preston, Defense Atty.
Request for Review by Claimant.

The facts of this case are reported in Volume I, VanNatta's Workmen's Compensation Reporter, Page 41. Previously the Hearing Officer had omitted mention of a leg award allowed on determination. On remand the Hearing Officer found the leg disability to be the same as the determination WCB affirmed on review.

WCB #67-1170 September 9, 1968

Calvin F. Sutton, Claimant.
Harold M. Gross, Hearing Officer.
J. Michael Starr, Claimant's Atty.
Earl Preston, Defense Atty.
Request for Review by Department.

Appeal from a determination allowing 15% loss of an arm for unscheduled low back injuries from an alleged fall from a ladder in an apple orchard. The evaluation of the disability is made more difficult by the fact that the claimant had a preexisting low back disability, failed to promptly report the accident, did not seek medical care for several days and suffered a non-industrial fall in a bathtub after the orchard injury. The Hearing Officer ordered the award increased to 35% loss of an arm for unscheduled disability. The WCB modified the award, reducing it to the determination amount. The Board cannot agree with the Hearing Officer's conclusion that two-thirds of this man's back disability was incurred in the farm accident.

WCB #67-1131 September 9, 1968

Bill McKinney, Claimant.
H. Fink, Hearing Officer.
Roger D. Todd, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Claimant.

Appeal from a denial. Claimant, age 42, has a history of back difficulties dating back 25 years. The last past claim was for a back strain from lifting on February 11, 1966. Claimant responded to conservative treatment and was able to return to work in the fall of 1966. On April 10, 1967, while employed as a winch operator the claimant sneezed. Claimant suffered immediate pain and was in the hospital for nine days. Claimant alleges an aggravation of a previous injury. The Hearing Officer concluded that this was a new injury, finding no rational way to attach this injury to any of the numerous previous injuries. He also found that as a new injury, it was not compensable, as it did not "arise out of" the employment. The WCB affirmed, commenting: "The low back problem is one that is commonly precipitated by the simple act of bending over, getting out of bed or, as in this case, sneezing. If one is looking for the ultimate responsibility, one should go back 25 years and assert the latest episode is an aggravation of that initial injury."

WCB #67-1051 September 9, 1968

Doris J. Lanham, Claimant.
John F. Baker, Hearing Officer.
Darrel L. Cornelius, Claimant's Atty.
Quintin B. Estell, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 25% loss of an arm for a low back injury when the claimant fell on her buttocks. Claimant was a dishwasher. The diagnosis was a chronic lumbosacral strain aggravated by a tremendous excess of weight. Range of motion was limited 50% in all planes by complaints of pain. Myelogram results were negative. In Dr. Cohen's opinion there was a great functional element associated with the claimant's complaints. Weight loss appeared to be the only hope of improvement. Claimant resisted losing weight. The Hearing Officer ordered that the Department pay for the medical expenses incurred in the program of weight reduction. The WCB reversed, noting that the Department would have been entitled to suspend compensation pursuant to ORS 656.325(2), and hence the claimant should not now be heard to complain that the Department has not shouldered its full responsibility. The 25% award was affirmed.

WCB #67-708 September 9, 1968

Glenn Schenck, Claimant.
Page Pferdner, Hearing Officer.
Richard P. Noble, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Department.

This claim is previously reported at Volume I, VanNatta's Workmen's Compensation Reporter, Page 65. There the case was remanded for consideration of whether there was a causal connection between claimant's chronic cervical radiculitis and the traumatic amputation of the tip of his right thumb. Dr. Pasquesi reports: "Objective Diagnosis: 1) Traumatic amputation of left thumb near the base of the terminal phalanx. 2) Moderate degenerative disc changes C-5,6 area. 3) Calcified cervical lymph nodes on the left. Subjective symptoms: 1) Radiculitis secondary to degenerative changes in the cervical spine area and probably aggravated by the strain that this patient probably suffered when he jerked his hand away from the saw." The Hearing Officer awarded permanent partial disability of 35% loss use of left arm together with unscheduled disability equal to 25% loss of an arm by separation. No reference to the previous finger award was made. On review the Majority of the Board finds no basis in the evidence for a combination of awards in excess of the loss of 60% of an arm arising out of the loss of the tip of the thumb. The majority of the Board concludes that the original determination of 40% loss of the thumb and 10% loss of opposition of the ring and index fingers is proper for the scheduled disability and that there is no basis for making an award on the arm itself without regard to the digits. The majority does conclude, however, that there is some permanent disability in the neck-shoulder complex, which is equal in degrees to the loss by separation of 15% of an arm. Mr. Redman would not allow an unscheduled award.

WCB #68-259 September 9, 1968

Richard A. Haun, Claimant.
Page Pferdner, Hearing Officer.
Donald S. Richardson, Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 10% loss arm for unscheduled disabilities. Claimant's abdomen was crushed between two large concrete pilings. The initial diagnosis was "1. Frac. of pelvis, with disruption of pelvic rings; 2. Lumbosacral strain." X-rays of the pelvis showed a fracture of the pelvis with disruption of the pelvic ring, dislocation of the sacroiliac joints, and overriding of the symphysis pubis, as well as a fracture of the ramus pubis. The Hearing Officer increased the award to 20% loss of an arm. WCB affirmed.

WCB #813 September 9, 1968

Max L. Glover, Claimant.
John F. Baker, Hearing Officer.
Richard P. Noble, Claimant's Atty.
Quintin B. Estell, Defense Atty.
Request for Review by Claimant.

Claim for an injury occurring November 11, 1965. The claimant fell, striking a log with his chest with sufficient force to produce a coronary injury. Subsequently the claimant developed symptoms of a cervical arthritis and later from a lumbar arthritis. These symptoms were accepted and an award of 30% loss of an arm for unscheduled disability allowed. The claimant is 64-years-old. The Department cancelled the award upon ascertaining that the claimant had fallen into a snowbank in early January 1966, coincidental with the latent symptoms claimed to be associated with the November accident. There was medical evidence to support the theory that the latent symptoms were associated with the snowbank instead of the fall on the log. Accordingly the Hearing Officer affirmed the cancellation of the award and found no permanent partial disability arising out of the industrial injury. The Majority of the WCB affirmed, with Mr. Callahan dissenting. Mr. Callahan would have found the 30% loss function of an arm award inadequate.

WCB #67-561 September 9, 1968

Robert Melius, Claimant.
H. L. Seifert, Hearing Officer.
Mark Bliven, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from notice of denial. Claimant alleges injury, when he was thrown from the green chain on which he was standing. He fell on his back and right shoulder. Claimant, age 24, worked the rest of the day and was first treated 20 days later for acute muscle strain in the upper thoracic region. No immediate low back complaints were made. Low back complaints were made in September 1966, and in January 1967, the pedicle stumps of the fifth lumbar were removed in order to relieve pressure upon the fifth lumbar nerve roots. There was a congenital defect in the low back. Further the claimant was riding a motorcycle which collided with a car subsequent to the industrial injury and prior to major complaints of low back difficulty. The Hearing Officer affirmed the denial of the claim. WCB affirmed.

WCB #68-165 September 10, 1968

Charles H. Winchester, Claimant.
Robert Boyer, Claimant's Atty.
John H. Chaney, Defense Atty.

The question is whether the claimant is an employee or independent contractor. One Elmo Haake contracted with Charles Winchester, claimant, to frame and install a concrete floor in Haake's garage for the price of $640.00, which included labor only, as Haake purchased and paid for the materials. The claimant had complete freedom to choose methods and time in which to build the garage. Prior to the completion of the garage, the two parties agreed that Winchester would build the exterior of a new house for Haake. A total contract price was discussed, but an hourly rate was finally settled on. Haake had the right to make structural changes in the house. Haake helped on the house some of the time, and the working hours were not very specific and on one occasion the claimant left the work at Haake's house to do ther carpentry work for another person. Haake furnished the materials and some tools and the claimant furnished the rest. There was no written contract and the right to terminate and employ assistants was disputed. There was no wage withholding of any kind. The Hearing Officer ordered the claim accepted. On review the Board concluded that the control was with the employer, as there was no written contract and compensation was on an hourly basis. WCB affirmed.

WCB #68-307 September 10, 1968

LeRoy J. Mersch, Claimant.
Richard T. Kropp, Claimant's Atty.
Robert E. Nelson, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing no permanent partial disability. Claimant was thrown to the floor, striking his head and shoulder when a shingle saw malfunctioned. X-rays indicated no fracture or osseous disease in the cervical portion of the spine. He was treated conservatively. Six months later the complaints were pain in the left shoulder and neck with occasional headaches. A myelogram was suggested, but the claimant was reluctant to proceed. All neurological signs were negative and the doctors were not agreed that a myelogram was indicated. Investigator's films indicated a stiff neck. The Hearing Officer awarded 15% loss of an arm for unscheduled disability. WCB affirmed.

WCB #67-334 September 11, 1968

W. H. Pleasant, Claimant.
Page Pferdner, Hearing Officer.
Richard F. Porter, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding claimant temporary total disability to December 30, 1966, together with a permanent partial disability award of 10% loss of an arm by separation for unscheduled disability. Claimant was injured,

when a refrigerator slid down a flight of stairs and hit him in the stomach. A myelogram, an exploratory laporotomy, and an embolectomy were performed on the claimant thereafter. The Department disclaims responsibility for the two latter procedures. Claimant had a history of a heart attack and about two months before the alleged injury, claimant was involved in a fight in which he suffered "internal injuries, nausea, dizziness, bruises, and abrasions." The hospital records indicate that during the fight he was struck on the right side of his nose, his left ear, his abdomen, and back, and he began having chest pain and almost immediately, starting beneath the mid-lower sternum and radiating laterally across the chest and down both medial upper arms to his elbow, with pain more marked in the left arm. Claimant's testimony was inconsistent with the truth and disbelieved by the Hearing Officer. The objective symptoms were all negative and the Hearing Officer affirmed the determination. WCB affirmed, commenting: "Though there are some medical reports tending to support the claimant's assertions, it is apparent that in large degree the history given by the claimant to the doctors was so incomplete or inconsistent as to seriously detract from the conclusion of the doctors relying upon that history."

WCB #68-340 September 13, 1968

William Staggs, Claimant.
H. L. Seifert, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Robert E. Nelson, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing no permanent partial disability. Claimant was hit in the chin by a wrecking bar propelled by an automotive coil spring. He was an auto wrecker. Immediately pain in the jaw was felt, and later the same day pain appeared in the neck with radiation down the shoulder to the ring and small finger of the left hand. Subsequently claimant was hospitalized for an unrelated bladder tumor. There was a diagnosis of a contusion to the chin with a whiplash to the neck. Dr. Yeager found a mild cerebral concussion, and probably also some mild strain of muscles and ligaments of the cervical spine. He also suspected a large functional overlay. Dr. Spady recommended psychiatric evaluation. No permanent partial disability was allowed. WCB affirmed.

WCB #68-98 September 13, 1968

Daniel B. Roberts, Claimant.
H. Fink, Hearing Officer.
Edward L. Clark, Jr., Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant.

Appeal from determination allowing no permanent partial disability. Claimant suffered a smashing injury to the tips of the middle and ring fingers on the right hand, when the pressure bar on a trimmer machine descended. Dr. Price diagnosed "Jagged lacerations of both finger tips. Fracture of distal tufts." Recovery was good. Claimant's fingers have full mobility, although the tips

are numb and less sensitive to touch than his other fingers. Claimant has difficulty picking up small objects such as coins, but has no difficulty in grasping those things he picks up at work. There are scars on the tips of each finger. Bumping the finger tips causes pain. The Hearing Officer allowed no permanent partial disability. WCB affirmed, commenting: "Compensation is not paid for pain and suffering as such and in this instance the physical structure involved is only a small part of one of the smallest parts which could serve as a basis for award. The Board concludes that there is not a measureable permanent partial disability."

WCB #68-130 September 13, 1968

Robert Zell Carter, Claimant.
H. L. Pattie, Hearing Officer.
William D. Peake, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Department.

Claimant, a 55-year-old nurse's aid, suffered a back injury. In due course a determination was issued awarding 5% loss of an arm for unscheduled disability. A hearing was requested and that award was increased to 35%. Thereafter claimant filed a request for a lump sum award which was granted. The department now denies liability for all medical services which are unpaid. This includes services rendered before the previous hearing and not raised at that hearing and services after the request for a lump sum award. It is from this denial that the present hearing is called. The Hearing Officer ruled that the fact that some of the bills were incurred prior to the previous hearing was not a bar to raising them now. There was no evidence presented that the Department had denied responsibility for the bills at that time. It was in the record of the previous hearing that the claimant was under the care of a doctor. The Hearing Officer ruled that ORS 656.283 (1) meant what it said, and that separate hearings on separate issues could be requested so long as they were within the time limits of ORS 656.319. The Hearing Officer further ruled that the 1965 Act had changed the rule of Tooley v. SIAC, 239 Or 466 and that under present law palliative treatments would be compensable. The "Hearing Officer therefore concludes that the services were neither palliative (just to make the claimant more comfortable) or curative (to afford a specific improvement in claimant's condition), but were in effect preventative (to prevent the disability from increasing or becoming worse.)" The Hearing Officer ordered all medical services paid. On review the Board rejects the dictum that Tooley v. SIAC is no longer the law and concurs in the Hearing Officer's conclusion, that the treatments were required and not palliative. The Board also agreed that ORS 656.304 did not bar continuing liability for medical services. The Department was directed to pay $500.00 attorney's fees.

WCB #68-299 September 13, 1968

Colleen Lisoski, Claimant.
Page Pferdner, Hearing Officer.
Richard P. Noble, Claimant's Atty.
Richard L. Lang, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 10% loss of an arm for unscheduled disability. Claimant suffered a low back injury while lifting a tray of cups and saucers. The cook was immediately notified. Claimant finished the shift, but could not get out of bed the following morning. A week later she consulted Dr. Garber, who diagnosed a "lumbosacral strain with possible nerve root involvement and (or) a disc problem." Claimant had a long history of back trouble related to dancing, ice skating and pregnancies. Claimant has suffered continued disabling back pain. Determination affirmed. WCB affirmed, commenting, "The medical evidence indicates that the major problem is not a permanent structural weakness. The problem is simply that the claimant fails to obtain or maintain proper muscle conditioning and that under such circumstances, the muscles are more susceptible to renewed strain...The fact that one episode occurred at work is not a sound basis for placing all responsibility thereafter upon the doorstep of the industrial injury."

WCB #68-125 September 13, 1968

Nathan D. Nelson, Claimant.
H. L. Seifert, Hearing Officer.
Harl H. Haas, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing a permanent loss of the right arm equal to 15%. Claimant alleges 45%. Claimant, age 45, fell from a machine on which he was welding and bruised his right arm and shoulder and left knee. He attempted to continue work, but was unable to do so because of pain in his right arm and shoulder. Examination revealed a fracture of the radial head with a slight displacement. Dr. Rask found limited movement, crepitation, pain and tenderness upon examination some 9 months after the injury. Claimant is able to continue work, but can do overhead work only on a limited basis. The Hearing Officer affirmed the determination and WCB affirmed, noting the medical prognosis of continuing improvement.

WCB #67-1507 September 13, 1968

Frank V. Thomas, Claimant.
Benton Flaxel, Claimant's Atty.
John Foss, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 15% loss use of the forearm. Claimant, a materials handler in a pulp mill, fell and suffered a fracture of the right wrist. The diagnosis was a fracture of the right radius and ulna. Further

diagnosis revealed an comminuted impacted fracture of the right radius with fracture lines extending to the articular surface in at least two places. A small ossicle had been pulled off the back of the carpus, and the ulnar styloid had been avulsed. Subsequent examination shows the grip in the right hand to be less than half the pressure of the grip in the left hand, and also showed an impairment based on limitation of wrist motion and loss of 10 degrees of supination of the right forearm. Claimant missed only a half-days work, while his wrist was casted and returned to work the following day, and has continued to do heavy work. Claimant continues to suffer periodic pain in his wrist. The Hearing Officer affirmed the determination and the WCB affirmed.

WCB #123 September 24, 1968

Myrnaloy V. McGill, Claimant.

A previous opinion at Volume I, VanNatta's Workmen's Compensation Reporter, Page 7, allowed no permanent partial disability. The Circuit Court remanded for further medical evidence on April 22, 1968. It was again found that there was no permanent partial disability. WCB affirmed.

WCB #67-827 September 24, 1968

James L. Eldridge, Claimant-Deceased.
George W. Rode, Hearing Officer.
Fred P. Eason, Claimant's Atty.
Eldon Caley, Defense Atty.
Request for Review by Widow.

Claimant suffered a whiplash injury in a collision while employed as an auto salesman. After the determination awarding 5% loss of an arm for unscheduled disability and after a request for the hearing on same, but before the hearing, the claimant died of unrelated causes. The questions consist of whether the widow can prosecute the appeal, and if so, the extent of the permanent partial disability. The Hearing Officer concluded that ORS 656.234 precluded the widow as administratrix from pursuing the deceased workmen's claim. On the basis of the evidence the Hearing Officer further ruled that if increased compensation were to be allowed, it would be 15% loss of an arm for unscheduled disability. The evidence was "claimant's left arm and back of neck and shoulders hurt after the accident, and he had headaches which lasted some time and made him deathly sick. He lost strength in his left arm and his arm was shrinking and shortened up. His left side was numb, and he had difficulty in sleeping. The Board reversed the Hearing Officer and ordered the 15% award paid, commenting, "The Board notes for the record that the long established policy of its predecessor, the State Industrial Accident Commission, was to permit the establishment of an award of permanent partial disability after death where such an award could be supported by reasonable medical certainty. If the claimant had severed a leg, for instance, the fact that the stump was still being treated should not preclude the obvious entitlement to 100% loss of the leg. A case could not be made for award which would of necessity be based upon conjecture and speculation. Here, however, the claimant's condition had been determined to be stationary and the issue of extent of disability could be determined without the continued existence of the injured workman."

WCB #68-255 September 24, 1968

Robert R. Kolb, Claimant.
Page Pferdner, Hearing Officer.
Vincent G. Ierulli, Claimant's Atty.
Clayton R. Hess, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding permanent partial disability of 50% loss left index finger by separation; 75% loss use left middle finger; 100% loss left ring finger by separation; 50% loss left little finger by separation; 30% left thumb due to loss of opposition. Claimant, a carpenter, was injured in a table saw accident. Dr. Harder reports,

> The final results--are that the index finger has been amputated at the distal interphalangeal joint, the long finger has its full length. The ring finger is amputated at the distal portion of the proximal phalanx and the small finger is amputated at the distal interphalangeal joint.
>
> He has diminution of sensation over the long finger and on the distal portion of it, particularly on the Volar aspect. The joint motions are full on the MP joints throughout, he has full range of motion of the proximal interphalangeal joint of the index finger. The long finger has a contracture in flexion at both the interphalangeal joints of approximately 45° of flexion from full extension.
>
> Then he has approximately 10° of active flexion in both the proximal and distal interphalangeal joints through the tendon graft that has been placed into this finger. Passively these joints will flex another 10 - 15°.

The Hearing Officer allowed 65% of the left index, 85% of the left middle, 100% of the left ring, 60% of the left little finger plus 30% of the thumb for loss of opposition. On review the claimant asserted 100% loss of the forearm, but the Board took note of the substantial residual function in the forearm and affirmed.

WCB #68-328 September 24, 1968

Larry D. Wright, Claimant.
Allen T. Murphy, Jr., Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for Review by Claimant.

Appeal from an award of 10% loss arm for unscheduled disability. Claimant suffered a back injury while unloading a 200-pound man hole cover. The diagnosis was "lumbo-sacral and left sacroiliac strain and local subluxation." Claimant suffers periodic pain and is doing lighter work. The physical problem faced by this claimant is not so much a structural damage caused by the accident, as it was a strain type injury to the soft tissues apparently imposed upon a back susceptible to injury. The Hearing Officer affirmed the determination. WCB affirmed.

WCB #433 September 24, 1968

Joseph A. Lescard, Claimant.
Request for Review by Department.

A previous opinion appears at I VanNatta's Comp. Rptr., 36. The claim has previously been order accepted. This hearing is for the purpose of setting the amount of disability. Dr. Richards was of the opinion that as a result of accidental inhalation of paint, claimant incurred a pulmonary injury, and that subsequent to claimant's recovery from the pneumonitis, there had been an aggravation of claimant's previous pulmonary disease to the point he was unable to sustain any capacity to work. The least activity created shortness of breath and palpitations, accompanied by intermittent ankle endema, the latter indicating that claimant was bordering on right heart failure as a result of increased cardiac load, as a result of his aggravated chronic obstructive pulmonary disease. The Hearing Officer ordered total and permanent disability. The Hearing Officer specifically found that it was an accidental injury. The Department appealed, claiming that this was an occupational disease. The Board found that it had jurisdiction, since it was both the claimant's theory and the Hearing Officer's theory that this was an accidental injury. Whereupon the WCB affirmed.

WCB #68-215 September 24, 1968

Frances Carroll, Claimant.
H. L. Pattie, Hearing Officer.
David M. Munro, Claimant's Atty.
Peter R. Blyth, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial of a back injury. Claimant, age 79, was the manager of the Racquet Club. Claimant twisted her back, when she missed a step on a stepladder sometime in July 1967. There was a witness to the incident. Claimant visited the doctor twice within the 30-day period, but no claim was filed until sometime in October. The Hearing Officer found that a compensable injury had occurred, but that good cause for failure to give notice within 30 days had not been provided. WCB affirmed, commenting that the latitude granted by law for filing late claims is directed toward situations where a claimant is unaware of compensable injury is so obvious, that written notice to the employer would not be important.

WCB #67-735 September 24, 1968

Robert Beazizo, Claimant.
J. David Kryger, Hearing Officer.
John W. Whitty, Claimant's Atty.
John Jaqua, Defense Atty.
Request for Review by Employer.

Appeal from a determination allowing 5% loss of an arm for unscheduled disability. Claimant, a 46-year-old logger, suffered a low back injury while carrying a saw, ax and gas can, while walking down rough terrain. Muscle spasms occurred immediately. Claimant was hospitalized for three days and then was released to return to work with the advice that he change jobs as there was a diagnosis of degenerative disease of the lumbar spine with acute exacerbation due to injury. The claimant, after some further effort at logging, shifted his occupational endeavor to that of a carpenter. The Hearing Officer increased the award to 25% of an arm. On review the Board reversed and reinstated the determination, commenting:

> Awards are made on permanent physical damage inflicted to the physical structure. Dr. Anthony Smith's report of April 19, 1967, reflects a mild disability due to underlying mechanical abnormalities rather than to the accident. Basically, there was a sprain which is largely temporary rather than a permanent physical change. If the underlying congenital defects had been altered, there would be a basis for a more substantial award. The change in occupations is one that any doctor would recommend to any logger found to have those mechanical abnormalities. The accident pointed to the desirability of a change, but it did not cause the change. Furthermore, if the occupation of carpenter increases the claimant's earning power, it will have no effect upon the award. A percentage of disability in the back or in the arm itself is paid without regard to past or future earnings. If a change of occupation is necessitated by injury, that change may be considered with regard to the existence of disability. The earnings at other work does not increase or decrease the actual physical disability nor does a preexisting disability become compensable beyond the additional partial disability caused by the accident.

WCB #67-1543 September 24, 1968

Burl P. Adams, Claimant.
Mercedes F. Deiz, Hearing Officer.
Harl Haas, Claimant's Atty.
George L. Kirklin, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 10% loss use of left foot. Claimant suffered severe burns over 35% of his body, caused by a discharge of hot water and steam. Most of the burns were second degree. Claimant had third degree burns to his ankle, which required a skin graft. The ankle healed well, but claimant alleges that it is weak. There is no limitation of motion or sensory loss. Claimant has returned to the same job and the evidence does not indicate that he is working with any substantial reduction of capacity. The Hearing Officer affirmed the determination. WCB affirmed.

WCB #67-965 September 24, 1968

Margaret K. Walsh, Claimant.
J. David Kryger, Hearing Officer.
Noreen A. Saltveit, Claimant's Atty.
James A. Blevins, Defense Atty.
Request for Review by Claimant.

Appeal from denial of aggravation of hip and low back injury for which claimant has been awarded 10% loss function of the right leg. It was the claimant's position that her condition had materially worsened since the determination. Dr. Jones recommended that the claim be reopened, because of the persistent painful symptoms. Dr. Haugen suggests that a diagnostic paravertebral sympathetic block "might tell us a good bit about her condition." Dr. Cohen is of the opinion that the claimant has sustained no aggravation. The Hearing Officer found no aggravation, and WCB affirmed.

WCB #68-917 September 24, 1968

Albert W. Weidner, Jr., Claimant.
Request for Review by Claimant.

Appeal from a partial denial. The claim is based upon a motor vehicle accident. The claimant's vehicle was rear ended, and the claim was made and accepted for chest wall injuries. Apparently the claimant then asserted that a preexisting abdominal hernia, appendicitis and a retro peritoneal hematoma were also in some measure the responsibility of the employer. The Department informed the claimant that it was not accepting responsibility for any claim other than the chest wall injury, and that the claimant should request a hearing within 60 days, if he disagreed with the denial. Claimant requested a hearing six months later. The Hearing Officer dismissed. On review the WCB held that a partial denial was a proper and recommended procedure and affirmed the dismissal.

WCB #67-1670 September 24, 1968

Katherine V. Popps, Claimant.
Mercedes F. Deiz, Hearing Officer.
Theodore D. Lachman, Claimant's Atty.
Allen G. Owen, Defense Atty.
Request for Review by Claimant.

Appeal from an evaluation of 17% of a forearm for burns to the hand and fingers. The claimant, on her second day of employment at a cleaning establishment in October of 1962, caught her left hand in a press with third degree burns to the thumb, index and middle fingers. Due to various complications, continuing complaints and alternating conservative and surgical care, temporary total disability was paid for over five years. Present complaints are limited to complaints of pain and a ligament malfunction and mild neuritis in the small finger. Dr. Gill evaluated the catching and mild hypersthesia of the left small

finger as a loss of 30% of the function of the little finger, and a loss of 15% of the function of the left forearm, because of claimant's pain and hypersensitivity. The Hearing Officer affirmed the award of 17% loss use of a forearm. WCB affirmed, commenting, "The Board concludes that the claimant has already been provided with too much attention and too much care."

WCB #68-186 September 26, 1968

James Koch, Claimant.
H. Fink, Hearing Officer.
Richard P. Noble, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 10% loss of an arm for unscheduled disability. Claimant, age 23, was hit in the lower left back by a large rock, which rolled down a hill and bounced in the air before striking claimant. Dr. Courtney diagnosed, "Severe contusion to back...Fracture transverse process 3rd lumbar vertebra." Claimant attempted to return to work after one month, but he had difficulty keeping up with the other loggers. Claimant's employment record was steady before the injury, but is now spotty. The Hearing Officer affirmed the determination. Prior to review the carrier reopened the claim for further treatment. The review was dismissed with $100.00 attorney's fees to the claimant's attorney, payable by the employer.

WCB #67-1596 September 27, 1968

Alfredo Esperanza, Claimant.
Arthur Beddoe, Claimant's Atty.
Robert Puckett, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant, who speaks only Spanish, alleges injury to his back, when the company crummy hit a violent bump. He alleges, he attempted to report the accident to his foreman, but this is denied. He continued to work on the railroad section gang without further attempt to report. Some two weeks later his car became stuck in a ditch and immediately thereafter the first complaint of back difficulty was made to the doctor. Denial of the claim affirmed.

WCB #68-4 September 27, 1968

S. M. Knight, Claimant.
H. Fink, Hearing Officer.
Maurice V. Engelgau, Claimant's Atty.
Evohl F. Malagon, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 15% loss use of the left leg. Claimant, age 25 and a logger, suffered fractures of both legs, when a tree swung around and struck him. The diagnosis was "Compound fracture of right tibia, compound

fracture of left tibia and fibula." Subsequent examination revealed that the right leg healed with good alignment, but the left leg had healed with some lateral bowing, which misalignment gave claimant sensation that the left leg was buckling. It was recommended, claimant could return to work on level floors. He is now pulling on the green chain. There is no limitation of motion, but there is a noticeable lateral angulation that would be sufficient to put some unusual stress on the left ankle. The limitation of mobility over uneven surfaces is not anticipated medically to be permanent. The Hearing Officer affirmed the determination. WCB affirmed.

WCB #68-135 October 2, 1968

Randy C. White, Claimant.
Mercedes F. Deiz, Hearing Officer.
Donald R. Wilson, Claimant's Atty.
Richard L. Lang, Defense Atty.
Request for Review by Employer.

Claimant was struck in the hip by a large flying piece of bark, flung by the tightening bind of a choker. Claimant was knocked downhill. The prime injury appears to be in the low back with an associated disability in the left leg. The determination allowed 15% of the left leg and unscheduled disability equal to the loss by separation of 30% of an arm. Time loss was authorized to June 1, 1967, and a further period from October 29 to November 18, 1967. By the time of the hearing, a new condition developed in that claimant acquired ulcers, which were medically related to the injury by treating doctors. This condition developing on March 27, 1968, was not apparent on December 8, 1967, when the determination was made and is in fact an item of aggravation, rather than improper determination, as the disability appeared in December of 1967. Claimant's compensation payment had been suspended without reason on March 31, 1967. The carrier requested a determination on June 28, 1967. The determination was not issued until December 8, 1967. Meanwhile, claimant collected public welfare, watched his weight drop from 160 pounds to 122 pounds, lost his driver's license, picked ferns and Cascara bark and sold eggs to supplement his welfare check, and was eventually left by his wife and five preschool children. The ulcers appeared soon after claimant was in court for nonsupport. Claimant had attempted to return to logging one day in April, but was unable to continue. He was scheduled for Vocational Rehabilitation in July, but was unable to attend because of his suspended driver's license. In this setting the Hearing Officer found that the December determination finding, that the claimant was medically statiomary as of June 1, was premature. Penalties were ordered for payments that should have been made from March 31st until June 1; $700.00 attorney's fees were allowed. On review the Board rejected the Hearing Officer's conclusion that the claimant had been treated harshly and found that the claimant was in fact medically stationary as of June 1st and remained so until the ulcer symptoms developed in March 1968.

WCB #67-722 October 2, 1968

John F. Koch, Claimant.
John F. Baker, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from an award of 20% loss of an arm for unscheduled disability. The claimant caught his leg and in raising up to extricate himself, he struck his head. The claimant has had many symptoms of pain and aching throughout his body, and the problem in rating disability is one of whether the complaints are real, whether the complaints, if real, are disabling, and if so, the extent of disability. Though the claimant asserts the need of further medical care, it appears that for the seven-month period prior to the hearing, the only resort to medical consultation was in contemplation of the hearing on which this review is based. The claimant is presently attending college and the largest physical complaint with regard to school activity was that of headaches which were controlled by nonprescription medicines. Dr. Robson thought it very obvious that claimant had a "terrific functional component to his difficulty..." He recommended the claim be closed with minimal permanent partial disability. The Department's doctor, Dr. Puziss, agree that there was a tremendous functional element, but in giving the claimant the benefit of the doubt, suggest 20% loss function of an arm to cover the neck and right arm complaints. He found nothing wrong with the knee. Dr. Yeager anticipated periodic soreness of the neck. Dr. Dixon recommended psychotherapy. Dr. Raaf did not believe that psychotherapy would be of value, but recommended no further treatment. The Hearing Officer concluded that the claimant was medically stationary and that the determination should be affirmed. WCB affirmed.

WCB #705 October 2, 1968

Hiram S. Cunningham, Claimant.
Page Pferdner, Hearing Officer.
Request for Review by Claimant.

This case was remanded at I VanNatta's Comp. Rptr., 58, for the taking of further medical evidence on the existence of narcolepsy. Dr. Swank reported:

> ...that this patient suffered central nervous system damage in addition to general bruising of the body and extremities as a result of the accident. This was probably due to marked increase in venous pressure and backing up and engorgement of cerebral veins as a result of the heavy weight which was on his body. In addition to this, he must have suffered from the general effects of severe trauma. These effects are ill-defined, but do include the symptoms of post-traumatic syndrome such as the patient describes, namely poor memory, nervousness, irritability, sleeplessness, and reduction in sex drive. Other evidences of damage to the nervous [illegible] of hearing and bilateral tinnitus both of which have

that he has developed an abnormal sleep pattern as a result of central nervous system damage. It would be impossible to localize this damage. However, the reflex changes, equivocal plantar response, slight atrophy of the left calf, the tinnitus and lack of hearing on the right, all suggest diffuse damage to the nervous system including both central and peripheral nerves."

On his re-examination it was Dr. Swank's impression "although this test did not rule out narcolepsy, it also did not furnish evidence indicating that the patient has narcolepsy. In conclusion, therefore, it is very unlikely that the patient has narcolepsy since the clinical picture is at the present time not that of narcolepsy."

On the basis of this medical opinion the Hearing Officer concluded that the "claimant does not have narcolepsy. He does have a hearing loss, but it was not engendered by his injury of May 18, 1965." Accordingly he affirmed the determination. On review the Board reversed, commenting, "The Board notes that many of the claimant's symptoms are labeled as functional and that he tends to exaggerate some aspects of the case history, but cannot overlook the fact that the medical evidence reflects that there was traumatic central nervous system and brain cell damage caused by backing up of blood to engorge the cerebral veins and producing brain cell damage. There is also evidence that one of the medications used for keeping the claimant awake may also produce brain cell damage." The Board further noted that the doctors had considered treatment of the claimant at the State Hospital. The Board found that the claimant was not presently capable of being placed in any regular or suitable employment. Accordingly, it found that the claim was prematurely closed, and that temporary total disability should be reinstated from September 22, 1966, and that the Department should obtain further psychiatric consultation, care and possible custody for the purpose of enabling the claimant to return to useful work.

WCB #67-1635 October 2, 1968

John Williams, Claimant.
Page Pferdner, Hearing Officer.
Richard P. Noble, Claimant's Atty.
Robert E. Nelson, Department Atty.
Request for Review by Claimant.

Claimant, a delivery boy, was injured in an auto accident. His employer was non-complying. The determination allowed 5% of an arm for unscheduled disability. The Hearing Officer found, "There was evidence that claimant has recovered in a third party action against the driver of the other car. ORS 656.578 states: 'If a workman of a noncomplying employer receives a compensable injury in the course of his employment or if a workman receives a compensable injury due to the negligence or wrong of a third person * * *entitling him under ORS 656.154 to seek a remedy against such third person, such workman * * *shall elect whether to recover damages from such employer or third person. * * *' ORS 656.580 (1) States: 'The workman* * * shall be paid the benefits provided by

compensation benefits pending receipt of damages. Accordingly the Hearing Officer dismissed the request for hearing. On review the Board reinstated the 5% award, commenting,

"The Board does not construe the third party provisions of the Workmen's Compensation Law to be an 'either or' election. As pointed out by the Supreme Court in Newell v. Taylor, 212 Or 522, 'the effect of the entire statute is to recognize that both the workman and the commission have an interest therein.' Both the claimant and the paying agency are restricted to a portion of the recovery. It is, however, clear that the claimant receives all benefits of an aggravation claim once a third party distribution has theretofor been concluded. ORS 656.593 (2)(c).

"The Board is advised that in the matter now before the Board, a settlement was negotiated with the approval of the State Compensation Department as the paying agency. Further claim processing of the claim may be necessary in many instances to determine the distribution of the third party proceeds. Though an additional award by way of aggravation is clear of a 'paying agency' lien no such absolute right appends to grant a claimant a double recovery to retain, to the exclusion of the paying agency, the money represented by a simple increase in the award. It would appear that in approving settlements, the paying agency may appropriately reserve rights to any additional sums which may be involved in hearing or review of disability awards to avoid the question created in this matter.

"As a matter of policy, a claimant proceeds at his own risk in making a third party settlement without 'paying agency' approval. Such settlements are void by statute and may, to the extent the claimant has himself participated in avoidance of the statute, preclude further workmen's compensation claims proceedings until the parties are all returned to the status quo."

WCB #68-80 October 2, 1968

Dale Richards, Claimant.
H. Fink, Hearing Officer.
Fred P. Eason, Claimant's Atty.
John W. Whitty, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 10% loss of use of the left arm. Claimant sprained his shoulder while operating a high pressure water hose. Dr. McCauley diagnosed "Acromial clavicular separation," and Dr. Smith diagnosed "Sprain of left shoulder girdle musculature." Claimant has not seen a doctor for six weeks before the hearing and has been working as a longshoreman whenever work

WCB #67-1593 October 2, 1968

Ervin B. Sahnow, Deceased.
Neal W. Bush, Claimant's Atty.
Robert P. Jones, Defense Atty.
Request for Review by Beneficiaries.

Appeal from a denial of a heart attack claim. The history of the myocardial infarction in this case involves a complaint of pain while using a 12-inch wrench at 11:00 A.M. on August 9, 1967, while at work. He returned to work Friday, August 11, and worked the half day on the 12th. On August 14 at 6:30 A.M., while at home, there was a rupture of the left ventricle. Claimant had experienced dull pains in the chest on exertion since approximately 1963. A heart murmur had been discovered in 1930. Studies carried out by Dr. Rogers in July 1966, disclosed moderately severe aortic heart disease. There was moderately severe narrowing of the primary branches of the main coronary artery and some narrowing of the right coronary artery. It was planned that claimant would have an aortic valve replacement, but this surgery would be deferred, because claimant was able to avoid the angina by carrying out moderate activities at a reduced pace. The autopsy confirmed the presence of preexisting coronary artery disease. Dr. Rogers, who did not testify at the Hearing, was of the opinion that the myocardial infarction was brought on by the vigorous pulling on the wrench. The defendant's doctors who appeared at the hearing believed that the actual infarction occurred ten to fourteen days before the death, and thus was not caused by the incident of August 9th at work. The symptoms at work were symptoms from preexsting infarction. Accordingly the Board affirmed the Hearing Officer's conclusion, that the death was not compensable.

WCB #67-781 October 2, 1968

Frank Canup, Claimant.
Robert E. Jones, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 10% of a leg for a knee injury. The diagnosis was "pre patellar bursitis," which was subjected to surgery. Subsequent to the surgery the leg continued to ache and the scar area was tender. There was also evidence of sweating from the knee down to the point that the stocking would be soaked. Distal to the scar there was considerable numbness in the knee. Claimant is somewhat limited in activities on uneven ground, but works as a cleanup man. He has some difficulty walking up stairs. The only recommended treatment was xylocaine blocks. This the Department has offered. The Hearing Officer affirmed the determination. On

WCB #68-396 October 2, 1968

Clarence Craghead, Claimant.
Page Pferdner, Hearing Officer.
Nick Chaivoe, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 25% loss use right foot; 15% loss use of left foot. Claimant fell some 10 feet to the sidewalk while working as a carpenter. He landed on his feet and suffered comminuted fractures of the os calcis of both feet, fractures of the second and third metatarsals of his right foot, and slight anterior wedging of approximately the 6th thoracic vertebral body. There was visible deformity of the os calis. The right ankle lacks 10 degrees of inversion and 10 degrees of eversion. Claimant has been able to return to work, but must take from 4 to 8 Empirin tablets each day to control the pain. His ankles swell. The Hearing Officer awarded 40% loss use of the right foot and 25% loss use of the left foot. On review the claimant alleges total disability. The Board affirmed the Hearing Officer, commenting: "The Claimant asserts that the recent decision of the Oregon Supreme Court in Jones v. SCD, 86 Adv 847, does not apply where both feet (or both arms) have a partial disability. The Workmen's Compensation Board does not so interpret that decision. As long ago as 1923, the Supreme Court in Chebot v. SIAC, 106 Or 660, refused to convert 100 per cent of one eye and 50 per cent of the other to permanent total disability since the disabilities were scheduled and short of the level prescribed for total disability."

WCB #67-1626 October 3, 1968

Roy Barr, Claimant.
H. Fink, Hearing Officer.
Robert M. Gordon, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 10% of an arm for unscheduled disability. Claimant suffered a "lumbosacral strain" while unloading baskets of pipes. He was treated conservatively without hospital treatment. He has been restricted from performing repetitive bending or heavy lifting. Claimant has sought light work in various mills, but the employers are not interested in a person with a back history. Claimant is only 20-years-old, and Vocational Rehabilitation started him in college, where he is now attending. He is unable to secure part-

WCB #68-70 October 3, 1968

Della Mae Ramberg, Claimant.
H. Fink, Hearing Officer.
Garry Kahn, Claimant's Atty.
Richard C. Bemis, Defense Atty.
Request for Review by Employer.

Appeal from a notice of denial. Claimant, a 63-year-old cannery grader, felt a sharp pain in the right kidney area, with nausea when she reached upwards to put some corncobs on a conveyor. An hour later claimant went home because of continued nausea and vomiting. Subsequently, claimant returned to work for five or six weeks, but the condition did not improve, so claimant consulted a doctor. She was operated for ptosis of the right kidney with kinking of the ureter and grade II hydronephrosis with kinking about the ureter causing the obstruction. A right nephropexy was performed. Claimant had had the left kidney removed for cancer in 1946. The Hearing Officer concluded that the Carrier ignored the claimant's doctor's medical report, because claimant's doctor is an osteopath. The claim was order accepted and penalties were allowed by the Hearing Officer. On review the employer contested the penalties award. The Board disallowed the penalties concluding that it was not unreasonable to seek additional medical opinion under the circumstances. Apparently the treating doctor's first medical opinion could be considered speculative or conjectural. The Board affirmed the award of $600 attorney's fees based on the denial of the claim.

WCB #68-418 October 3, 1968

Kenneth Warden, Claimant.
Page Pferdner, Hearing Officer.
Nels Peterson, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 45% loss of arm for unscheduled back difficulty. Employer cross appeals.
Claimant, age 21, was struck in the back by a piece of broken lumber. Dr. Bauer diagnosed a "sciatica-nerve root injury." Dr. Miller diagnosed "traumatice L 5 intervertebral disc syndrome with radiculitis." A laminectomy was performed. Claimant also has a congenital heart problem dating back to age 12. Dr. Goldberg characterized it as "probable pulmonic stenosis (valvular versus infundibular)." Claimant alleges total disability. The

both limit strenuous labor. The back injury may be a blessing in disguise to require the claimant to work within the limits of his cardiac capacity. The combined disability should essentially be no greater than imposed by the back injury alone.

Penalties and attorney's fees were allowed against the carrier, because of a premature suspension of temporary total disability.

WCB #68-8 October 4, 1968

Richard R. Barrett, Claimant.
Page Pferdner, Hearing Officer.
George DesBrisay, Claimant's Atty.
David Young, Defendant's Atty.

This is a subjectivity hearing of Frazier Roofing Company. Claimant was injured, when he stepped into a bucket of hot roofing tar. Frazier alleges either a subcontractor relation or a partnership in which Frazier was to take $5.00 per hour and Thomas Barrett $4.00 per hour with the first $14,000.00 of profits to Frazier and 80% of the excess to Thomas Barrett. It was not in writing. Shortly before the accident the claimant joined the roofing job, and thereafter Frazier gave $6.50 per hour to Thomas Barrett to be divided between the Barretts as they saw fit. There was no assumed business name filed and no wage withholding or estimated income returns. Frazier controlled the records and the funds of Frazier Roofing Co. Frazier also apparently gave the estimates, obtained the jobs and supervised the work. The Hearing Officer concluded, that it made no difference whether Thomas was a partner with Frazier or not; in either case, Richard Barrett was an employee. The claim was ordered accepted.

WCB #67-1588 October 4, 1968

Trudy Crouse, Claimant.
H. Fink, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Hugh Cole, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding no permanent disability. Claimant, age 30, fell through a hole in the floor with her right leg and suffered contusion of the right leg and buttock and a low back strain. Subsequent to discharge from the hospital, claimant developed irregular vaginal bleeding which has now disappeared. A myelogram on the back was negative, but the claimant has many subjective symptoms relating to the back, hip and knee. The Hearing Officer allowed no permanent partial disability. The Board affirmed, commenting: "The claimant in this case has numerous complaints and has been examined by a general practitioner, two gynecologists, two orthopedists and three neurologists. The various medical examinations range from a diagnosis of a mild injury to finding no objective basis for the symptoms. Of greater interest are the medical reports

WCB #67-1504 October 9, 1968

John Wright, Claimant.
Richard P. Noble, Claimant's Atty.
J. David Kryger, Hearing Officer.
Evohl F. Malagon, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding no permanent partial disability. Claimant was injured, when the tractor he was driving hit a bump, causing low back pain. Six days later claimant suffered a sharp pain in the back. Dr. Chatburn diagnosed a lumbo sacral strain. Claimant suffers recurrent disabling pain while lifting or bending. The Hearing Officer allowed 25% loss of an arm for unscheduled back difficulty. Objective symptoms were lacking. WCB affirmed.

WCB #68-212E October 11, 1968

Ada Doan, Claimant.
Mercedes F. Deiz, Hearing Officer.
Nathan J. Ail, Claimant's Atty.
Richard C. Bemis, Defense Atty.
Request for Review by Employer.

Appeal by employer from a determination awarding 20% of the whole man as unscheduled permanent partial disability (64 degrees). Claimant, age 71, was a part-time shoe saleslady. She slipped and fell down a flight of stairs on the defendant's premises. She was treated for contusions, strains, and sprains of the rib cage, the low back and the left knee. There were numerous objective symptoms and Dr. Blechschmidt noted claimant's extremely slow convalescence was "probably due to her age, her type of work which requires her to get up and down while fitting shoes, to her overweight and to the extreme amount of nervousness which has come on since the accident." The Hearing Officer concluded that since there was no suitable occupation to which claimant could regularly return, she was totally disabled. It was observed that the claimant had sold shoes for some 27 years without previous trouble. On review the Board reversed the award to permanent total disability, observing that widespread application of such awards in similar cases would seriously limit the opportunities of older persons to gain even part-time work. The Board did find that the permanent partial disability was equal to 40% of the whole man or 128 degrees of a maximum of 320 degrees.

WCB #67-610 October 11, 1968

Leonard D. Sills, Claimant.
H. L. Seifert, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Owen E. McAdams, Jr., Defense Atty.

and a lumbosacral sprain. Extensive physical examinations reveal minimal objective symptoms. Claimant complains of low back pain radiating into the legs. It appeared to Dr. Hickman, who conducted pyschological evaluation, that claimant was malingering, so that Vocational Rehabilitation would send him to barber college. The Hearing Officer ordered the determination affirmed. WCB affirmed.

WCB #67-1540 October 14, 1968

Elmer L. Misterek, Claimant.
H. Fink, Hearing Officer.
Alan R. Jack, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 10% loss use of the foot. Claimant was injured when a catch basin dropped on his foot. Dr. Steele diagnosed "Fractures of the tips of the great toe and second toe with laceration of the great toe and partially evulsed nail of second toe." Five months later surgery for a hallus valgus was performed. Claimant takes several pain pills per day and his foot bothers him. He favors the foot somewhat. The Hearing Officer affirmed the determination. WCB affirmed, noting that there was substantial evidence of a functional overlay with an exaggeration of symptoms.

WCB #67-1292 October 15, 1968

Fred Robins, Jr., Claimant.
Richard T. Kropp, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Claimant.

Claimant was awarded 135 degrees for loss of a leg by amputation seven inches below the knee. The injury occurred in August 1962, and the claim was not closed until August 1967, some five years later. Claimant was a farmer and warehouseman, whose foot became entangled in an auger, requiring amputation. There is evidence of serious difficulty with the stump. There was objective as well as subjective evidence. Claimant's condition had not changed appreciably over the last year. The Hearing Officer found that claimant was medically stationary and affirmed the award. On review the claimant alleged total and permanent disability. The Board concludes the decision of Jones v. SCD, 86 Adv Sh 847, 441 P2d 242, is applicable, and that the award must necessarily be limited to the loss by separation of the leg below the knee. It was noted that the award allowed was the maximum permanent partial award allowable by statute.

WCB #68-428 October 15, 1968

Donald R. Johnson, Claimant.
Mercedes F. Deiz, Hearing Officer.
Don Atchison, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 18% loss hearing right ear, 20% loss hearing left ear and 20% loss of arm by separation for unscheduled disability. Both the claimant and defendant appeal. Claimant, a cab driver, was robbed and shot in the neck by a passenger. The bullet entered below his right ear just behind the tip of the mastoid on the right side and exited to the left of the midline of the neck. Claimant seeks increased permanent partial disability and defendant seeks an earlier termination date for temporary total disability and challenges the hearing loss award. As to the temporary total disability, the treating doctor approved claimant's return to his regular employment as of October 4, 1967. The carrier did not submit the matter for a determination immediately, but had their own doctor examine. His report was dated February 15, 1968. The subsequent determination found the claimant medically stationary as of February 16, 1968. Accordingly, the Hearing Officer found that the claimant was medically stationary as of October 4, 1967. Claimant has not returned to work. Dr. Storino's examination revealed well-healed scars, left neck turning limited 25%, some hypesthesia and hypalgesia on the right posterior regions of the head and right ear with the right greater auricular nerve and occipital nerves being involved, and slight weakness of the right sternocleidomastoid muscle. The X-rays revealed metallic fragments adjacent to the sponous process of C2 and a fracture of the tip of C2. The prognosis was that there was some nerve injury, but that the symptoms of limited and painful neck motion and headaches would eventually subside, with the numbness being permanent.

As to the hearing loss audiogram: indicates a decibel loss which is consistent with the hearing loss in both ears between the 25 to 30 level. The audiogram reveals at the 1000 cycle level, air conduction is a bit less at the left ear than the right ear. Claimant testified, he still gets the shocking, tingling sensation, whenever he bends his head down, has constant headaches, is unable to turn his head to the left and a sharp pain develops when he tries. He states his reflexes are not quick enough to be a cab driver. The Hearing Officer affirmed the award of permanent partial disability. WCB affirmed.

WCB #68-105 October 15, 1968

Victor M. Essy, Claimant.
Page Pferdner, Hearing Officer.
Edwin A. York, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 30% loss use of the right foot and 20% loss of an arm for unscheduled disability. Claimant, a steel fabricator and welder, was injured by a falling beam. The diagnosis was (1) severe lacerations and avulsion of scalp; (2) severe lacerations of the face; (3) compound fracture, nasal bone and malar bone; (4) fracture, right zygoma; (5) multiple

rib fractures, right third, fourth and fifth ribs; (6) abrasions of knees and legs; (7) crushing injury, right foot with hematoma; (8) compound fracture, right little toe; (9) fracture, simple right great toe; (10) fracture of the maxillary bone. Claimant developed an avascular necrosis of the first four toes and the adjacent area of his right foot, and "an amputation of the first four toes and the dorsom of the foot was carried out." Subsequently "a split-thickness skin graft was placed over the (amputation) area with approximately 80% take of the skin graft, there still being some sloughing of soft tissues from necrosis." The laceration of the face was severe, starting with the left upper eyelid and passing over the nose, cutting it partially away and crushing a sinus cavity as well as other damage. As to the eye, there was a diagnosis of "Enophthalmos, right eye; hypothropia, right eye." When claimant was released to return to the work, Dr. Hayes listed the residual disabilities as: (1) Scars of the nose and face; (2) Loss of a portion of the nasal bone with defective bridge of the nose; (3) loss of the right infra-orbital nerve; (4) loss of the first, second third, and fourth toes of the right foot; (5) Vaso-motor instability, right foot, characterized by coldness of skin and discomfort." Claimant's present employment requires him to read blueprints, and he has difficulty keeping glasses in place with the defective nose and suffers from some double vision on account of the eye defect. The cold foot requires artificial heat when the temperature is below 50 degrees.

The Hearing Officer increased the foot award to 40% losss use of the right foot and the unscheduled award to 25% loss of an arm. WCB affirmed.

WCB #67-741 October 17, 1968

Elmer Lee Gouker, Claimant.
J. David Kryger, Hearing Officer.
Richard J. Smith, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Employer.

Appeal from a determination awarding 20% loss of an arm for unscheduled disability. Claimant was attempting to move furniture, when he felt a sudden pain in his lower back with a numb and tingling sensation in the legs. Temporary total disability was awarded until March 27, 1967, which the employer contends is too long. The unjury occurred in January 1966. Dr. Moltner on July 18, 1967, indicated that a neurosurgical consultation should be had prior to claim closure. Dr. Luce examined on November 15, 1966, at which time claimant's condition was found medically stationary. The determination was made on a medical report from Dr. Bolton, dated March 27, 1968. The Hearing Officer found that the claimant was medically stationary as of November 15, 1966. As for the permanent partial disability, there was no objective diagnosis and there was evidence of malingering and functional overlay. The Hearing Officer increased the award to 35% loss arm for unscheduled disability. Upon review the Board reinstated the determination, commenting:

"Upon hearing, the award was increased to 35% loss of an arm by separation upon the premise of the hearing officer that 'it is well settled law that in the unscheduled area, loss of earning capacity is a major deciding factor.' The Board does not so construe the law and to do so might deprive many workmen with substantial permanent injuries from any award if their earning capacity is

not in fact reduced. The Supreme Court decision cited did not involve the issue for which it is cited and even as dictum it in nowise serves to discard the concept of measuring physical disability as the basis for award. A better picture is presented by the early decision on a low back injury of Wilson v. SIAC, 112 Or 588, where the entire consideration in arriving at a disability award is in terms of the physical effect of the injury upon the claimant."

WCB #68-134 October 18, 1968

Roscoe F. Lilly, Claimant.
H. L. Seifert, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Quintin B. Estell, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding no permanent partial disability. Claimant, a 50-year-old whistle punk, hurt his back, when hooking a guy line. The complaints were pain in the lower back with pain radiating down the left leg. X-ray studies revealed principally evidence of lumbosacral osteoarthrosis, and Dr. Borman's diagnosis was lumbar strain superimposed upon osteoarthrosis. There were few objective findings. Claimant had had previous back injuries with similar symptoms. In 1956, claimant was awarded 35% of the left leg and 40% loss function of an arm for unscheduled disability. In 1960, claimant was awarded 45% loss use of an arm for unscheduled disability. It is recognized that, although claimant has received a further injury to the same general area of a prior injury involving a disability, compensation would not necessarily be barred in separate accidents, if there were additional disability in the unscheduled area: Green v. SIAC, 197 Or 160, 251 P2d 437; Cain v. SIAC, 149 Or 29, 37 P2d 353; Nesselrodt v. SCD, 85 AdSh 797, 435 P2d 315. The question here is whether or not claimant sustained permanent partial disability as a result of his latest injury. The Hearing Officer concluded that he did not. On review the Board affirmed, commenting:

> "The Supreme Court in the recent Nesselrodt v. SCD was careful to refer to the prior case of Green v. SIAC in the terms of 'assuming that the Court in Green reached the right result.' Each case must rest upon its own facts but the Board questions whether it was ever the legislative intent to permit recurrent accumulative recoveries for what is essentially the same disability. There has long been an artificial limit on the maximum recovery for unscheduled disability in one accident and that maximum could be exceeded by multiple accidents. That was involved in the Green case. This is quite a different picture from a premise that one can repeatedly recover for essentially the same disability."

WCB #68-77 October 18, 1968

Ray E. Clark, Claimant.
John F. Baker, Hearing Officer.
Dan W. Poling, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant, age 41, is a shingle mill worker who alleges injury to his low back while at work on November 3, 1967. A claim form was signed by claimant on November 21, 1967, and a denial was issued on January 3, 1968. Claimant testified to a sudden pain, while he was pulling a cedar block across a metal deck with a pickeroon about an hour before quitting time. Claimant testified that he told his boss that he would be unable to work a second shift that night as he often did. Claimant was unable to work the next day. The employer testified that the mill did not operate the next day. Claimant returned to work the following Monday with a back brace, which was left over from a similar accident in 1959, and worked continuously until November 21st. On two days he worked 12 hours. The Hearing Officer affirmed the denial of the claim, being of the opinion that the claimant's testimony alone was insufficient to make out a case. The Board reversed, ordering the claim accepted and awarding $500.00 attorney's fees and commenting, "It is noted that the Hearing Officer in no wise discredits claimant as a witness. Though there is no requirement that unrefuted testimony be accepted, the Board agrees with the Hearing Officer that a prima facie case was established and concludes that the claim was basically denied by the State Compensation Department at the urging of the employer, that he simply doubted whether claimant could work so long if so injured."

WCB #68-1142 October 18, 1968
and
WCB #68-786

Joseph Dubravac, Claimant.
Page Pferdner, Hearing Officer.
Allen T. Murphy, Jr., Claimant's Atty.
Allen G. Owen, Defense Atty. in WCB #68-786.
Marshall C. Cheney, Jr., Defense Atty. in WCB #68-1142.
Request for Review by Employer.

Claimant alleges back difficulty arising after he lifted some ankle iron stakes weighing 50 pounds. WCB #68-786 is an appeal from a denial of an aggravation claim relative to the symptoms which returned on January 18 and 19, 1968.

WCB #68-1142 is an appeal from a denial on claimant's claim of a new injury on January 18 and 19, 1968. In effect one carrier has denied, because the problem is aggravation and the other because it was a new injury. Claimant, age 54, sustained a back injury in 1951, resulting in a laminectomy and fusion. On May 3, 1966, claimant again injured his back. This claim was accepted. It was closed out in July 1966, with no permanent partial disability. Claimant continued to work as a construction laborer for the same employer and was so employed on January 18 and 19, 1968. A laminectomy now indicates a serious

defect above the prior fusion site. The Hearing Officer found that under the rule of Armstrong v. SIAC, 146 Or 569, which holds, "When an accident causes, lights up, aggravates, or accelerates a diseased condition, the resulting disability or death is chargeable to the accident." The Hearing Officer also found that the claimant's lack of knowledge of the employer's change of carriers and the belief that this was an aggravation, was "good cause for failure to give notice within 30 days after the accident," as required by ORS 656.265(4) (c). On review the Board affirmed, observing that it was sometimes difficult to distinguish new injuries from aggravation, but "the Board deems the better practice in any case with facts such as those here evident, to place the responsibility upon the last employer where there is a well-defined incident which qualifies as a compensable injury."

WCB #68-569 October 21, 1968

George R. Buscumb, Claimant.
Page Pferdner, Hearing Officer.
Burton J. Fallgren, Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding no permanent partial disability. Claimant, age 36, was an off bearer on a veneer slicing machine, when his right hand was crushed. At the hearing, claimant's primary complaint related to complete loss of active motion of the metacarpal phalangeal joints of the middle, ring, and little fingers of his right hand. He also complained of loss of grip, intermittent swelling and intermittent pain. Although claimant may have some loss of motion in the metacarpal phalangeal joints of the second, third and fourth fingers of his right hand, because of his insistence he lacked any motion in these joints, it is impossible to ascertain whether he has any limitation of motion or not. It is noted, claimant could actively flex the metacarpal phalangeal joints 30 degrees on October 30, 1967. Although he professed to have exercised with a rubber ball and a sponge since then in order to restore the motion to his hand, at the time of the hearing, he demonstrated that there was no motion in those three joints. The Hearing Officer found this to be unreasonable in light of the absence of any medical findings. Accordingly no permanent partial disability was allowed. WCB affirmed.

WCB #68-90 and WCB #67-1590 October 22, 1968

Norman L. Cooley, Claimant.
H.H. Pattie, Hearing Officer.
James G. Griswold, Claimant's Atty.
James F. Larson, Defense Atty.
Request for Review by Claimant.

This is a consolidated hearing over an aggravation claim and a new injury claim pertaining to ankles of the claimant. Fortunately, the same carrier is responsible for both. They have been denied. It is apparently the claimant's contention that he fell in November 1967, injuring his left ankle. He also contends that this condition caused an aggravation of his right ankle, which he claims was

covered by a prior claim arising out of a 1966 injury. The records, however, indicate that the 1966 injury was to the left ankle also. Claimant's memory was demonstrated to be less than entirely accurate. For example, he had forgotten a motorcycle accident in July 1967, for which he was treated in the hospital for "pain in right instep area." The Hearing Officer concluded that the records were correct, and that the 1966 injury was to the left ankle, and hence there could now be no aggravation claim to the right ankle. The claim for injury to the left ankle was ordered accepted. On review claimant appeals denial of anything for his right ankle. He was unsuccessful.

WCB #68-631 October 23, 1968

Alvin J. Malek, Sr., Claimant.
H. L. Pattie, Hearing Officer.
Nick Chaivoe, Claimant's Atty.
Allen G. Owen, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant, age 26, alleges accidental injury to his back about December 18, 1967, when he stumbled while carrying one end of a 30-foot aluminum channel, estimated to weigh between 60 to 80 pounds. No written notice was given to his employer until February 6, 1968. No medical services were sought by claimant until February 1, 1968. There was evidence from a co-worker corroborating the December 18 incident. However, claimant then continued to work until February 1, 1968, when he asked the foreman for three weeks off to go to the hospital. This was before he had consulted the doctor. The Hearing Officer concluded, however, that there was insufficient evidence to prove that the condition requiring treatment was the result of the activity described. The Hearing Officer did not understand how claimant could continue to work without any observable difficulty for so long a period. The Hearing Officer further found that there was no prejudice in the late notice of injury. However, the denial was affirmed. On review the Board reversed and ordered the claim accepted, commenting, "With the incident corroborated it appears to the Board that the matter would largely be one of medical substantiation. The only two doctors whose opinions are of record related the deterioration of the back and the need for treatment and surgery to the incident of December 18, 1967. If the conclusions of those doctors were based upon an erroneous history that matter could have developed for the record rather than left to conjecture or supposition."

WCB #68-349 October 30, 1968

Mary M. Ward, Claimant.
Mercedes F. Deiz, Hearing Officer.
John A. Tujo, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for Review by Employer.

Appeal from a determination allowing no permanent partial disability and temporary total disability to May 24, 1966. Claimant, age 63, and a nurse's aid, suffered leg and chest injuries as a result of a collision of hospital carts on May 10,1966.

The diagnosis was a large hematoma on the left knee, bilateral contusion of both knees, and chest contusions. Claimant has now retired and is receiving Social Security. The last examination of the claimant was on April 19, 1968, when Dr. Cherry found: "She is mildly tender in her low back. She bends to reach 4 inches of floor. Straight-leg raising is to 80 degrees. Knee kicks are 2+ bilaterally. Ankle jerks are 1+ on the right and absent on the left. Sensation is reduced on the left leg. Left Fabere's and hip flexion tests are mildly positive...She has no severe varicosities. She is somewhat tender in the area of the left knee." The orthopedist's opinion was, "This lady has residuals of low back strain and sciatic irritation due to her injury. I feel that her injuries are real and that she does have residuals of back strain and contusions of her legs, especially of her left knee region. I feel that her difficulty is sufficient to prevent her from working." Claimant has preexisted varicose veins, and a chronic respiratory problem. The Hearing Officer allowed 20% loss use of the left leg and 10% loss by separation of an arm for unscheduled disability. On review the Board affirmed the leg award, but deleted the unscheduled disability award, finding the evidence insufficient to justify any award for disability related to the accident.

WCB #68-44 October 30, 1968

Elias Dutton, Claimant.
J. David Kryger, Hearing Officer.
William Babcock, Claimant's Atty.
J. W. McCracken, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 15% loss use of right arm. Claimant, age 50, suffered an injury to his right forearm, when it was caught and twisted in a conveyor belt. Dr. Rockey diagnosed a fracture of the distal shaft of the right ulna and applied a long arm cast. Presently the claimant complained of pain in his right arm near the fracture area, a loss of grip as a result of numbness in the fingers, and a severe aching of the right forearm after work each day. Dr. Rockey evaluated claimant as having a 6% impairment of function of the right upper extremity by using the AMA rating scale. The Hearing Officer affirmed the determination. The Board affirmed, commenting, "The disability determination is not to be made upon ability to operate this particular machine, but the difference in the physical abilities required for that machine and the physical abilities demonstrated in other work or demonstrated by medical examinations becomes basic."

WCB #68-220 October 30, 1968

Robert C. Hill, Claimant.
Forrest T. James, Hearing Officer.
Bartlett F. Cole, Claimant's Atty.
Allen Owen, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 15% loss arm for unscheduled disability. The claimant, a 34-year-old foundry worker, fell into a furnace and suffered a lumbosacral strain. He received conservative treatment. The claimant had a

similar injury in 1963, which was closed with 20% loss function of an arm for unscheduled disability. The present proceeding is based upon the 1966 injury, but is an aggravation claim based on recurrent low back strain in November 1967, which appeared after some heavy lifting. The Hearing Officer concluded that the recurrent low back strain was a new injury, and hence there was no aggravation of the 1966 injury. The Board affirmed the finding of a new injury, observing that the State Compensation Department no longer insured the defendant employer.

WCB #67-1508 October 30, 1968

George J. Hutchison, Claimant.

On August 16, 1968, the Board remanded the order of the Hearing Officer and referred the claimant to the Physical Rehabilitation Center for work evaluation and consideration by the Back Clinic. There was a subsequent Circuit Court appeal and a hearing. The Circuit Court appeal has been dismissed by agreement and the review sought on the hearing is remanded by this order, so that the claimant might finally be referred to the Physical Rehabilitation Center.

WCB #68-126 October 31, 1968

James P. Anderson, Claimant.
J. David Kryger, Hearing Officer.
A. C. Roll, Claimant's Atty.
Eldon Caley, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 25% loss use of the right arm. Claimant, age 52, injured his right shoulder when he attempted to lift a 175 pound fan. Dr. Larson diagnosed "traction strain to his right shoulder." After conservative treatment failed, Dr. Larson recommended an exploration of the shoulder area, which resulted in a "fixation of the biceps tendon on the humeral head." Subsequently, Dr. Larson released the claimant, commenting, "It would be my feeling, he can participate in any type of occupational activity which would not require use of the arm above shoulder height." Generally, claimant complains of a loss of motion in his right shoulder and a loss of grip of the right hand. Claimant states, he has difficulty in picking up utensils such as knives and forks. The Hearing Officer allowed temporary partial disability to the extent of 75% from August 12, 1967, until March 1, 1968. The permanent partial disability award was affirmed. On review the Board inconclusively discussed temporary partial disability. The Board concludes that the award of 75% was liberal, but observed that the employer was not protesting. The Board affirmed.

WCB #68-518 November 4, 1968

William M. Busby, Claimant.
H. L. Seifert, Hearing Officer.
Donald Atchison, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 10% loss function of the left leg and 25% loss function of the right leg. Claimant, a 35-year-old logger, was struck across the legs and hips by a falling tree approximately four feet in diameter. He was hospitalized, but there was no evidence of fracture or bone injury. Six months after the injury Dr. Cooper found both claimant's legs stiff to some degree, with the main difficulty being that the right knee was painful, particularly when claimant attempted to kneel or squat. Claimant had a mild right limp, although the right knee extended fully and the left knee extended fully at the expense of straining in the cords in the back of the knee. Dr. Cooper thought that claimant would not be improved appreciably by further supervised medical care, but believed that it would be risky for claimant to return to work in the woods. At the present time his right leg is the only one which bothers him and he has some difficulty with his right leg motion in extremes; the left appears to have recovered satisfactorily, although it oftentimes aches. Determination affirmed. WCB affirmed.

WCB #68-377 November 4, 1968

Ellis E. McConnell, Claimant.
Forrest T. James, Hearing Officer.
James J. Kennedy, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding permanent partial disability of 35% loss use of the foot. The claimant is a 65-year-old stationary engineer, who injured his right and left ankles while operating a donkey engine. The injury occurred when the spar-pole toppled over and crushed claimant's right ankle and fractured his left ankle. Dr. Bachhuber found no permanent impairment of the left ankle, but did find permanent impairment of the right ankle. The claimant now complains of pain in both his ankles. He states that he has suffered restrictive and increasing discomfort in his right ankle and his left ankle has started to give him restrictive pain as he uses it more. Claimant is presently unemployed and has taken Social Security. He indicated willingness to work if he could get a "sit-down" job. The Hearing Officer cast some doubt on the credibility of the claimant and took special note of the fact that the request for hearing was filed immediately after the determination was issued (within the week). Accordingly, the 35% determination for the right foot only was affirmed with no award for the left foot. WCB affirmed.

Robert R. Jackman, Claimant.
Page Pferdner, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Daryll E. Klein in WCB #67-1447E.
Allen G. Owen in WCB #68-446.
Request for Review by SCD and Claimant.

This hearing pertains to two claims and two alleged injuries to claimant's left arm, shoulder, and left upper back. The first occurred on June 12, 1967, (WCB #67-1447E) while claimant was employed at Willamette Western Corp., which claim was accepted and benefits paid until defendant became convinced claimant had suffered an intervening injury to the same area. Benefits were terminated and defendant requested a Hearing to determine the extent of its liability. Claimant then filed a claim alleging he reinjured his shoulder on July 23, 1967 (WCB #68-446), while employed at C & J Steel & Salvage Company, and this claim was denied. The latter claim was not filed until December 27, 1967. Claimant was released to return to work on June 21, 1967, and was apparently symptom-free when he commenced working for C & J on July 17, 1967. He testified that the pain did not begin again until after he had worked a couple of days for C & J. This lead the Hearing Officer to the conclusion that the injury of June 12, 1967, was asymptomatic and medically stationary prior to July 17, 1967, and any subsequent exacerbation or aggravation constituted an injury under Armstrong v SIAC, 146 Or 569, 31 P2d 186. Accordingly the Hearing Officer found that the claimant sustained a new injury on or about July 23, 1967, and further concluded that sufficient reason had been given for not giving a notice of injury within 30 days. The Department who was responsible for accidents occurring in July appealed. The Board reversed, commenting, "The treating physician attributes the condition to the June 12 injury. The consulting orthopedist tends to place the primary cause on the later incident. The Board finds that no intervening separate accident did occur. Some of the conflicting medical opinions and some of the man's own statements provide ample support for that finding. The finding of the Hearing Officer on this point is reversed."

WCB #67-1447E (June 12, injury) was re-referred to the Closing & Evaluation Division for a determination. It was further ordered that the insurer of record in WCB #67-1447E, Argonaut Insurance Co., reimburse the State Compensation Department for any and all monies expended by the Department for compensation or as attorney's fees paid as a result of the Hearing Officer's order in these cases. Credit will be afforded to Argonaut to the extent that reimbursement is effected for payment of attorney fees to attorneys for claimant by the Department.

WCB #68-639 November 15, 1968

Isabelle L. Sedergren, Claimant.
H. Fink, Hearing Officer.
Hale G. Thompson, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant's condition is diagnosed as "Chronic tenosynovitis of the right extensor pollicis longus tendon." The Hearing Officer concluded that claimant had sustained the burden of proving a compensable occupational disease. Claimant had worked at the same restaurant for 18 years. Ownership was changed on October 1, 1967, and the Department became the carrier on November 9, 1967. Claimant first visited the doctor with the problem on January 8, 1968. The Hearing Officer affirmed the denial of the Department, concluding that the symptoms were present prior to November 9, 1967. On review the Board remanded to the Hearing Officer with instructions as follows:

1. The workman's right to compensation is dependent upon the workman's relationship to the employer, not the insurance carrier, not even the State Compensation Department.

2. A workman's physical condition may produce symptoms, but disability does not exist until the workman is unable to work or requires medical treatment. The workman's condition at the time the right to compensation begins is ruling, not what is said to have existed or even did exist prior to the time that right to compensation began.

3. A workman's right to compensation begins at the time he is unable to work or requires medical treatment. At this time, or later, within the time limits provided by statute, the claim should be filed.

4. The employer of the workman, or his insurance carrier, at the time the workman is unable to work or requires medical treatment, is responsible for the claim if there has been exposure to the causative factor from that employer's work.

5. The State Compensation Department had been the carrier of the employer's workmen's compensation coverage for approximately two months before the claimant was disabled (unable to work or required medical treatment).

WCB #68-348 November 15, 1968

Erwin A. Murray, Claimant.
H. L. Pattie, Hearing Officer.
Nick Chaivoe, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Department.

This is an aggravation claim pertaining to a contusion of the right rib cage for which no permanent partial disability was previously awarded (See I VanNatta's Comp. Rptr., 67). The medical reports of Dr. Meuller of October 1966, and the reports of Dr. Kimberley on December 6, 1967, and February 19, 1968, differ only slightly. Dr. Meuller found a tender

spot below the right shoulder blade. Dr. Kimberley found tenderness along the dorsal spine. Neither doctor found any limitation of motion, muscle spasm, bony pathology, or other objective evidence of impairment. Dr. Mueller made no recommendation for permanent partials disability (although he did not negate such). Dr. Kimberley suggests a small permanent partial disability, but this is based entirely upon subjective complaints of tenderness and pain. There is no indication that the claimant's tenderness and pain increased since the Determination was issued by the Board on October 24, 1966. The Hearing Officer affirmed the denial of the aggravation claim. The Board affirmed for the reason that, "The medical reports are not sufficient to support a finding of adverse change or deterioration since determination."

WCB #67-1663 November 19, 1968

William R. Gill, Claimant.
J. David Kryger, Hearing Officer.
Richard Noble, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for Review by Claimant.

"Mr. Gill sustained an injury to his back on October 19, 1966. His claim for that injury gave rise to an award of temporary total disability to January 7, 1967. Within a year of the Determination claimant appealed, claiming that his condition was not stationary on January 7, 1967, or, alternatively, that he was entitled to an award of permanent partial disability.

"The Hearing Officer found that the Determination was correct. However, the hearing officer found also that Mr. Gill had, in fact, suffered an aggravation of his October, 1966 injury on or about October 29, 1967. The Board agrees with the findings of the hearing officer on both of these issues.

"The Board concurs, therefore, in the order that this case be remanded to the State Compensation Department to pay benefits to claimant as prescribed by law.

"The Matter of attorney fees presents a unique problem. The State Compensation Department was given no opportunity to respond to a claim by Mr. Gill of increased compensation because of aggravation of his disability. There is thus no occasion for attorney fees based upon denial or rejection of a claim. The Hearing Officer finally so held and the Board affirms that position.

"The Hearing Officer then ordered attorney fees to be paid from an increased award to be granted to claimant as a result of this proceeding. The Board disagrees solely with the conclusion that this proceeding has a direct connection with any permanent disability award which might ensue. In short, the Board reverses that part of the order of the hearing officer which instructs payment of an attorney fee from any future permanent disability award. The decision here as to aggravation vs. intervening accident did not involve any ruling on permanent disability."

WCB #68-2 November 19, 1968

Rodney C. Wheeler, Claimant.
J. David Kryger, Hearing Officer.
William Babcock, Claimant's Atty.
John Jaqua, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 20% loss use of the left arm. Claimant sustained a severe comminuted fracture of the left scapula, acromion and coracoid. Claimant, a 56-year-old logger, was hit from behind by a widow-maker. Claimant states he has difficulty in his occupation, as he is unable to lift his saw above belt level and has difficulty in holding the saw with his left hand. He cannot carry a saw on his left shoulder. With regard to lost motion, the claimant is unable to place his wallet in his back pocket and is unable to button his suspenders. The closing report of the orthopedic surgeon notes weakness in abduction from 60 to 90 degrees. The Hearing Officer affirmed the determination. On review the Board increased the award to 30% loss use of the left arm.

WCB #68-878 November 21, 1968

Frank J. Fillpot, Claimant.
H. L. Pattie, Hearing Officer.
Edwin York, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by the Claimant.

Appeal from a determination awarding 16 degrees additional disability (5% of the workman for unscheduled disability). Claimant alleges a back injury when he slipped and fell. Claimant has a long history of back injuries. A fusion of L4 to S1 was performed in 1954. Exploratory surgery was performed at the next higher vertebral level in 1957, and in 1960, the lower spine was refused. Only the 1960 injury was a workmen's compensation case, then the award of 35% was made for that. Claimant sustained a hip injury in 1964, for which he was granted 10% loss function of the left leg. Claimant has increased pain in both legs and in the back as a result of the injury at issue. He is particularly bothered by sudden cramping or muscle spasm in his low back, his legs, or both. Claimant limps badly and has extreme difficulty in getting up from a chair. The Hearing Officer affirmed the Determination as did the WCB.

WCB #68-194 November 21, 1968

Glen Coltrane, Claimant.
John F. Baker, Hearing Officer.
Larry J. Anderson, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing unscheduled disability of 50% loss of an arm by separation and scheduled disability equal to 25% loss use of the left arm. Claimant, a 57-year-old fire fighter, sustained injury to his head, neck, back,

and left arm when the vehicle in which he was riding was struck by a snag sliding downhill, pushed off the road and rolled into a stream. Claimant sustained multiple lacerations of the face and scalp, a fracture subluxation of C-6 on C-7, a minor compression fracture of L3 and a fractured nose. Also the right ear was nearly avulsed from the head. Dr. Stainsby performed a hemilaminectomy at C6-C7 and C7-D1 on the left. At the same time Dr. Brackebusch performed a spinal fusion of C-6 through D-1. At the present time, claimant complains of numbness in the left arm and left side of his body. There is pain in the low back and in the neck and shoulders. He experiences a catching sensation in the jaw. Claimant also complains of a nervous condition and nausea. Claimant has difficulty in moving his neck. The use of the left arm is limited due to residual weakness and numbness. Claimant's grip is weakened and he has difficulty in bending and taking objects from the ground. Strenuous activity causes disabling pain in the shoulders, neck and low back. He is unable to walk long distances or ride more than 25 miles in a car without resting. Claimant has a seventh grade education and has not found employment within his physical limitations. The Hearing Officer increased the unscheduled disability to 75% loss by separation of an arm and affirmed the 25% loss use of the left arm. During the treatment the claimant also was referred to a urologist for a diagnosis of a possible kidney ailment. The diagnosis was probably kidney stone, but the symptoms went away. Since it was the informed opinion of the orthopedic surgeon that the symptoms could have been related, the Department was held responsible for the diagnostic expense. On review the WCB affirmed.

WCB #68-490 November 21, 1968

Lulla Chambers, Claimant.
H. Fink, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Quintin B. Estell, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 10% loss arm for unscheduled disability. Claimant, on October 3, 1966, sustained a "recurrence of low back strain" while lifting a television set. She is a 60-year-old dinner cook. On August 2, 1967, a determination was issued, granting temporary total disability to October 15, 1966, plus one day time loss on July 14, 1967. On August 17, 1967, claimant felt immediate pain in her back while lifting some roast weighing 30 to 35 pounds. Dr. Endicott diagnosed "Herniated disc syndrome." A laminotomy was negative. Dr. Kimberley's report has objective findings. His examination showed that pressure at the level of L-5 caused involuntary muscle spasm and a referred left sciatica to the ankle. His X-ray examination showed a 65% atrophy of the lumbosacral intervetebral disc, which the Doctor stated corresponded to the level where the claimant was tender. The Hearing Officer found that the permanent partial disability should be 25% loss of an arm by separation for unscheduled disability. On review the Board notes that the claimant had a prior compensable injury to the same area of her body in April of 1963 for which she received an award of 50% loss use of an arm. The Board affirmed.

WCB #68-647 November 21, 1968

Cecil R. Bradley, Claimant.
H. L. Pattie, Hearing Officer.
Richard P. Noble, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing no permanent partial disability. Claimant, a 34-year-old truck driver, strained his back while lifting some steel. The objective symptoms are minimal and the subjective complaints the usual. Dr. Logan recommended that the claimant seek less strenuous work and avoid heavy lifting. Claimant has been attending a two-year college course of vocational retraining. The Hearing Officer found that limitation on heavy lifting comes within the definition of physical impairment. On review by the Workmen's Compensation Board, loss of ability to lift has been equated to 25% loss of an arm in cases of Richard L. Kreier, WCB #67-1513, I VanNatta's Comp. Rptr., 137; William J. Benedict, WCB #67-294, I VanNatta's Comp. Rptr., 38. An award of 20% of an arm for disability including the loss of ability to do heavy lifting was affirmed by the Board in Arthur L. Schafroth, WCB #67-1206, I VanNatta's Comp. Rptr., 141. Under the facts of the present case, the limitation placed upon the claimant is minimal. No precise amount of weight lifting is specified. Accordingly, the Hearing Officer awarded 15% loss arm for unscheduled disability. On review, the WCB affirmed.

WCB #67-1388 November 21, 1968

Florence M. Baker, Claimant.
John F. Baker, Hearing Officer.
Robert E. Jones, Claimant's Atty.
John R. McCulloch, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 10% of an arm for unscheduled disability. Claimant, a 63-year-old waitress, sustained a fracture of the left pubic ramus, when she tripped and fell. Dr. Linquist thought it conceivable that claimant's degenerated cervical spine could have been aggravated by her fall, and it would be reasonable that she had mild disability in her cervical spine at that time with some post-fracture symptoms in her pelvis. Claimant complained of recent dizzy spells, a hurting in the left side of her head, pain and a full feeling in her left ear. She also complained of continuing pain in the neck and down through her back. The doctor did not see a relationship between the claimant's left ear problem and her fall. This claim had been previously closed with an award of no permanent partial disability, but on hearing this,claim had been remanded for further medical care. In Dr. Cooper's opinion, claimant's complaints were modest and the objective findings were "toward the minimal side." Dr. Meincke examined the claimant most recently. At that time claimant complained of low back pain radiating into the left hip, down the back of the thigh to the mid-lower leg. There was pain in the right shoulder joint on arm use and pain in the left temporal scalp. Examination revealed 25% restriction in backward movements and elevation of the right arm as compared to the left. Forward bending produced low back and left leg pain. Pressure at L4-5 and on the left

buttock produced pain. Left straight leg raising was positive for posterior leg and low back pain at 25 degrees and the left leg was only half as strong as the right. The left achilles reflex was absent. In Dr. Meincke's opinion, there is without question nerve root involvement at the lumbar 4-5 area. Subsequent to the hearing, Dr. Campagna found achilles reflexes absent on both sides. His impression was severe degenerative lumbar disc disease with osteoporosis, and he felt that claimant's back problems were non-traumatic in nature.

The Hearing Officer found the disability attibutable to the injury to be 25% loss arm by separation. WCB affirmed, observing that much of claimant's trouble was not medically related to the accident, but rather the result of natural aging and degenerative processes.

WCB #68-699 November 25, 1968

Roy C. Persinger, Claimant.
John F. Baker, Hearing Officer.
Robert L. Ackerman, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 30% loss use of the left leg. Claimant, a log truck driver, was injured when he fell from the side of the truck and struck his knee on a rock. Claimant suffered an avulsion of the insertion of the quadriceps mechanism into the left patella. He was hospitalized for surgical removal of a bipartite fragment of the patella and repair of the ruptured quadriceps mechanism. The final medical evaluation revealed extension to 180 degrees and flexion to 100 degrees on the left compared to 145 degrees on the right. There was no ligamentous instability in either knee. There was one-half inch atrophy of the left calf as compared to the right, and a persisting three-fourths-inch atrophy of the left quadriceps as compared to the right. Claimant has no prior injuries to his left leg. Claimant wears a bandage on the knee and still drives a log truck and is able to operate the clutch thereon satisfactorily. The Hearing Officer affirmed the determination. On review the WCB affirmed.

WCB #68-539 November 26, 1968

William J. Hallas, Claimant.
Page Pferdner, Hearing Officer.
Herbert B. Galton, Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for Review by Claimant.

Appeal from determination awarding no permanent partial disability. A previous determination had been issued, but was set aside and the claim reopened for further medical care and treatment pursuant to opinion and order of Hearing Officer Deiz. The claim was there designated WCB #67-657. The statement of facts is incorporated by reference from the previous opinion, and is accordingly unavailable to this editor. Claimant consulted Dr. Groth, who found all of the left knee ligaments were intact with no effusion or anterior tenderness, although forced internal rotation caused some distress in the posterior aspect of the knee.

It was his impression that the claimant had a straining of the muscles and ligaments of the popliteal fossa area into the capsule. Claimant was observed to walk with a limp. There was evidence indicating that claimant's complaints were psychogenic. The Hearing Officer awarded permanent partial disability of 5% loss of use of the left leg. WCB affirmed.

WCB #68-283 November 26, 1968

Robert Lee Williams, Claimant.
H. Fink, Hearing Officer.
Robert M. Gordon, Claimant's Atty.
Scott M. Kelley, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing no permanent partial disability with question whether occupational disease. Claimant inhaled fumes from slow-drying acrylic lacquer, while painting a car in a dust-proof room, when the ventilating system failed to work properly. The diagnosis was "Pneumonities & Bronchitis because of paint fumes." The claim was accepted. The Hearing Officer concluded that this was an accidental injury. The medical evidence did not offer substantiation for the proposition that the allergy itself was caused by the exposure. The issue is basically whether the claimant, with no demonstrable physical disability, is entitled to an award upon the basis that he has been advised by doctors to avoid further exposure to such fumes. The basis of the claim as an accident is some uncertain day in mid-July, when the ventilating system was not functioning properly. Medical care was not sought until early August and the condition treated was a pneumonia. The claimant's current complaints are not limited to paint fumes, but extend to exposures to house dust, face powder, perfume, hair spray and fingernail polish. The physical situation is one wherein the person with a predisposed weakness suffers a temporary disability. The fact that future exposure might produce further temporary disability is not a permanent injury unless the predisposed weakness is caused by the occupational exposure, which was not shown here. The Hearing Officer allowed no permanent partial disability, and WCB affirmed.

WCB #67-834 November 26, 1968

Marjorie R. Riswick, Claimant.
H. Fink, Hearing Officer.
Hayes Patrick Lavis, Claimant's Atty.
Jerry K. McCallister, Defendant's Atty.
Request for Review by Claimant and Employer.

Appeal from a determination allowing 20% loss function of right arm. Claimant, age 58, fell from a platform on which she was splitting fish, injuring her right hip and arm. The diagnosis was "Ecchymosis, right hip; inflammation secondary to trauma, right arm." Dr. Pasquesi measured her impairment at 23%. Abduction of the right arm is limited to 90 degrees both actively and passively. Claimant complains of greatly reduced strength of the arm. Almost any reaching, lifting, etc., precipitates pain and swelling which is disabling. Attempts at vocational

rehabilitation as a switchboard operator failed, as the activity required use of her right arm. The strength of the right hand is reduced to the point where claimant cannot hold a coffee pot with it. The Hearing Officer ordered an award of 75% loss function of the right arm. On review the Employer sought to have the award set aside, but the WCB affirmed.

WCB #68-486 November 26, 1968

Robert S. Elizarras, Claimant.
John F. Baker, Hearing Officer.
Maurice V. Engelgau, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 5% of a man for unscheduled disability to the low back. Claimant slipped and fell with the right side of his back striking a 4"x 12" block he had been carrying. He continued work for an hour and then severe pain set in the low back, radiating into the legs. Claimant, age 65, has not worked since. Claimant has been released for light duty with directions to avoid lifting, twisting and work requiring a bent position. Claimant tried to return to his former employer, but found he did not have sufficient seniority to be assigned light work. Since the injury, claimant has also applied for light work at the State Employment Office and at several lumber companies. Claimant wears a brace most of the time he is out of bed. The Carrier's doctor found restricted motion in the low back and right hip with the right leg ½-inch shorter than the left. In his opinion, claimant's basic problem is that of degenerative arthritic involvement of the back and right hip. The doctor felt that slight residual impairment resulted from the accident in question, but that claimant's major difficulty is the combination of long years of hard work and gradual attritional changes. The claimant's doctor evaluated total spinal impairment to be equivalent to 30% of the whole man. Claimant had a prior neck injury with some symptoms in the low back, and was having some difficulty with his low back and hip prior to the accident. The Hearing Officer ordered an award equal to 20% loss of the man for unscheduled disability. On review the Board commented that the award seemed generous and observed that the claimant's Dr. Chatburn, D.C., was a chiropractor, while defendant's Dr. McHolick, M.D., was a specialist in orthopedic surgery and hence his testimony was to be given greater weight.

WCB #68-618 November 27, 1968

Fred Masters, Claimant.
Page Pferdner, Hearing Officer.
Keith Burns, Claimant's Atty.
Richard C. Bemis, Defense Atty.
Request for Review by Employer.

Appeal from a determination awarding claimant "permanent partial disability equal to 15% loss of an arm by separation for unscheduled disability, and 10% loss use of the left leg due to this injury." Claimant, a baker, strained his low back while reaching. Claimant testified that he has pain on occasion

in his left leg and right arm and stiffness in his low back. He also has numbness in his left calf; his left ankle hurts, and he frequently limps to alleviate the pain. He further testified the limping causes blisters to form on the outside of his left foot. Claimant has not missed work, since he first returned. A report from Dr. Rask states: "...There was a subluxation of the lumbosacral facet joint and narrowing of the lumbosacral and L4-5 joints...On examination I found the patient had definite tenderness over the lumbosacral joint and the L4-5 area with limited flexion of the low back. In addition there was one-quarter inch atrophy of the left calf. The patient had limited inversion eversion of the left ankle. The left ankle jerk reflex was completely absent. There was residual tenderness along the course of the sciatic nerve in the buttocks and thigh." Dr. Cherry reported: "There is slight tenderness in the lumbo-sacral area and mild back spasm. He can bend to reach four inches of floor. Straight-leg raising is to 80 degrees bilaterally. Knee kicks are 2+ bilaterally. Ankle jerks are absent bilaterally." Dr. Cherry did not find atrophy in the left calf. The Hearing Officer increased the awards to 20% of the arm by separation for the back and 20% loss function of the leg. WCB affirmed.

WCB #68-555 December 2, 1968

Willie C. Dickinson, Claimant.
Page Pferdner, Hearing Officer.
Alan R. Jack, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant did not file a claim on his alleged knee injury for three months. Claimant contends that on or about November 26, 1967, he inadvertently struck the tines of a forklift with his right knee. He stated, he continued to work until February 12, 1968, when he stooped to look under his home, at which time his knee gave out, causing him to fall against the porch. He consulted Dr. Homer L. Winslow, who found exquisite tenderness in the medial joint line of the right knee and later found considerable effusion. His ultimate diagnosis was "internal derangement, right knee," and following an arthrotomy on February 15, 1968, Dr. Winslow confirmed his diagnosis in that "there was a bucket handle tear of the medial menisucus..." He further stated that findings at surgery were compatible with an old injury. There were no witnesses to the alleged injury with the forklift, and there were various factual conflicts. The claimant's wife describes the incident at home as occurring when the claimant "stooped down on all fours," and he "fell right off the porch." The Hearing Officer denied the claim and WCB affirmed.

WCB #67-1213 and WCB #67-1322 December 2, 1968

Leonard Bealer, Claimant.
H. Fink, Hearing Officer.
William A. Hedges, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Claimant.

WCB #67-1213 is a denied claim pertaining to an alleged foot and toe injury. WCB #67-1322 is an appeal from a determination awarding 15% loss arm for low back disability. Claimant, a school janitor was stacking desks, and when one slipped

causing a back injury when he attempted to catch it and,according to the claimant, a toe and foot injury when he failed to catch it. The injury occurred on July 2, 1966. Claimant had had a back injury in 1954, which had required a laminectomy and fusion. An 85% award was allowed for this injury. For the injury at issue, surgery was performed for the removal of a large extruded intervetebral disc in the low back. As to the foot, no complaints were recorded of any foot injury until December 1966. The right fourth toe was amputated on May 15, 1967, because of gangrene. The Hearing Officer found insufficient connection between the toe contusion and the compensable injury, as it would seem that if the toes were injured in July, a report of this injury would have been made before December. WCB affirmed.

WCB #68-145 December 3, 1968

Linford James Dixon, Claimant.
H. L. Pattie, Hearing Officer.
Tyler Marshall, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Hearing was conducted pursuant to stipulated facts. The facts were "Claimant was an inmate of the Multnomah County Correctional Institution on or about November 1, 1967, and as of that date, Multnomah County had not elected to come under the provisions of ORS 656.041 of the Workmen's Compensation Laws. The claimant alleges an accidental injury occurring on November 1, 1967." The Hearing Officer ruled that, if there was no election under ORS 656.041, there was no coverage. On review the facts were added indicating that the claimant was being paid 25¢ per 8-hour day for performing janitorial services. The Board held that the payment of 3 and one-eighth cents per hour " is not such a wage as would convert the inmate status to one of an arm's length contract whereby one party engages to furnish his services subject to the direction and control of another. Larson, Sec. 47.31 was also quoted in denying compensation.

WCB #68-768 December 4, 1968

Robert C. Rising, Claimant.
H. L. Seifert, Hearing Officer.
Jack Kennedy, Claimant's Atty.
Arthur D. Jones, Defendant's Atty.
James Blevins for the Department.
Request for Review by the Claimant.

Defendant, Apex Enterprises, Inc., dba 26th Avenue Theatre, was a non-complying employer, but subjectivity is conceded. Compensability of the claim is the issue. On March 23, 1968, claimant, a projectionist, fell and injured his neck and back while attempting to gain entrance into a projection booth. During the period April to November 1967, claimant had been the sole owner and proprietor of the Theatre at which time operation of the Theatre was discontinued. In February the claimant joined with two others in promoting a corporation to operate the Theatre. Claimant subscribed to one-third of the stock, but had not

paid in. It was agreed that the payment would be postponed until later. It was also agreed that claimant would be treated as if he had paid in. The corporation was closely held and claimant was elected vice-president. All three stockholders were active in the operation of the Corporation and any of the officers could sign checks, but the claimant had the greater business experience and generally prepared the checks and then had the other two sign them. Wages were by agreement to be postponed until the business was a going business. The Hearing Officer denied compensation and WCB affirmed, commenting:

"The legal problem is one of determining the legislative intent in defining corporate officers as non-subject workmen by ORS 656.027 (8). Prior to the 1965 Act, subjectivity of employers was basically determined by the occupation of the employer. The 1965 Act, by ORS 656.027, makes the employer subject if the workman is defined as subject. The law then provides for a special election (ORS 656.039) to convert workmen defined as non-subject to subject status. That had not been followed in this instance.

"The Board is cognizant, of course, of the prior Supreme Court decisons of Carson v. SIAC, 152 Or 455 and Allen v. SIAC, 200 Or 521. The former involves a 'dummy' officer and the then corporate officer exclusion was not applied. The latter case involved a bona fide corporate officer and the Court by the narrow margin of 4-3 refused to apply the dual capacity doctrine in which the corporate officer is deemed not subject on such statutory exclusions only as to corporate officer activities. The section in the then law requiring special election to insure corporate officers was deleted by the 1959 Legislature. As noted above, however, an equivalent special election was reinstated by the 1965 law.

"The claimant herein was not a dummy director as in the Carson case. As vice president and former sole owner of the theatre and as a former subject employer, the claimant was aware of the need to comply with the law. There is even substantial evidence from which to conclude that the various officer had left the matter of obtaining workmen's compensation coverage to this claimant."

WCB #68-858 December 5, 1968

Napoleon Jelks, Claimant.
H. L. Pattie, Hearing Officer.
Allen T. Murphy, Claimant's Atty.
Allen G. Owen, Defense Atty.
Request for Review by Department.

Appeal from a notice of denial. Claimant was employed from February 21, 1968, to March 5, 1968, as a brick mason's assistant. The job required heavy manual labor. Claimant had not previously worked for some time and no accident was observed by the employer, and no injury was reported to him at that time. Claimant was treated as an outpatient at Emanuel Hospital, March 7, 1968, and was admitted to the hospital on March 9, 1968. A herniated cervical disc was found and eventually a fusion was performed. The first notice to the employer was on April 1, 1968, and a claim was not filed until April 15, 1968. The employer did not fill out a form 801 until April 22. The claim was ordered accepted and $600 attorney's fees were allowed. The request for review by the department was withdrawn.

WCB #68-462 December 5, 1968

Jane Berg, Claimant.
H. L. Pattie, Hearing Officer.
Gary R. Gregory, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant is owner and general manager of Jane's Wig and Beauty Salon. Claimant has elected coverage as a sole proprietor. Instead of employing a regular linen service, the claimant took the towels home with her every night, where she would launder them in a laundromat. She would then return to the shop the following morning with the clean towels. En route from her home to the shop with her customary load of towels, claimant was injured in an automobile accident which caused facial lacerations and a severe fracture of the larynx. On the particular day in question the claimant washed the towels in the laundromat in the mobile home court in which she lived (as she frequently did). Upon completion of the washing in mid-morning, the claimant discovered that she had locked herself away from her keys, so she called one of her employees to come and take her and the towels to work. The collision occurred with a telephone pole which was not in the roadway. The Hearing Officer cited Marks' Dependents v. Gray, 251 N.Y. 90, 167 N.E. 181, as presented at Section 18.00 in Larson. The rule is, "If the work of the employee creates the necessesity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own...If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand has been dropped, and would have been cancelled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk." Here the claimant would have gone back and forth from her home to work anyway and that particular laundromat was chosen simply for convenience. Hence compensation was denied. WCB affirmed.

WCB #68-382 December 5, 1968

Neal Rosencrans, Claimant.
H. Fink, Hearing Officer.
Edwin A. York, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant was feeding hay to cattle from a slow-moving pickup. He alleges he fell from the top of the load some seven to nine feet, striking his stomach on the pickup box and then falling to the ground. Claimant alleges he lost his breath momentarily, but got up right away, caught up with the pickup, and climbed back into the pickup box. Claimant continued working the remainder of that day. A co-worker who was driving the pickup testified that he would have seen or heard the claimant fall, if he had fallen, but that he had seen or heard nothing. A week later claimant was treated for vomiting symptoms. Five weeks after the alleged accident claimant had a contu- of the abdomen. The medical evidence did not particularly indicate a relationship of the injury, if any, to the alleged accident. Claim denied. WCB affirmed.

WCB #67-1648 December 5, 1968

Everett Z. Stafford, Claimant.
J. David Kryger, Hearing Officer.
A. C. Roll, Claimant's Atty.
Eldon Caley, Defense Atty.
Request for Review by Claimant.

Appeal from an award of no permanent partial disability. Claimant suffered a crushing injury to his chestal area on October 4, 1966. Claimant, age 57, was pulled into a chipper machine when a conveyor belt was turned on. The diagnosis was severe compression to the upper chest and upper abdomen with humerous rib fractures in conjunction with intra-abdominal bleeding and pneumothorax. Claimant has been treated or examined by approximately 20 different physicians. Claimant was in the hospital approximately two months with complaints of chest pain which radiated up into the right shoulder area and down into the right arm, left leg and numbness from the knee to the foot, and difficulty in breathing. Despite all the examinations no objective symptoms were found pertaining to the left lower extremity and the right upper extremity. The only reference to a possible objective symptom pertaining to the chestal area was by a psychiatrist, Dr. Butler and Dr. Cumming who referred to intrapleural adhesions. Dr. Kiest found "hysterical paralysis." The subjective complaints included intermittent shortness of breath and inability to flex certain joints. The Hearing Officer concluded that this inability was voluntary. The denial of permanent disability was affirmed. WCB affirmed.

WCB #68-771 December 6, 1968

John Carson, Claimant.
Forrest T. James, Hearing Officer.
Robert A. Bennett, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 32 degrees of disability or 10% of a whole man. Claimant strained his back while doing work involving heavy lifting. X-rays were negative. The psychological evaluation found minimal psychological disability. Claimant still complains of pain and limited motion in his lower left side and shoulder and lower back and of spasms in the low back. There is evidence of poor motivation. The workman has made little effort to return to work. The determination was affirmed. WCB affirmed.

WCB #67-750 December 6, 1968

Jack Weimer, Claimant.
H. Fink, Hearing Officer.
David R. Vandenberg, Jr., Claimant's Atty.
Richard J. Smith, Employer's Atty.
Cliff A. Allison, Department's Atty.
Request for Review by Claimant.

Appeal from a notice of denial on the grounds that claimant is not a subject employee. Claimant alleges an accidental injury to his low back, while helping unload sprinkler parts which he was to help assemble. There was no immediate report of the accident, although a doctor was consulted a week later and notice was given. The medical treatment apparently consisted of a few doctor calls. The Hearing Officer concluded that there was no compensable injury. The other issue is the subjectivity of the employer. The defense contends that the sprinkler business is incidental to farming, which at this time was not subject to the Act (ORS 656.090). The claimant worked solely in the sprinkler assembly business. However, "it is occupation of employer, not employee, that is determinative of whether occupation is hazardous within the Workmen's Compensation Act." Richert v. SIAC, 240 Or 381. The question of what is incidental also was at issue. The sprinkler business had begun as a sideline of the irrigated potato farming operation of the employer several years back and sales to third persons accounted for about half of the sprinklers purchased in 1967. The gross purchases of sprinklers were some $240,000 in 1967. The Board found that this was still small when compared to the multimillion dollar gross from nearly a thousand acres of irrigated potatoes, which the farming operation to which the sprinkler business was incidental. The claim denial was affirmed.

WCB #68-167 December 9, 1968

Lonnie Frank McCormick, Claimant.
Norman F. Kelley, Hearing Officer.
Bruce J. Manley, Claimant's Atty.
Earl Preston, Defense Atty.
Request for Review by Department.

Appeal from a denial of a right ankle and foot injury. Claimant, while operating a small bulldozer in a logging operation, was struck in the head and jaw by a breaking pole, with sufficient violence to lift him from the seat. Claimant believed that his foot was partially caught underneath the brake pedal, causing the foot injury when he was thrown from the seat. He experienced some foot pain; the more severe pain of the head, neck and jaw were of more immediate concern. The claim filed pursuant to a medical examination of the head made no mention of any foot injury. The foot injury was not recorded until two days later. Eventually it appeared that claimant had a small chip fracture of the posterior facet of the talus in the right ankle. The Hearing Officer ordered the ankle claim accepted. WCB affirmed.

Earnest F. Milburn, Deceased.
George W. Rode, Hearing Officer.
C. H. Seagraves, Jr., Widow's Atty.
Allan Coons, Defense Atty.
Request for Review by Department.

Decedent sustained a compensable back injury on October 25, 1966, when he fell backwards a short distance, landing on his lower spine on a sharp-edged metal bar. On May 30, 1967, claimant died from what was diagnosed in post-mortem examination as an occlusive thrombus. It was generally the claimant's theory of the case that great emotional and nervous strain relative to his deteriorating condition was the cause of the heart attack. The Hearing Officer denied the death benefits, but concluded that the claimant was totally and permanently disabled at the time of his death, and that the widow was entitled to widow's benefits under ORS 656.208. On review the Board reversed, commenting:

"Mr. Milburn sustained injury to his back on October 25, 1966. On admission at the hospital he had severe pain over his coccyx and also a lesser degree of discomfort higher in his back and neck. He was treated conservatively and discharged on October 30, 1966. At that time the treating internist, after consultation with an orthopedist, continued to treat the lower spine region with ultrasound therapy. On November 7, 1966, the internist concluded that Mr. Milburn would 'probably be able to (go to work) within three or four days period.'

"Mr. Milburn did not return to work and, on November 20, 1966, the treating physician made the following diagnosis:

> 'DIAGNOSIS: At the present time I think he is probably a lumbo-sacral strain with radiculitis, but the possibility of a herniated nucleus pulposis cannot be ruled out. He is to be hospitalized for bed rest in traction. If there is a failure of response within 6 to 7 days, a myelogram will be performed.'

"There is substantial evidence in the file that Mr. Milburn was fearful of the myelogram. Whether or not he therefore resisted a myelogram is not made clear by the record. In any event, one was not performed, and on May 16, 1967, the treating orthopedist noted that, 'Over the ensuing weeks and months (Mr. Milburn) has failed to develop significant additional improvement.' At that time the treating orthopedist recommended consultation with another orthopedic surgeon; but before that reference could be made, Mr. Milburn died from a coronary occlusion on May 30, 1967.

"The Hearing Officer found that the claimant had not sustained the burden of proving a causal relationship between the injury and the death of Mr. Milburn. After an exhaustive review of the evidence, the Board affirms that finding of the hearing officer. On the alternate issue, however, of whether the decedent was permanently and totally disabled at the time of his death (so as to entitle the claimant to widow's benefits under ORS 656.208), the hearing officer found in favor of the claimant. The evidence does not support the conclusion of the hearing officer that the existing degree of disability was permanent and total at the time of death. The claimant was only 42 years of age. He was still undergoing conservative treatment and diagnosis at the time of death from other causes. There is no evidence that he suffered from any degree of permanent injury which would preclude return to regular and suitable employment."

"The hearing officer relied primarily upon the opinion of Dr. Bush, afforded by testimony in person at the hearing. During his testimony, the doctor stated:

> 'What can be deduced from that statement, and I remember my very distinct impressions--it was completely on the meaning the man had enough finding to have strongly suggested real trouble in the form of a ruptured disc or root irritation, but I was also frankly quite suspicious of a functional overlay.'

The hearing officer discounted Dr. Bush's indication that the question of functional overlay should be ruled out. In addition, he failed to mention entirely the opinion of the same physician, given at another point in the testimony, that Mr. Milburn was not on May 16, 1967, permanently and totally disabled.

"All that a doctor can often do, in a case of a complicated nature, is to state the various factors which must be evaluated in reaching a reasonable conclusion. A doctor's testimony concerning these factors is necessarily interrelated. It is dangerous to select out a portion of that testimony for the purpose of proving a single point. Here, for instance, Dr. Bush had obviously reported that he could not conclude on the issue of whether there was a herniated disc, until he had the benefit of a myelogram and had ruled out the probability of functional overlay. The Board, on an independent review of the entire testimony of Dr. Bush, and in light of the other medical reports and evidence in the file, concludes that Mr. Milburn was not permanently and totally disabled at the time of his death. The widow's claim is denied. The determination issued in this case is reinstated. In all respects, save the finding of the hearing officer that there was no causal relationship shown between the injury and the death, the opinion and order of the hearing officer is reversed. Under these circumstances there can be, of course, no attorney fees awarded."

WCB #68-149 December 9, 1968

Daniel W. Brennan, Claimant.
Page Pferdner, Hearing Officer.
Gordon H. Price, Claimant's Atty.
Stanley J. Mitchell, Schmidt Bros. Farms.
See also, I VanNatta's Comp. Rptr., 24.

Claimant, age 68, broke his right arm while unstacking baled hay. Defendant operates a pellet mill on the farm premises, and it was in a preliminary operation of the pellet mill, that claimant was injured. Employer operates an integrated commercial farm of which the pellet mill is a part. The Hearing Officer reversed the Workmen's Compensation Board order of October 18, 1967, (I VanNatta's Comp. Rptr., 24) and ordered the claim accepted.

On review the Board reversed, and holding in line with the October 18, 1967, order found that the pellet mill was incidental to farming. Substantially all of the Board opinion is as follows:

"The claimant allegedly injured himself when he fell while unstacking baled hay in a feed mill operated by Schmidt Bros. Farms. Schmidt Bros. Farms had not become a complying employer under the Workmen's Compensation Act and asserts that it was a non-subject employer pursuant to the continuing effect given ORS 656.090 by O L 1965 Ch 96 and O L 1967 Ch 114."

"One of the first claims appealed to the Supreme Court after the original 1914 Act involved an ensilage cutter found to be a feed mill. Raney v. SIAC, 85 Or 199. Though farming was not then subject, feed mills were defined as subject. Whether the pendency of this 1917 decision was instrumental in the change is not known, but the 1917 Legislature added the specific farming exemption and included as exempt feed mills operated incidental to farming.

"There is no question but that employment in a feed mill in and of itself, without association with a farm, is subject employment. There is no question but that a feed mill can even be an additional occupation of a farmer, but if incidental to the farming it is excluded. This is implicit in the language of ORS656.090 (4) referring to other occupations when incidental.

"One further comment should be made. In the two year transitional stage of subjectivity of farming between January 1, 1966 and January 1, 1968, most employment was made subject without regard to occupation, but the exemption of farming for this two year period was retained on an occupational basis. Such a clear and broad legislative purpose of exemption should not be administratively destroyed by fragmentation of an integrated operation into fragmentary 'occupations.'

"Schmidt Bros. Farm encompasses several hundred acres from which was produced, in 1967, over 500 tons of hay and from which were sold about 1700 head of livestock. The words, 'incidental to' are comparative words. A feed mill of similar dimensions on a ten-acre farm with a few head of cattle would leave the farm incidental to the feed mill.

"The Board knows of no policy nor precedent of the former State Industrial Accident Commission from which it could be found that there was any longstanding administrative interpretation that such activity is not farming and in this connection must discard the testimony of a former employee of the State Industrial Accident Commission. The legislative exemption of farm feed mills in 1917 concurrent with a Supreme Court decision on the matter is considered controlling.

"The whole operation never left the ambit of farming with farm products being processed for solely farm use. Otherwise useless products of the farm were salvaged into the form of useful pellets and converted to saleable livestock. The sale of some of the ingredients or final product or production of some pellets for fellow farmers did not destroy the entire operation from its logical classification as farming and work incidental to farming.

"The hearing officer made his decision largely on whether it could be said there were two occupations without due consideration of the basic issue of whether, on a comparative basis, the feed mill was incidental to the farm. It appears that in the instant case there was, at most, a 15% custom operation of the mill for other farmers. The pellet mill was developed as an integral, but minor, part of the farm operation and remained a suordinate part of the farm operation. This conforms to the ordinary meaning of the words 'incidental to.'"

WCB #68-790 December 9, 1968

Robert Bates, Claimant.
H. L. Pattie, Hearing Officer.
Virgil E. Dugger, Claimant's Atty.
James F. Larson, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 20% loss use of forearm. Claimant, age 31, suffered multiple lacerations of the left forearm and left thumb in a chainsaw accident. An attempt was made at Good Samaritan Hospital to suture or repair all tendons, ligaments, nerves and blood vessels in the arm, and the surgeon was remarkably successful. Claimant suffers from limited motion. Grip in the left hand has been diminished, but probably equals more than 50% of the grip of the right hand. Most of the grip which claimant retains in the left hand is in the ring and little fingers, and this is included in the "total" grip, if measured on a gripping machine. However, grip with the minor fingers is not as useful in employment as grip between the thumb anf forefinger or thumb and middle finger. This portion of his grip is most weakened by the injury. There is loss of feeling in the left thumb, index and part of the middle finger. Claimant has not attempted to seek employment. The Hearing Officer affirmed the determination. WCB affirmed.

WCB #68-793 December 10, 1968

William Martes, Claimant.
H. L. Pattie, Hearing Officer.
Edwin York, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant, age 55, was covered by election as a sole proprietor. On April 19, 1968 (sic) he prepared a Form 801 alleging that on April 3, 1967 (sic) he had sustained an injury to his left elbow. Claimant alleges he bumped his left elbow on the hoist at his service station. Immediate treatment was performed by his wife with hot packs and soaking. In June swelling reappeared and a doctor was consulted. A final diagnosis was Olecranon bursitis which was made about February 9, 1968. Surgery was performed April 23, 1968. The Hearing Officer affirmed the denial of the claim for the reason that it was made more than one year after the alleged injury. On review the Board lists five reasons for denying the claim:

"First, ORS 656.262 (3) requires any employer insured by the State Compensation Department to report accidents which may result in claims within five days.

"Secondly, ORS 656.128 (3) requires corroborative evidence in addition to the evidence of the claimant and the Board construes that the corroborative evidence must be substantial and extend to all phases at issue and that the corroborative evidence tendered in this claim is not adequate.

"Thirdly, ORS 656.265 pertaining to written notice requires that in any event the notice be given the Workmen's Compensation Board or State Compensation Department and no such notice was given within even one year, nor was any showing made of good cause for failure to give notice within the time required.

"Fourthly, ORS 656.319 bars a hearing on a claim if no medical services were provided or benefits paid, one year after the date of the accident. Though subsection (2) of ORS 656.319 appears on its face to extend time for 'denied' claims, jurisdiction in such a case would vest due to an employer's denial. The Board concludes that it was not the legislative intent to deny the claimant hearing if the employer or insurer simply failed to act, but to vest jurisdiction on a denial. Taking the statutory provisions in their entirety, a fixed limintation was intended.

"Finally, regardless of whether the claimant could be excused for the failure to notify in five days or 30 days or one year, it is not enough that a claimant justify the initial delay. He must justify the continuing delay. This is not a case of discovering an injury at a late date. It is a case of continuing and repeated medical attention for over a year before filing a claim. See Johnson v. SCD, 84 Adv 615, for effect of continuing failure to file."

WCB #68-829 December 10, 1968

Leonard P. Palumbo, Claimant.
H. Fink, Hearing Officer.
Tyler E. Marshall, Claimant's Atty.
Charles T. Smith, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 15% loss arm for unscheduled disabilities. Claimant, age 39, sustained shoulder and neck strains and sprains when he fell down a stairway. The Hearing Officer affirmed the determination. On review the Board affirmed, commenting: "The medical reports in the file are many and voluminous. None of the medical findings, and only a minimal portion of the medical opinions, support a conclusion leading to an increased disability award. Mr. Palumbo does state subjective complaints of a varied nature, but these complaints do not fall into any known neurological pattern."

WCB #67-1424 December 11, 1968

Robert Haak, Claimant.

(For a detailed summary of the facts, see I VanNatta's Comp. Rptr., 128)

In general claimant alleges aggravation of a preexisting asthmatic condition by exposure to chlorine gas. The claim is treated here as an occupational disease claim. The Medical Board of Review concluded that there was no occupational disease or infection. A substantial part of the Medical Board's report is as follows:

"The patient stated that he last worked on November 10, 1967. He had worked most days from late July until quitting at Reynolds Metal, but states that while working in a labor crew in various locations at the Reynolds Metal

plant, he would often develop tightness in the chest, shortness of breath, cough, and slight wheezing. He had no difficulties during a few days work in the carbon bake department and while loading bricks on two carts in the brick room, but other jobs in various parts of the plants caused symptoms. At present, the DVR is sending him to diesel mechanic school (starting 10/21/68). He recently passed a high school equivalency test after taking courses under the auspices of DVR at Clark College. He thinks that work as a diesel mechanic will be feasible for him as long as he "is not exposed to diesel fumes."

'Since quitting work in November, he has continued to have episodes of tightness in the chest with shortness of breath, slight wheezing, and cough, relieved by raising sputum. These episodes awaken him at night about twice a month now, but were more frequent late in 1967 and early in 1968. The most recent episode of shortness of breath at night was early in October, 1968. He is more likely to have symptoms during the day if he is 'nervous,' for example if creditors have been bothering him. There has been no definite seasonal difference in these symptoms. He is helped by using a Medihaler or taking Tedral.

"He is short of breath on carrying groceries up the stairs to his house, but has no difficulty on walking on the level at a pedestrian pace. He has gained about 10 lbs. of weight since the fall of 1967, and now weighs 179 lbs. He often has sharp brief pleuritic pain at either anterior costal margin, expecially on the right, when he is short of breath on exertion. He does not know of anything at home which cause respiratory distress. He is sometimes aware of slight dizziness and numbness in the fingers when he is short of breath. He becomes short of breath and fatigued on moderate exertion, but does not wheeze unless he has sputum to raise. It was noted in the history that respiratory symptoms began in January, 1962 after he had been working for Reynolds for ten years. Mild difficulties were noted while working for Two Forges of America for a year in 1963-4.

"On physical examination, this moderately obese stocky man of 41 seemed to be in no respiratory distress. Rib motion and breath sounds were satisfactory. No constant wheezes or other rales were heard at rest. The heart sounds were satisfactory. Recent chest films (10/25/68) were essentially normal, with no change from September, 1967. A recent forced expiratory spirogram (10/25/68) had shown a forced vital capacity of 3.45 liters, about 84% of predicted normal, and a first second volume of 2.65 liters, about 81% of predicted. The figures obtained after an inhalation of Isuprel were about 20% lower than these. It was concluded that he had only mild venilatory impairment of the obstructive type.

"Dr. Goodman walked up and down four flights of stairs rapidly with the patient. The patient seemed to be moderately short of breath after this exercise, and showed a wheeze over the hila, louder on expiration."

WCB #68-288 December 11, 1968

Drew R. Ryan, Claimant.
H. Fink, Hearing Officer.
Charles O. Porter, Claimant's Atty.
J. W. McCracken, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing no permanent partial disability. Claimant, age 24, slipped and fell on a stairway. X-rays were negative. Claimant had pain and tenderness in the cervical and thoracic spine areas, with limited flexion and rotation of the neck. A month after the injury Dr. McShatko diagnosed "contusions, neck & back, by history. No evidence serious injury." By two and a half months after the injury, claimant had developed a totally rigid spine. He alleges inability to bend or lean over. Dr. Trommald stated claimant's physical complaints and findings were completely unrealistic so far as any evidence of organic disease could be determined. Dr. Rockey was of the opinion that claimant had no organic basis for the symptoms in his back and there was no permanent organic function impairment of the back as a result of the injury. The Hearing Officer affirmed the determination. On review the Board affirmed, commenting, "The definition of permanent disability provided by the section of the law applicable refers to 'any other injury known in surgery to be permanent partial disability.' So far as the orthopedic problem is concerned, the reluctance of the claimant to return to work or the continued assertion of nonexistent physical infirmities is not an 'injury known in surgery.' An inseparable part of such situations is that it is based upon the desire to be compensated, regardless of the degree of conscious motivation demonstrated. The result of compensation, if paid, would be that compensation was paid for the desire to be compensated and not for actual physical disability."

WCB #68-306 December 11, 1968

Willemit Williams, Claimant.
H. Fink, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Richard W. Butler, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 80% loss arm for unscheduled disability. Claimant was struck on the head by a four-foot chunk of 2 x 6 board, which had fallen approximately 250 feet. Claimant was wearing a hard hat. He was knocked down, but not unconscious. He was able to climb up a ladder to get out of the shaft that he was in. X-rays revealed extensive degenerative disc disease in the cervical, dorsal, and lumbar spine areas. It was Dr. Van Olst's opinion that claimant symptoms were a result of aggravation of this spinal condition. It was his further opinion that claimant would be permanently restricted from any types of bending, twisting, or lifting (other than light weights of 10 pounds or less), and that he would be restricted from climbing or descending stairs or ladders, and from walking long distances. Claimant, age 55, has a formal education of one year of grammar school and was a carpenter by trade. The

Hearing Officer ordered an award of 100% loss arm for unscheduled disability. On review the majority of the Board, Mr. Redman dissenting, awarded total disability. Claimant had previously suffered paralysis of both legs at age 24, when he was struck by lightning, but eventually regained full use of the extremities. There was little or no indication that the claimant was faking his present disability for compensation purposes.

WCB #68-249 December 11, 1968

Norman A. Laknes, Claimant.
H. L. Seifert, Hearing Officer.
Keith Burns, Claimant's Atty.
Philip A. Mongrain, Defense Atty.

Claimant, a plywood plan employee of 8 years, developed bronchial asthma with a hypersensitivity to Douglas fir sawdust. At present claimant is well, as he is not working in the plywood plant, but rather in a cheese factory and taking allergy shots. Claimant has been awarded temporary total disability, but no permanent partial disability. The Hearing Officer determined that the problem had a gradual onset and should be described as an occupational disease. The Hearing Officer awarded 15% loss arm for unscheduled disability. The claimant rejected, and the Medical Board of review considered the case. The report appears to support the conclusion that claimant in fact has developed an occupational allergy. The Board made no recommendation as to the extent of disability. "The claimant, in fact, is not disabled, but has a sensitivity, which is likely to disable him upon re-exposure. Whether any disability exists per se, whether it is permanent and if so, the extent thereof, are not completely resolved by the order of the Medical Board," comments the Workmen's Compensation Board in entering the Medical Board report.

WCB #67-1625 December 11, 1968

Larry Glenn Hoover, Claimant.
John F. Baker, Hearing Officer.
Herbert R. Deselms, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.

Appeal from a denial of an occupational disease claim. Claimant is a 33-year-old radio announcer, who alleges a loss of voice arising out of and in the course of his employment. Claimant has worked in radio for approximately 11 years. He never had any voice problems until on or about June 14, 1967, when he began losing his voice intermittently, sometimes for a day or so at a time. This condition grew worse. Claimant did not respond to conservative treatment. A direct larynogoscopy and removal of vocal cord nodules was performed. Subsequent to a three-week recovery period, use of the voice has been satisfactory and without any apparent problems. The Hearing Officer concluded that the excessive use of his voice in the employment was a material contributing factor in the onset of the voice problems. The claim was ordered accepted. The Medical Board of Review confirmed the Hearing Officer's medical findings.

WCB #67-810 December 12, 1968

Billy L. Hersha, Claimant.
Mercedes F. Deiz, Hearing Officer.
Garry Kahn, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding no permanent partial disability. Claimant suffered a low back strain on June 29, 1966. Temporary total disability was allowed until July 8, 1966. Claimant had had a previous injury to the low back for which he was awarded 50% disability in December 1964. There is also mention of a preexisting psychiatric problem. Determination affirmed. WCB affirmed.

WCB #68-557 December 12, 1968

Charlotte Acheson, Claimant.
Forrest T. James, Hearing Officer.
Roger Germundson, Claimant's Atty.
James H. Gidley, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 5% loss use of the right foot. Claimant twisted her ankle. A cast was applied. Upon removal of the cast a ganglion was discovered on the side of her foot. The ganglion was surgically removed. Symptoms persisted. The ganglion reoccurred and was again surgically removed. The symptoms persisted. Claimant still suffers pain, swelling and some instability in her right ankle. Dr. Hazel reported, "There appears to be a full range of mid tarsal and subtaler and talotibial motion, all of which create slight discomfort in the forefoot. There is no evidence of relaxation of the anterolateral ligamentous structures in her foot." X-rays didn't show anything. Dorsiflexion is limited by about 10 degrees. Dr. Bachhuber took stress inversion films of the ankle, both with anesthesia and without. They revealed widening of the ankle mortice laterally. His diagnosis is that the claimant sustained tears of the calcaneal fibular and anterior talor fibular ligaments and concluded that there is residual ligamentous instability to which her present symptoms are related. Dr. Bachhuber's report was prepared after the determination and it is more positive as to the permanency of the disability. The Hearing Officer increased the award to 30% loss use of the right foot. WCB affirmed.

WCB #68-372 December 18, 1968

Ted C. Taylor, Claimant.
H. Fink, Hearing Officer.
Lynn Moore, Claimant's Atty.
Allan H. Coons, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 15% loss use of the left leg. Claimant, a truck driver, suffered "Contusions & abrasions, left knee." Claimant developed a hematoma just below the left knee, which was surgically removed. Complete

healing did not occur and a skin graft was required. In December 1967, claimant was examined by Dr. Brackebusch, who found, "(1) Healed crushing wound to left leg with residual scar which is hypersensitive. (2) Medial instability, left knee, secondary to crushing injury in February 1967." Claimant is presently working steadily as a truck driver. Movies of the claimant while climbing in and about the truck did not show apparent disability. He appeared to ascend and descend a vertical ladder without apparent difficulty. Claimant's foreman testified that he had not observed any disability. Determination affirmed. WCB affirmed.

WCB #68-701 December 18, 1968

Robert E. Tatum, Claimant.
J. David Kryger, Hearing Officer.
Sanford Kowitt, Claimant's Atty.
Rogert Warren, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 35% loss function of an arm for unscheduled dorsal back injuries and 10% loss of the right arm. Claimant strained his back while pushing a heavy weight. Presently the claimant complains of pain in his entire back with more severe pain in his lower back, exacerbated by rising and sitting in a chair and which results in inability to sleep properly. Claimant's right arm and leg are painful and numb and claimant has occasionally fallen, due to his right leg "buckling under him." Claimant's neck is painful from below the ears down to his upper back. Claimant has an inability to turn his head. Claimant complained of pain in his right shoulder. Claimant alleges total disability. The physical findings which include X-rays, did not substantiate any evidence of any organic disease to account for the claimant's complaints. A myelogram was suggested to rule out the possibility of a herniated disc, but the claimant refused this diagnostic treatment for personal reasons. At the hearing, the defendant sought to exclude the medical report from a nontreating physician on the grounds of hearsay, because the history contained the report that was given to the physician by the claimant. Defendant seeks to rely on Henderson v. U.P.R.R., 189 Or 145, 167, 219 P2d 170 (1950) and Reid v. Yellow Cab Co., 131 Or 27, 32, 33, 279 P 635 (1929). However, the Hearing Officer relies on ORS 656.310(2), ORS 656.252(1) and Administrative Order #5-1966 Sec. 5-05 for the proposition that the above cited cases should not be applied to administrative hearings pursuant to the present Workmen's Compensation Act. Rule 5-05(d) provides:

> "Reports from claimant's doctor will be accepted as prima facie evidence unless defendant, in desiring to explore that written evidence, subpeonas claimant's doctor for cross-examination. Reports from defendant's doctor will also be accepted as prima facie evidence providing defendant is willing to produce the doctor for cross-examination whose report is in evidence."

The Hearing Officer affirmed the determination, and WCB affirmed.

WCB #68-596 December 18, 1968

Johnnie S. Scott, Claimant.
H. L. Pattie, Hearing Officer.
Tyler Marshall, Claimant's Atty.
Allen G. Owen, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. The claimant alleges an aggravation of a preexisting peptic ulcer as the result of being struck on the abdomen by the handle of a pike pole. There was no visible external evidence of the blow. The accident having been unwitnessed and no visible evidence present, the entire matter rests solely on claimant's history of the blow, its subsequent symptoms and medical opinion. The subsequent symptoms were, of course, the same as the previous symptoms. The record does contain some medical evidence in the form of one or two words appended to a diagnosis without expalanation, which might otherwise support the claim. Against this brief statement is over 30 pages of testimony by a qualified doctor who concluded on cross-examination that the cause and effected urged by the claimant would be "barely credible," and that the blow did not aggravate the ulcer. Claim denied. Board affirmed.

WCB #68-294 December 18, 1968

Wade Hedrick, Claimant.
H. Fink, Hearing Officer.
William E. Taylor, Claimant's Atty.
Allan H. Coons, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. The claimant alleges a back injury while lifting some empty pop bottles. The claimant had a long history of back injuries. The evidence is conflicting. The employer and workman were on the best of terms prior to the incident and socialized to the extent of invitations to Thanksgiving dinner and fishing outings immediately prior to the crucial date. The employers testified to observing the claimant report for work on the date in question, holding his back and complaining of pain. The claimant alleges the injury occurred after he arrived at work. The Hearing Officer affirmed the denial of the claim. On review "The majority therefore conclude that special consideration and weight should be given the observation of the witnesses by the hearing officer." Mr. Callahan, dissenting, would have allowed the claim, as he found no reason for disbelieving the claimant and pointed to some discrepancies in the employers' testimony.

WCB #68-848 December 20, 1968

Homer E. Sears, Claimant.
Page Pferdner, Hearing Officer.
Bruce J. Rothman, Claimant's Atty.
Fred M. Aebi, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 10% loss arm for unscheduled disability. Claimant, a welder, received a 440 volt shock while endeavoring to remove some fuses. He suffered burns to both hands, his right foot and lost consciousness. Dr. Grossman's impressions were (1) Electric shock with cerebral injury; (2) Post-traumatic head syndrome; (3) Chronic cervical strain syndrome; (4) Chronic post-traumatic stress syndrome; (5) Superficial nerve injury, left palm; (6) Scar, fading, in palm over second metacarpal. Claimant has severe headaches and has difficulty working. The Hearing Officer expressed disbelief of Dr. Grossman's testimony and affirmed the determination. WCB affirmed, commenting, "Dr. Hickman reports the claimant probably has had chronic psychoneurotic problems for years and no doubt that considerable emotional instability predated the injury."

WCB #67-1230 December 20, 1968

Eila A. Hopkins, Claimant.
H. Fink, Hearing Officer.
Thomas S. Young, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant, a waitress, alleges low back injury while moving some racks of dishes. There was no immediate report of the incident. Claimant worked the remainder of the week and consulted the doctor on Saturday. Dr. Poulsen diagnosed, "Severe sprain to right shoulder and dorsal spine with pains radiating into cervical spine." The Hearing Officer affirmed the denial of the claim. On review the Board reversed, commenting:

"The testimony of the claimant alone, if believed, would of course be sufficient to support the claim. The nature of the injury alleged is consistent with the treatment sought. Many otherwise compensable injuries would be improperly denied if no claim could be made unless there was an immediate symtom and complaint forthwith to the employer.

The Board recognizes that delay in reporting may defeat a claim and accordingly applies a standard of whether under the evidence there is a reasonable probability that the accident occurred as alleged."

WCB #68-706 December 20, 1968

Eddie Green, Claimant.
Mercedes F. Deiz, Hearing Officer.
Keith Burns, Claimant's Atty.
James F. Larson, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 15% loss arm for unscheduled back injury. That claim has been previously denied, but was ordered accepted at Eddie Green, WCB #67-121, I VanNatta's Comp. Rptr., 51. The mechanics of the accident are therein described, but briefly claimant suffered a ruptured disc at L4-5 on the left superimposed upon a 1963 injury. Dr. Groth reported definite distress in the low back with backward bending, a decrease in sensation of the left foot and left lower leg, pain in the low back with straight-leg raising at 80 degrees on the left, tenderness over the L4-5 area. The doctor's impression was, "Residuals of nerve root irritation L4 L5 on the left with decreased sensation into the foot. Some weakness of the ankle jerk and some weakness extensor of the toe. Unstable low back." Claimant has to avoid operating heavy machinery because the jarring "hurt too much." The Hearing Officer applied the rule of Wilson v. SIAC, 189 Or 114, which held that the disabling effects of pain may be considered in determining the disabling effect of any particular injury." Accordingly the Hearing Officer ordered an award of 25% loss arm for unscheduled disability. WCB affirmed.

WCB #68-36 December 20, 1968

Jack Gingles, Claimant.
John F. Baker, Hearing Officer.
C. H. Seagraves, Jr., Claimant's Atty.
Lyle C. Velure, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding no permanent partial disability. Claimant was struck in the head by a 2 x 4, which was flipped up by a jitney wheel. Dr. Purtzer diagnosed a basilar skull fracture and a fracture of the right mandible. Later, Dr. Post described the fractures as severe and added concussion and abscesses to the original diagnosis. At the Hearing, claimant testified to severe headaches. The final expert opinion after prolonged study and observation was that claimant did not have any complication of his head injury but had a "post-traumatic neurosis with a passive dependent personality type." There were no objective findings to account for his complaints. The determination was affirmed. WCB affirmed.

WCB #67-1631 December 20, 1968

Lane Freitag, Claimant.
H. L. Seifert, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
O. E. McAdams, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing no permanent partial disability. Claimant, a mill worker, hurt his back while loading a tool box into his car, preparatory

to leaving the job. He has had previous difficulty with the same low back area. There was an award of 50% loss function of an arm for this 1955 injury. The evidence indicates that he was fully capable of heavy manual labor prior to the injury in question. Now claimant cannot lift or shovel, drive long distances, stand for a long period of time, or climb steps, or hike with the boy scouts. Dr. Fry found no discogenic disease, but felt that claimant had a mechanical back strain. The Hearing Officer ordered an award of 15% loss arm for unscheduled disability. On review the Board affirmed, commenting:

"The Board concludes that ORS 656.222 compels a consideration of the combined effect of the injuries and the past receipt of money for such disabilities. There are several implications, particularly in areas where much of the claim of disability is upon a subjective basis and where the claimant obviously does not demonstrate all of the alleged disability upon physical examination. If the recovery was as complete as claimant alleges, there was little or no permanent disability from the first injury, but the claimant sought and retained the fruits of this award. If the same complaints miraculously disappeared before, the expectation should be that the same complaints should again resolve themselves when this issue is settled."

WCB #67-1283 December 20, 1968

Ben C. Flaxel, Claimant.
George W. Rode, Hearing Officer.
Robert C. Jones, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for Review by the Department.

Appeal from a notice of denial. Claimant, age 61, has been engaged in the general practice of law in North Bend since 1950. He sustained a heart attack, which was attributed to "Tensions and fatigue resulting from overwork in law practice, aggravated existing circulatory problem and precipitated (sic) coronary attack." There was evidence that the claimant was particularly worried about some difficult cases that he was handling. The Hearing Officer ordered the claim accepted under the "accidental" result theory. On review the Board reversed, commenting:

"The claimant in this instance is a self-employed attorney who obtained insurance upon himself through application to the State Compensation Department pursuant to ORS 656.128.

"The claim filed with the State Compensation Department and denied by that agency describes the injury as follows:

> 'Claimant has been subjected to extreme tensions and fatigue during past six months as the result of an extremely heavy office and trial practice resulting in an aggravation of an existing circulatory condition and precipitating a coronary attack.'

"The distressing symptoms indicative of the attack were suffered at home. No issue of the physical stress claimed as the basis of most coronary claims is noted. The claim was denied by the State Compensation Department, but ordered allowed by the hearing officer."

"The issue for consideration is whether the coronary attack, based upon a claim of six months tensions and fatigue, is an accidental injury. The claimant's heart problems had a history dating back at least to 1961, when there were definite electrocardiographic tracings compatible with myocardial ischemia and damage. Despite warnings to slow down his activities, including the efforts of both his partner and his wife, the claimant admittedly continued to 'drive' himself. The theory of the claimant that the coronary was the inexorable result of months of stress is incompatible with the concept of accident.

"Further, the stress, if a responsible agent, was not imposed by an employer exercising direction and control. The stress was self-imposed and thus solely within the control of the claimant himself and even further removed from the concept of an accidental injury. The Legislature, in 1957, deleted the violent and external means requirement and included as compensable 'accidental results.' The words and concept 'accidental injury' were retained. The problem sought to be cured was the situation where a physical lift or strain obviously resulted in injury. The Board concludes that neither by the ordinary concept of the term, nor by the history of the legislation was there ever any intent to include as compensable an alleged association between six months of occupational tension and a subsequent coronary attack.

"The Board also concludes that ORS 656.128, permitting an employer to obtain insurance against accidental injuries to himself, is obviously to be more strictly construed. No claim, for instance, is to be allowed or paid except upon corroborative evidence.

"All persons are subjected to emotional stress, both on and off the job. Emotional stress is not limited to the busy attorney. It attends even menial jobs. Every person of claimant's age has some degree of artery disease. The process of aging and diminished circulation commences early in life. The decision before the Board is simply whether to give its stamp of approval to a new concept which would make every coronary compensable. No longer would the argument be based upon whether any physical exertion was involved which could be said to have produced the coronary. The Test would simply be whether the claimant worried about his work.

"Even if the issue was reduced to one of searching out both the legal and medical causation standards deemed required by the Supreme Court in Coday v. Willamette Tug & Barge, the Board concludes that the evidence as a whole is too conflicting, conjectural and speculative to meet either of those requirements.

"The Board therefore concludes that whatever differences of opinion there may be between the medical experts in this claim are of minor significance and if there was a relationship between the six months or 30 years work and an occlusion of a coronary artery, that relationship did not constitute a compensable accidental injury."

WCB #68-752 December 20, 1968

Russell A. Dement, Claimant.
Page Pferdner, Hearing Officer.
Don Atchison, Claimant's Atty.
Allen G. Owen, Defense Atty.
Request for Review by Claimant.

Appeal from an award of permanent partial disability of 10% of a workman, or 32 degrees. Claimant, a log trucker, sprained his back lifting a bunk stake. The Hearing Officer ordered the award increased to 15% of a workman, or 48 degrees, commenting, "As to the extent of claimant's permanent partial disability, claimant is no longer able to perform the work he formerly did. Although Dr. Fitch reports a congenital anomaly of a horizontal sacrum, claimant has performed strenuous work all his life and has never suffered any low back problem previously. Thus, it appears the congenital anomaly does not make his back unstable. Dr. Fitch was of the impression the acute lumbar sprain was superimposed on a 'wearing-out low back' and this is significant in that at age 50, claimant cannot do the things he did when he was 25. Certainly his employer is responsible for all the residuals resulting from the injury of September 22, 1967, but he is not responsible for the wearing-out, a natural result of growing older. On the other hand, claimant was able to successfully perform all of the duties associated with his employment until his injury of September 22, 1967."

On review the Board affirmed.

WCB #68-583 December 23, 1968

Lawrence E. Andrews, Claimant.
Harold M. Gross, Hearing Officer.
Allen T. Murphy, Jr., Claimant's Atty.
James F. Larson, Defense Atty.
Request for Review by Department.

For the facts in this case see Lawrence E. Andrews, WCB #67-91, I VanNatta's Comp. Rptr., 87. Claimant is suffering from a muscle tension problem which limits the amount of time that he can spend working. The previous case centered around temporary partial disability as does this one. There the Board directed the Department to pay temporary partial disability based upon the proportionate loss of wages attributable to the injury. The Board now comments, "The State Compensation Department concluded that the claimant is now earning more than he did at the time of injury and that therefore no compensation is payable. The comparative value of the dollars earned may be of interest and a comparison of the present hourly wage comparison of the former job and the present job might be a yardstick. The Board is also aware of the general rule which limits awards of compensation to schedule in effect on the date of injury. Each case must be determined on its own facts and the Board concludes that there is an easy standard to be applied to the facts in this case. It appears that the claimant's effective work capabilities have been reduced from 40 to 35 hours. By any standard the claimant must have a loss of one-eighth of his earning power. Because of the variable work week due to holidays, the percentage may vary but the principle of hours of work lost as the basis of computation is adopted as the formula for arriving at the percentage of temporary total disability payable as temporary partial disability."

WCB #387 December 24, 1968

Fred S. Anthony, Claimant.
Norman E. Kelley, Hearing Officer.
Sydney L. Chandler, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for Review by Claimant.

This is an aggravation claim. Claimant was injured in 1963, when his employment as a timber faller lighted up preexisting arthritis. The claim was closed in 1964, with an award of 40% loss function of an arm. An aggravation claim was filed in 1966. On Hearing in March 1967, it was found that "claimant had not sustained the burden of proving an aggravation of this compensable injury." The Board affirmed. On Appeal to the Circuit Court of Coos County, Judge Norman ruled that as a matter of law, the statement of Dr. Flanagan was sufficient to support a claim for aggravation. The case was then remanded for an administrative evaluation of the amount of aggravation, if any. The Hearing Officer discounted the probative value of the treating doctor's opinion and found that there was no aggravation. WCB affirmed.

WCB #67-1419 December 24, 1968
and
WCB #67-1363

Lorene Z. Kappert, Claimant.
Page Pferdner, Hearing Officer.
Darrell E. Cornelius, Claimant's Atty.
Gerald C. Knapp, for Rehabilitation Institute of Oregon, WCB #67-1363.
Robert E. Joseph, Jr., for St. Vincent Hospital, WCB #67-1419.
Request for Review by Claimant.

Appeal from a determination awarding permanent partial disability of 30% loss function of an arm for unscheduled disability as a result of a June 5, 1965, injury (WCB #67-1363) and awarding no permanent partial disability as a result of the injury of May 19, 1966 (WCB #67-1419). Both injuries were low back injuries. Claimant worked as a nurse's aid. The Hearing Officer found that there was a 20% loss function of an arm disability from the 1965 injury and a 20% loss arm by separation for the 1966 injury. The Hearing Officer also ordered that the payment of compensation would be stayed pending the outcome of an appeal, if any. On review the Board commented,

"The issues include (1) the extent of permanent disability; (2) whether the claimant is entitled to the increased compensation allowed a married claimant whose husband is an invalid; (3) the propriety of adjusting compensation paid between two carriers and (4) a situation where the claimant was paid as temporarily and totally disabled for periods totalling 33 weeks though she was regularly employed at her usual occupation during these 33 weeks she was accepting compensation on the basis of being totally disabled from work.

"On issue (1) the determination issued pursuant to ORS 656.268 found the claimant to have suffered an unscheduled permanent partial disability equal to the loss of function of 30% of an arm for the injury of June 5, 1965, and no additional disability for the injury of May 19, 1966. This was modified by the hearing officer who found a combined disability chargeable to the two accidents of 20% loss of function of an arm for the first and 20% loss by separation of an arm for the second accident. With respect to this issue, the Board finds no basis for these modifications and therefore restores the original determinations in each claim.

"On issue (2) the record reveals that claimant's husband has injuries to one arm and one leg but would fall far short of qualifying as permanently and totally disabled if he was a claimant. The record reveals the husband does the gardening including the use of a rototiller and through all of the wife's working in Portland the husband operated the family automobile taking his wife from and to Rainier, Oregon. Upon this record the claimant's husband may be partially disabled but he is far from an invalid. The portion of the hearing officer order directing the compensation for temporary total disability to be re-computed on the basis of an injured wife with an invalid husband is set aside.

"(3) With respect to adjustments of compensation payable where two employers are involved, the Board notes ORS656.307. Though not directly applicable to the facts herein, the Board accepts such statutory expression as a legislative intent, along with ORS 656.268 (3), that proper adjustments be made whether one or more employers are involved. The issue is partially moot by the finding of the Board that no permanent partial disability compensation is payable by the second employer and no reduction is proper in the permanent partial disability award as to the first employer.

"(4) The hearing officer attempted to explain away the claimant's actions in drawing temporary total disability while regularly employed on the basis of economic plight. The testimony of claimant and her husband, who must have known of the wife's receipt of compensation while driving his wife daily to and from work, is made relatively useless. The claimant is in poor position to assert that either employer, either insurer or the Workmen's Compensation Board has dealt unfairly with her in the matter of compensation. If ORS 656.990 is applicable to the facts herein, the issue is more serious than dispute over the yardsticks of compensation.

"The Board also concludes that though the mere request for review or appeal may not suspend compensation by operation of ORS 656.313, the hearing officer and Board do have the authority to order suspension. In this instance there was good reason to do so.

"The Board therefore orders the determinations issued in the respective claims pursuant to ORS 656.268 reinstated, orders that compensation of claimant for temporary total disability remain computed on the basis of a working wife without an invalid husband and further orders that any overpayment by either employer or its insurer by virtue of claimant drawing compensation while employed by offset against any compensation the respective employer or carrier may now or hereafter owe due to the findings and awards of disability."

WCB #68-802 January 3, 1969

Mary F. Barnes, Claimant.
H. L. Pattie, Hearing Officer.
Marvin S. Nepom, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant suffered a "low back and right gluteal strain, possibly secondary to abnormal weight bearing on right foot," while lifting dishes. A fellow employee observed claimant double over on the lunch counter and exclaim with pain. Claimant did not seek medical attention for over four months after the alleged injury. A form 801 was filed with the employer ten days thereafter. The Hearing Officer found that claimant had not proved a sufficient excuse for not filing a claim within 30 days. He ruled that belief that would get better was insufficient. The Hearing Officer did find that the employer had actual knowledge as there was evidence that the employer;s manager was told the following day. The Hearing Officer found, however, that there was no compensable injury, and that the condition treated was not the result of the activity described. On review the Board affirmed with a modification. The Board commented:

"...the assertion that the employer was charged with knowledge is well defined by claimant's counsel, Tr., pg. 56, lines 18-22:

> 'The day after the accident, Dorothy mentioned to her the fact what Mary was supposed to have done, that Mary was supposed to have strained her back so, therefore, the day after the accident, the employer had notice of this claim.'

"The Board concludes that the authority cited of Ogletree v. Jones, 106 P2d 302 is in point:

> 'Actual knowledge of employer within compensation act provision excusing written notice of the accident or injury, means knowledge of the mere happening of an accident or than merely putting upon inquiry, and notice in casual conversation or mere notice to employer that the employee became sick while at work is insufficient.'

"The Board also notes that the claimant is described as obese and that in addition to this abnormal weight naturally imposed upon her spinal structure, the claimant had bunions which caused her to bear her weight in an abnormal manner."

WCB #68-531 January 3, 1969

Calvin L. Cochran, Claimant.
Page Pferdner, Hearing Officer.
Allen T. Murphy, Claimant's Atty.
Request for Review by Claimant.

Appeal from a determination allowing 15% loss arm for unscheduled back injury. Claimant, age 44, suffered a ruptured disc while lifting. His occupation is that of a foreman on a steel erection crew. Although he is able to flex until his fingers are six to eight inches above the floor, this causes pain in his low back as does any degree of extension. Left and right rotation of his trunk produces pain in his right hip, and right and left lateral flexion is even more painful than rotation. Neither are as painful as his efforts to extend. He testified that after a hard day's work, pain will radiate down his right leg to his heel. Although many of his motions are limited by pain, he finds sitting causes even more problems since this also causes his right leg to ache from his hip to his heel. As a result, driving is one of his most difficult tasks. Claimant was formerly a "boomer" in the ironworker trade, but now travel is too difficult and he knows no other trade. The Hearing Officer found that the claimant had permanent partial disability equal to 25% loss arm for unscheduled disability and 20% loss use of right leg. WCB affirmed.

WCB #67-1423 January 3, 1969

Thea Rose Derbyshire, Claimant.
Forrest T. James, Hearing Officer.
Tyler Marshall, Claimant's Atty.
Allan H. Coons, Defense Atty.
Request for Review by Claimant.

Appeal from determination allowing permanent partial disability eqaul to 5% of an arm. Claimant jerked her neck, while attempting to regain her balance after slipping, while carrying a tray of water glasses. The psycholgical findings include both conversion hysteria and exaggeration of symptoms for secondary gains. Defendant's Exhibit O reveals:

"I was very careful in moving this arm to make sure that she was not using the scapular muscles and yet she complained that this aggravates her back pain." Claimant alleges a loss of right arm strength to the extent that she "don't dare even carry a cup of coffee."

The Hearing Officer affirmed the determination. WCB affirmed, observing: "The basic problems appear to be functional. Personal tragedies include being first widowed, then divorced, experiencing the loss by death of several friends and relatives and losing belongings in a flood."

WCB #68-477 January 3, 1969

Victor J. LaBrec, Claimant.
Forrest T. James, Hearing Officer.
Tyler Marshall, Claimant's Atty.
Allan H. Coons, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 20% loss arm for unscheduled disability. There was an application for a lump sum award, which was somewhat confused, and a voluntary reopening of the claim which caused difficulties as whether claimant had a right to a hearing. Claimant had a back injury. The case was primarily decided on the merits and there were color movies which provided an adequate basis for affirming the determination.

WCB #68-925 January 7, 1969

Phillip L. Burns, Claimant.
George W. Rode, Hearing Officer.
Alan Holmes, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant alleges a double hernia, while lifting garbage cans or lifting a buffing machine in the course of employment. Claimant had had a previous left hernia some 31 years ago. The medical report contained no mention of employment connection. Also the first complaint of pain arose after the claimant realized that he was about to be fired. Claim denied. WCB affirmed.

WCB #68-325 January 7, 1969

Harry W. Roberts, Claimant.
Mercedes F. Deiz, Hearing Officer.
John Purver, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding no permanent partial disability. Claimant suffered a low back injury while operating a hand truck. He was subsequently operated on for a hernia. When claimant was released for work, Dr. Rieke reported, "He is 55 years of age, weighs 125 pounds and is advised to use reasonable discrimination about handling excessive weights. No maximum limits can be set, but these should not exceed 250-300 pounds in break-over." Claimant complained of pain in the groin. Subsequent to the hearing, Dr. Berlin reported "a vesical neck contracture and median bar with prostatic calcinosis," which did "not preclude this patient's usual employment..." The Hearing Officer found that there was no medical causal relationship between the prostatic calcinosis and the strain sustained at work. No permanent partial disability allowed. WCB affirmed.

WCB #68-602 January 7, 1969

Luman E. Ballance, Claimant.
George W. Rode, Hearing Officer.
Al Roll, Claimant's Atty.
Keith D. Skelton, Defense Atty.

Denied claim. Claimant sustained a left side and hip injury while attempting to clear a plugged conveyor. The claim was accepted but no compensation was paid. Seven months later a request for hearing was filed. A few days thereafter the claim was denied. The Hearing Officer held that the acceptance without payment of benefits was the same as a denial. The descriptions of the accident were not entirely consistent nor was the date of the accident. There was also a non-occupational back injury, which occurred three months prior to the alleged industrial injury. Also a claim for bursitis had been made to a non-occupational group insurance policy. The Hearing Officer found that this was sufficient to indicate no unreasonable refusal to pay, but he did find unreasonable delay and awarded 10% penalties and $750.00 attorney fees. A request for review was withdrawn by the employer.

WCB #68-913 January 8, 1969

Karl E. Karlsen, Claimant.
John F. Baker, Hearing Officer.
James A. Pearson, Claimant's Atty.
John E. Jaqua, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 10% of an arm for unscheduled disability. Claimant, a millwright, fell from a dock approximately six feet and struck a protruding valve. Claimant suffered immediate pain but has not lost any time from work. Claimant complaints of pain and reduced lifting capacity. Determination affirmed. WCB affirmed. Medically, the injury is described as a sprain with minimal impairment.

WCB #68-632 January 8, 1969

Ronald L. Groshong, Claimant.
Forrest T. James, Hearing Officer.
Reese Wingard, Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 10% arm for unscheduled disability. Claimant, a 55-year-old whistle punk, was injured when the main line flipped against claimant, throwing him against a stump. The diagnosis indicated a #2 whiplash type injury to neck and contusion and strain of lumbar muscle due to hyperextension. No fracture or dislocation was found. Subsequent examinations revealed that claimant could bend forward to touch ankles quite readily; Backward and lateral bending was 60 to 70% of normal; and straight-leg raising was 70 degrees

on the right, but only to 50 degrees on the left "whereupon the patient states it does cause some low back distress." Dr. Anderson also opined that, "if sufficiently motivated, that this patient could carry out gainful occupation of a remunerative character. It is doubtful whether he could do the heaviest types of lifting, bending or stooping and carrying activities, however, which are required in logging operations." It was also observed that the claimant is 5'9" tall and weighed 234 pounds at the time of the hearing. The Hearing Officer increased the award to 25% of an arm. WCB affirmed.

WCB #68-1090 January 8, 1969

Rodger J. Hall, Claimant.
H. Fink, Hearing Officer.
Burton H. Bennett, Claimant's Atty.
Earl M. Preston, Defense Atty.

Appeal from a determination awarding 15% loss of the left leg. Claimant suffered "Multiple abrasions & lacerations calf & thigh, contusion left ankle, marked," when his leg went between two rollers, one of which was studded. The studs were about ½ inch apart and about ½ inch high. They caused multiple puncture wounds. Claimant was off work for three months. He is now working as a minister. Claimant's physical complaints are as follows: Prolonged standing causes swelling from the ankle up into the calf--which occurs after approximately four hours. He is unable to walk on the ball of the left foot and is unable to ascend stairs in the normal fashion. Repeated or prolonged usage of a car or heavy equipment clutch causes an aching and swelling in the ankle joint which extends up into the calf. The Hearing Officer affirmed the determination. WCB affirmed. There was a small loss of motion in the ankle.

WCB #68-781 January 8, 1969

Howard H. Hannan, Claimant.
H. Fink, Hearing Officer.
Tyler E. Marshall, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 40% loss use of left arm. Dr. Geist found 63% loss left upper extremity using the AMA Guide. The Hearing Officer increased the award to 65% loss use of left arm. On review the Board commented:

"Mr. Hannan, a maintenance engineer for a hospital in Portland, suffered an injury to his left index finger on February 2, 1966. On June 18, 1967, he fell with his weight fully on his left hand in a manner which injured his left shoulder.

"In November of 1967 an operation was performed to ease his shoulder condition. Since that time Mr. Hannan has not worked; his shoulder continuing to demonstrate restriction in movement. Substantial medical opinion is to the effect that an aggressive effort on Mr. Hannan's part to improve the mobility

of his shoulder would have lessened the disability at that point. While Mr. Hannan does have substantial disability in the left arm as a result of the accidents mentioned, the Board finds no reason in its individual review of the record which justifies an increase above the 65% loss use of the left arm awarded by the Hearing Officer. The findings and conclusions of the Hearing Officer are adopted and the order under this review is affirmed."

WCB #68-342 January 8, 1969

George A. Raines, Claimant.
J. David Kryger, Hearing Officer.
Ronald L. Bryant, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 10% loss use of right forearm. Claimant suffered a fracture of the distal radius of the right wrist. Dr. Corrigan found a "full range of active motion of the elbow, forearm, wrist, and fingers. He, perhaps, lacked a slight degree of full extension of the fingers...Muscle strength in the arm, forearm, and wrist was felt to be equal on both sides. He did exhibit weakness of grip on the right." The doctor also found an area of hypesthesia which involved the ring finger and the dorsum and palmar aspect of the hand. The Hearing Officer affirmed the determination. On review the Board affirmed commenting:

"Mr. Raines on March 30, 1967, fell while jumping from one log to another. He sustained, as a result of this fall, a wrist fracture. The assignment of a degree of permanent disability attributable to this injury is dependent in large part upon an evaluation of the nature, degree and extent of a claimed nerve insensitivity radiating from the wrist down into the hand and fingers. There is a conflict of medical opinion as to the conclusions to be drawn on that issue. The Hearing Officer had an opportunity to hear all the evidence and to observe the man on the stand. The determination of the facts as to presence and extent of the hypesthesia is dependent in large part upon the subjective reports of the claimant. The observations and findings of the Hearing Officer in this regard are given substantial weight by the Board."

WCB #68-406 January 8, 1969

John R. Wheeler, Claimant.
H. L. Pattie, Hearing Officer.
James J. Kennedy, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant.

Claimant received a dorsal spine injury on June 30, 1967, when he fell down a stairway. His claim was accepted and compensation was paid. Three months later claimant moved to Eastern Oregon and worked as a cowboy on a cattle ranch. In November and December of 1967, claimant was treated for a herniated disc in the low back. The Department denied that these symptoms were related to the injury of June 1967. The Hearing Officer found no causal connection. The Board affirmed, commenting, "To merely state that no accident occurred while farming is not equivalent to proof that the activity of farming did not produce the new disability."

WCB #68-821 January 8, 1969

Francis Stark, Claimant.
Page Pferdner, Hearing Officer.
Garry Kahn, Claimant's Atty.
Robert E. Joseph, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 20% loss use right foot after amputation of the great toe. Dr. Bachhuber reports "these are cavus feet bilaterally, right more than left." None of the four remaining toes on claimant's foot will touch floor while standing. Claimant has a sharp pain in the ball of his foot and his second toe is numb. In his final report, Dr. Bachhuber stated, "Mr. Stark has somewhat more than the statutory award for amputation of a great toe though the MP joint due to the aggravating effect of a preexisting cavus foot with forefoot varus." On review the Board commented:

"Mr. Stark lost his right great toe by amputation as a result of a crushing injury sustained on May 16, 1967. He initially received an award for disability equal to 20% loss of use of the right foot. Upon a review decision, issued on August 7, 1968, the Hearing Officer re-evaluated the award to an amount equal to 30% loss of use of the right foot."

"The Board, therefore, in response to the request for review, has surveyed the evidence in the record on the issue of disability award. This analysis has led to selection at this state, of the level of award stated by the Hearing Officer, rather than that established by the administrative order from the Closing and Evaluation Division. The treating orthopedic surgeon indicates in his letter of closing examination that an award greater than that assigned for amputation of a great toe is indicated because 'of the aggravating affect on the pre-existing' deformed foot condition. Based on the medical evaluations in the record and considering this case in comparison with others of a like nature which have previously been before the Board, this order affirms an award equivalent to 30% loss of use of the right foot. The findings and conclusions of the Hearing Officer are adopted as part of the Board action taken in this case."

WCB #67-1638 January 8, 1969

Nellie G. Weeks, Claimant.
Mercedes F. Deiz, Hearing Officer.
Donald S. Richardson, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Claimant.

Appeal from a determination of 35% loss arm for unscheduled back injury. Claimant, a 67-year-old widow, suffered a low back injury while moving a mimeograph machine. Claimant had been under treatment for coronary artery disease and had had prior accidents relating to her back and neck. The diagnosis of claimant's condition included: "Compression fracture body L-1, degenerative arthritis of thoracic spine, arteriosclerotic heart disease, convalescent from myocardial infarction....Noted also was spondyloisthesis of L-5 and S-1 and an inferior irregular articular plate in the body of L-3. There is an older

wedging of body of T-7 with a disc between T-11 and 12 indicative of the past degenerative change." There is also osteoporosis of the back. Claimant has experience in general office work and is now receiving Social Security. The Hearing Officer concluded that the claimant was not totally disabled and increased the award to 50% loss of an arm. On review the Board affirmed, commenting: "It would appear that the employer's insurer agrees that the claimant by reason of pre-existing disabilities and subsequent heart attacks may be unable to now regularly engage in a suitable occupation. The issue is whether that inability to work is the result of the accident at issue. The back alone should not preclude the semi-sedentary performance of office work."

WCB #68-161 January 9, 1969

Harold A. Toureen, Claimant.
John F. Baker, Hearing Officer.
Larry J. Anderson, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

Claimant fell off a trailer house in 1967, injuring his arm. The diagnosis was left shoulder and elbow strain. In 1955, claimant suffered a left arm and neck injury, when his arm was caught in a conveyor. The injuries consisted of a fracture of the wrist, a fracture of the left humerus and a dislocation and laceration of the left shoulder, as well as several lacerations of the lower arm and elbow. There was residual limitation of internal and external rotation of the shoulder. An award was allowed to 65% loss function of an arm for this injury. Claimant now complains of some shoulder disability. The Hearing Officer found that the disability was not in excess of that already awarded. WCB affirmed.

WCB #68-359 January 9, 1969

Calvin R. Hickey, Claimant.
J. David Kryger, Hearing Officer.
Carl Burnham, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by the Department.

Appeal from a notice of denial on Coronary thrombosis and myocardial infarction claim. Claimant, age 47, was an appliance installer. Claimant had had a prior attack in 1967, from which he recovered. Claimant was advised to take nitroglycerin pills daily but was not taking them at the time in question.

"On November 9, 1967 the claimant was ordered to Riggins, Idaho, to install gas pipes 24 feet in length weighing approximately 250 pounds. At approximately 10:30 a.m. on the morning of November 10, 1968, while lifting and threading one of the gas pipes, claimant commenced to have chest pain. This chest pain continued throughout the remainder of the day and generally increased in severity. The claimant returned to his motel room that evening and the chest pain subsided.

The next morning, November 11, 1967, the chest pain commenced again as the claimant began to work and increased in severity until the claimant left Riggins and returned to Weiser, Idaho, approximately between 10 and 11 a.m. Weiser is approximately 100 miles from Riggins and the claimant stated that he did, in fact, have chest pains during this trip but they did not increase in severity. Later on in the claimant's testimony he indicated that during this trip the chest pains subsided. After returning to Weiser in the afternoon of November 11, the claimant was ordered to check a heater and to install a gas cylinder. At approximately 4 or 5 p.m. the claimant and one Ed Fitzmorris arrived at a customer's home and the claimant, when attempting to pull this 200-pound cylinder from the back of the pickup, sustained a very severe pain in his chest. Claimant stated that at the very same instant that he pulled on the gas cylinder, the chest pain commenced. The claimant almost immediately returned in his pickup to the plant shop and informed his employer that he was going home due to the chest pain. At approximately 5:30 p.m. claimant arrived at home and reclined on the couch until 8 p.m., when one Mr. Robinson, claimant's immediate supervisor arrived with some horses. Claimant was asked to aid in stabling the horses but refused due to his condition. At approximately 9:30 p.m., Mr. Robinson telephoned the claimant and asked him to come to the plant to discuss the Riggins gas pipe installation. This the claimant did and immediately returned home with more severe chest pains. His wife then transported the claimant to the hospital."

Mr. McGrath, a general practitioner, was of the opinion that the activity of November 9, 10, and 11 was a substantial contributing factor to the resultant thrombosis and infarction. Dr. Allen, former assistant professor at the University of Oregon Medical School, was of the general opinion that the thrombosis and infarction was merely coincidental with the work activity of the claimant. The Hearing Officer concluded that the heart attack did arise out of and in the course of employment. A penalty of 25% was allowed, because the claim was not accepted or denied within the statutory 60 days. $500.00 attorney's fees were allowed. On review the Board affirmed. There was a cross request by counsel for claimant for increased attorney's fees. This was allowed and the fees for the hearing were increased to $800.00 with $200.00 additional for the review.

WCB #68-664 January 9, 1969

Ray J. Mann, Claimant.
Norman F. Kelley, Hearing Officer.
Donald Wilson, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 15% loss arm for unscheduled disability. Claimant was injured when his feet slipped from under him, while he was descending a stairway. He struck the back of his head and neck on a step. Claimant suffered from severe headaches. Dr. Rask removed two ruptured discs and performed an anterior fusion at C-5-6 and -7. The physical examination revealed that there was definite limitation of motion in the neck. His neck would flex forward and backward over a range of only two inches. Rotation of the neck was about 25 degrees to each side. Lateral bending of the neck was only 25% of normal. Claimant suffered from headaches and heavy lifting was not recommended. Dr. Rask indicated that claimant has lost "seventy per cent of the use of his neck and thirty per cent of the use of his right arm." The Hearing Officer increased the award to 25% loss of an arm for unscheduled disability. WCB affirmed.

WCB #67-1665 January 9, 1969

John Rickman, Claimant.
H. Fink, Hearing Officer.
Larry J. Anderson, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

Claimant sustained a left hand contusion, when struck by a falling deck saw. Claimant lost no time from work and no determination was issued. Only minimal medical care was required. Claimant complained of sensitivity in the palm of the left hand, and also a thickening in the palm which prevented him from grasping things firmly at work. Dr. Kanzler diagnosed a dupuytren's contracture involving the ring finger of the left hand. The medical opinions as to the relationship of the dupuytren's contracture to the contusion ranged from no opinion to definitely not. Movies indicated claimant's ability to use his hand. The Hearing Officer concluded that there was no relationship. WCB affirmed.

WCB #68-200 January 9, 1969

Gabriel P. Kilwien, Claimant.
George W. Rode, Hearing Officer.
Robert Ackerman, Claimant's Atty.
Earl Preston, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 50% loss arm for unscheduled disability. Claimant suffered a low back injury in 1966. It is clear that the claimant cannot return to either of his former occupations which were warehouseman and heavy appliance repair. Claimant is presently attending barber college. Claimant's chief complaints are an inability to stand for more than an hour or two without experiencing pain; difficulty in walking up and down stairs; less speed in walking generally; and inability to do heavy lifting; and pain in his right leg upon physical activity. The Hearing Officer increased the award to 60%. WCB affirmed. It was also held that claimant is not entitled to temporary total disability while in vocational rehabilitation.

WCB #68-409 January 13, 1969

Chester M. Lucas, Claimant.
H. L. Pattie, Hearing Officer.
Don S. Willner, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Department.

Appeal from a determination allowing no permanent partial disability. Claimant, an employee of Reynolds Metals, was exposed to chlorine gas briefly. Claimant has sustained a loss of lung function or breathing capacity. His ability is estimated at 65% of normal (Exhibit 5) and 80% of normal (Exhibit 6). This loss is attributed to 40 years of smoking. Claimant has developed an acute bronchitis from exposure to cholorine (Exhibit 5). With this susceptibility, he should

avoid further exposure to cholorine or other such irritants (Exhibit 5). The acute bronchitis was appropriately treated and claimant made an apparent recovery (Exhibit 6). Claimant returned to work at Reynolds Metals as a gardener, a position that pays less than his former regular occupation of furnace man. Although claimant's breathing loss is attributed to his smoking habit, the incapacity was not apparent or symptomatic when claimant was examined by the company doctor in May 1952 or April 1964. The Hearing Officer awarded 10% loss of an arm for unscheduled disability. The review was not a final review, but rather an interim order assessing penalties and $100 attorney fees for nonpayment of compensation as provided from law from the date of the hearing (October 28, 1968) until January 8, 1969. It was indicated that a review on the merits was still pending.

WCB #68-95 January 13, 1969

Marion F. George, Claimant.
Norman F. Kelley, Hearing Officer.
Dan O'Leary, Claimant's Atty.
James B. Bedingfield, Jr., Defense Atty.
Request for Review by Employer.

Claimant was crushed by a rolling log. Dr. French found fractures of the nose, right zygoma, several left ribs, left scapula, and a possible fracture of the sternum. He also found a fracture of the first metacarpal and a chipped left coranoid process of the ulna as well as multiple contusions and abrasions with severe soft tissue injury. His left arm and shoulder were most severely crushed by the log. The accident also broke the lower plate of his dentures. The Board comments as follows:

"The claimant was injured severely on July 7, 1966, when caught from the rear by a rolling log which rolled over the claimant as he was bent forward over another log. There were numerous serious head, arm and chest injuries.

"The order of the hearing officer is quite detailed and no purpose would be served in again reciting the matters encompassed in those eight pages. A substantial part of the problem was created by the fact the claimant has a 500 acre ranch and commenced some activity on the ranch in September of 1966. The employer's insurer discontinued payment of temporary total disability and submitted the matter to the Workmen's Compensation Board for determination pursuant to ORS 656.268.

"A determination of disability was issued January 5, 1968, upon the information supplied by the employer's insurer finding permanent disabilities of 35% loss of hearing of the right ear, 10% loss of use of the left arm and unscheduled disabilities equal in degree to a loss by separation of 10% of an arm. The request for this determination was made more than a year after the employer and its insurer stopped the payment of compensation.

"Upon hearing, the various awards of permanent partial disability were affirmed with the exception of the award for unscheduled disabilities which was increased from 10 to 25% loss of an arm by separation."

"The employer requests review on the application by the hearing officer of ORS 656.262 (8) in assessing increase in compensation of 25% of approximately three months temporary total disability from September to December, 1966, and 10% of approximately 11 months temporary total disability from December, 1966 to November, 1967. The employer is particularly concerned by the 'maximum' assessment of 25% for the three months temporary total disability. At the rate of compensation then in effect for a married workman without qualifying children, the assessment would be about $150 and the total assessment would be less than $300. The sum so assessed does not appear to be harsh or unconscionable and is therefore affirmed. The employer also contests the allowance of attorney fees chargeable to the employer. The payment of compensation and the processing of claims therefore is a basic obligation of the employer, ORS 656.262 (1). If it is found that the employer has failed to meet that obligation, the effect is a resistance to payment. Again the employer urges that the imposition of the attorney fees and assessment of increased compensation for delay is largely made in retrospect. This is true, but the obligation cast upon the employer by the law is to so administer the law that in retrospect it can be said the employer promptly and fully met his obligations. It is upon this basis that the hearing officer imposed the assessment and attorney fees and it is upon this basis the Board affirms the hearing officer decision on these issues.

"The claimant's cross appeal urges that the award for unscheduled disability is inadequate. Within the ambit of unscheduled disabilities in this claim include chronic sinusitis, difficulty in opening his mouth affecting his eating and nutrition and restriction of motion in the shoulder and neck. The Board concludes that these various disabilities are equal in degree to the loss by separation of 75% of an arm and the order of the hearing officer is modified to further increase the award from the 25% awarded by the hearing officer to the 75% loss by separation of an arm.

"The review having been initiated by the employer without reduction in award, the claimant's counsel, pursuant to ORS 656.382 (2), is entitled to a further fee in the sum of $250 payable by the employer and it is so ordered.

"Pursuant to ORS 656.386 (2), counsel for claimant is also entitled to a fee equal to 25% of the increased compensation awarded by this review and payable therefrom and it is so ordered."

WCB #68-823 January 13, 1969

Harold C. Crooks, Claimant.
H. Fink, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 10% loss use of a forearm. Claimant fell up a stairway, bending his thumb over backwards and spraining his wrist. Claimant is a roofing salesman and now has trouble climbing stairs. The Hearing Officer affirmed the determination. On review the Board increased to 20% loss function of a forearm, commenting:

"Pursuant to ORS 656.268, a determination was issued, recognizing the claimant had some pre-existing physical impairment by way of degenerative joint disease or cystic lesions, and finding a disability in the forearm related to the accident equal to 10% of a member.

"There is medical evidence relating to the disability as confined to fingers including the metacarpal bone and adjoining soft tissues. The Board concludes that the disability rating was properly extended to include the forearm because of the involvement of the wrist which goes beyond the metacarpal region of the fingers. However, the Board concludes that the disability to the thumb, the limitation of opposition to the index and long fingers and the involvement of the wrist caused by the injury constitute a loss of function of 20% of the forearm above any pre-existing disability."

WCB #68-964 January 13, 1969
and
WCB #68-722

Roy R. Saul, Claimant.
Forrest T. James, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Allen Owen, Defense Atty.
Request for Review by Claimant.

The Board commented:

"The above entitled matter involves an issue of the extent of permanent disability suffered as the result of two separate compensable accidental injuries. Though the injuries of September 2 and December 13, 1966, were for different employers, they were both insured by the State Compensation Department and involved essentially the same portion of the claimant's body.

"The September 2nd injury involved falling 18 feet from a bridge with the claimant landing in a sitting position with his right foot doubled beneath the left thigh. The December 13th injury involved a twist of the back while carrying a five gallon pail of oil.

"Pursuant to ORS 656.268, determinations were issued finding no permanent partial disability resulting from the first and more dramatic of the two accidents. The claimant had shortly thereafter returned to work and was basically asymptomatic. The second accident was determined to have produced permanent injury equal in degree to 30% of the loss by separation of an arm. This award was increased by the hearing officer to 40% of the arm and additional temporary total disability was awarded for May, 1967, less three days thereof.

"The claimant urges that his disability be compared to a particular claimant whose claim was processed through appeal to the Supreme Court. The Board acknowledges that uniformity in rating of disability is one of the goals of the law. As noted in the case relied upon by claimant, uniformity results from processing of hundreds of claims. These comments are not to be interpreted as any concession that by comparison an inadequate rating has been made in this

instance. The comparative ratings reflect that the claimant's disability herein has been rated as more than 11% greater than the award granted the other claimant.

"Dr. Donald Smith notes that the claimant should gradually regain strength and concludes there is a moderate impairment of function of the low back. The disability must be compared to a scheduled disability. In this instance it has been compared as equal to the loss by separation of 40% of an arm. The claimant admittedly cannot perform some functions within his capabilities prior to the accidents. At the same time he can still perform many functions which would be beyond his capabilities if he had in fact lost 40% of an arm by separation. The Board concludes that the moderate impairment of low back function does not exceed the 40% of an arm awarded for the December 13th accident and that no permanent disability resulted from the September 2nd accident.

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

WCB #68-498 January 13, 1969

James A. Snyder, Claimant.
J. David Kryger, Hearing Officer.
O. W. Goakey, Claimant's Atty.
Robert Puckett, Defense Atty.
Request for Review by Employer.

Appeal from a determination awarding 40% loss arm for low back injury. Claimant sustained compensable injuries to his low back in December 1965, and again in January 1966. A protruded disc was removed at the midline of L-4. In 1967, a second myleogram was performed which indicated a marginal defect, "probably due to herniated disc fragment." In April 1967, claimant again attempted to return to work and was again hospitalized. In June 1967, claimant was found medically stationary and Dr. Ottinger noted, "It seems unlikely to me that he will ever return to work in the woods or in a sawmill." Generally claimant complains of constant pain in his low back, which is exacerbated by activity and a numbness of his left leg, which extends from the thigh to the ankle. Claimant is unable to lift, bend or stoop without sharp pains in his low back. Claimant is unable to bend backward to any degree whatsoever. Claimant is capable of walking for a couple of blocks only, without stopping and resting. Driving a car for a lengthy period of time results in a sharp pain in his back and increased numbness of the left leg. Any twisting or turning of the trunk of his body results in the same symptoms. Dr. Compton indicated that claimant "presumably could occupy some light job." There is evidence that the claimant believes that he is totally crippled and that he is severely overweight. The Hearing Officer increased the low back award to 60% loss arm for unscheduled and in reliance on Walker v. SCD, 185 ADV 531 (1968), which held that permanent partial disability may be awarded to a lower extremity as a result of disabling radiating pain having its origin from a compensable back injury, the Hearing Officer awarded 15% loss function of the left leg, although claimant had not requested such an award. On review the employer objected to the extent of the award but the Board affirmed, awarding an attorney's fee of $250.00.

WCB #68-697 January 14, 1969

Billy R. Holmes, Claimant.
H. L. Seifert, Hearing Officer.
F. P. Stager, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Employer.

Appeal from a notice of denial. Claimant alleges, he was struck in the forehead by a board on February 1, 1968, while loading a boxcar. On February 8, 1968, claimant was hospitalized for headache, blackened eyes and swelling. The Hearing Officer ordered the claim accepted and allowed $350 attorney's fees. On review the Board affirmed and awarded $250 attorney's fees, commenting:

"Mr. Holmes, on March 29, 1968, filed a form with his employer alleging an accident which occurred on February 1, 1968. The claim was denied with the form carrying the following statement by the employer:

> 'This man claims to have been injured 2/1/68 as indicated above. He filed under off job insurance--doctor said was on job injury--off job insurance rejected. He seemed not himself when filing off job ins.'

"The claim was denied. In due course the Hearing Officer, considering Mr. Holmes' appeal, found he had in fact suffered the head injury he claimed. At the hearing the only witnesses were those supporting the allegations of Mr. Holmes. A friend of Mr. Holmes was called by the defendant, but his testimony only served to support in some small part the allegations made by claimant. There are conflicts apparent in the record. However, an independent evaluation shows the evidence weighing toward a finding of a valid claim for compensation. The findings and conclusions of the Hearing Officer are adopted and the order subjected to this review is affirmed."

WCB #68-1575 January 13, 1969

Bobby J. Logan, Claimant.
Forrest T. James, Hearing Officer.
Tyler Marshall, Claimant's Atty.
David P. Miller, Defense Atty.

Appeal from a notice of denial. Claimant alleges a low back injury. He sets the date as May 20, 1968. Claimant discussed the pain in his back briefly with a co-worker. No claim was immediately made and claimant applied home remedies hoping to get better. He continued working until July 19, 1968, at which time he went to the hospital. The first doctor visit was on July 1, 1968. The first actual notice to the employer was July 19. There was evidence that the claimant was familiar with the proper procedure for handling a Workmen's Compensation claim, as he had had a foot injury in the not too distant past. The claim was ordered accepted with $500 attorney's fees allowed. The review of this date is not a review on the merits, but rather an order pursuant to a protest by claimant's counsel that no compensation has been paid, pending review by the Board at the employer's request. The Board entered an order directing all due and unpaid compensation to be paid, plus 25% penalties and $150 attorney's fees.

WCB #67-864 January 14, 1969

Edward N. Lewis, Claimant.
George W. Rode, Hearing Officer.
Fred P. Eason, Claimant's Atty.
Hugh Cole, Defense Atty.
Request for Review by Employer.

Appeal from a notice of denial. Claimant, age 41, was a choker setter for Georgia Pacific. Claimant began work on June 9, 1967. On or about June 22, 1967, claimant alleges the onset of chest pain, which he believed to be a heart attack. The pain appeared to be centered directly over his heart. He continued to work and stated the pain was continually there, as if a portion of his body was "irritated." He continued working until June 29, 1967, at which time he reported to the Safety Supervisor, stating that he suspected he was going to have a heart attack. He quit work that day and reported to a doctor. Dr. Sorum diagnosed claimant's condition as costochondral separation of the left sixth rib, which would be a tearing away of the rib from the surrounding cartilage. There was no indication of heart damage. Dr. Sorum has since died. Dr. Sorum had also indicated, "Although there was no definite history of an accident, I felt that in the scrambling about that a hooker-tender must do in his job, that he may have sustained such an injury without even realizing it at the time." The claim was ordered accepted and attorney's fees of $425 allowed. On review the Board affirmed, allowing $250 attorney's fees and commenting:

"The Supreme Court in Plowman v. SIAC, 144 Or 138, made it clear that the failure of a claimant to properly diagnose his own condition is not the proper basis for denying compensation. The claimant here testified to the on-the-job onset of chest pain as on or about June 22, 1967, which gradually developed in severity during the day. There is medical evidence that normally the condition is one which would normally manifest itself immediately but this does not preclude the occurrence as alleged from the evidence."

WCB #68-791 January 14, 1969

Mary Ellen Snyder, Claimant.
Forrest T. James, Hearing Officer.
A. W. Gustafson, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Department.

Appeal from notice of denial. Claimant, an egg packer, twice injured her back while carrying eggs, by slipping (on February 8, 1968), and by falling (February 20, 1968). Claimant gradually became worse and finally visited a doctor on March 5, 1968. There was no formal report of the injuries until March 21, 1968. A myelogram on April 15, 1968, indicated probable herniated discs in the low back. There is some contention that the notice of injury was not timely, but it is observed that from February 20 to March 21, is less than 30 days. There is some evidence that the employer had actual knowledge, although the facts are somewhat conflicting. The Hearing Officer ordered the claim accepted with $400 attorney's fees. On review the Board affirmed with $200 attorney's fees.

WCB #68-843E January 14, 1969

Glen W. Robinson, Claimant.
J. David Kryger, Hearing Officer.
Robert Chrisman, Claimant's Atty.
Stanley E. Sharp, Defense Atty.

Appeal by employer from a determination awarding permanent total disability. Claimant is a 68-year-old laborer who sustained a back injury while lifting. The diagnosis was a collapsed vertebra at L-4. Claimant had a preexisting condition of osteoporosis. The Hearing Officer held that the employer had not sustained the burden of showing that the claimant could engage in any suitable and gainful occupation. Two doctors agreed that claimant was totally disabled and a third concurred, but thought that the preexisting osteoporosis was the main reason for claimant's present unemployability. The Hearing Officer affirmed the determination and allowed $600 attorney's fees. The Board opinion is not on the merits, but on a collateral issue of non-payment of benefits pursuant to the above order. The Board comments:

"It appears that on December 17, 1968, the insurer of the employer acknowledged that compensation for temporary total disability from February 15 to May 6, 1968, in amount due of $400 had not been paid and that an accumulation of compensation from May 6, 1968, in amount of $1,240 for permanent total disability had also not been paid.

"An order of the hearing officer affirming the determination was issued November 26, 1968, and is now final for want of a request for Board review.

"ORS 656.313 (1) provides that request for review shall not stay payment of compensation. ORS 656.262 (1) places the responsiblity of processing claims and providing compensation upon the employer. ORS 656.262 (8) provides for adding an amount of up to 25% of compensation payments unreasonably delayed. It appears to the Board that the delay in payment of compensation is unreasonable and that the failure was so gross as to justify the further imposition of an attorney fee pursuant to ORS 656.382 (1).

"The employer is therefore ordered to pay the additional amount of 25% of the compensation erroneously delayed and to further pay to claimant's counsel the sum of $100 for services rendered in connection with obtaining the compensation."

WCB #67-1217 January 14, 1969

Bernice L. Stevens, Claimant.
John F. Baker, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
O. E. McAdams, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 15% loss arm for low back injury. Claimant was a 56-year-old aide at Fairview home. The Hearing Officer affirmed the determination. The Board commented:

"Mrs. Stevens suffered an accident, involving a slip and fall against a wall, in April, 1967. She described substantial pain in the back, of a varying nature, most of which she attributes to the claim accident. Medical testimony was available, including the findings of an orthopedic surgeon and a neurologist who had each seen Mrs. Stevens in connection with a 1965 accident which she had sustained. Both of these doctors testify rather firmly to the effect that the 1967 accident has had little, if any, affect on the disability pattern claimed by Mrs. Stevens. A third orthopedic surgeon examining Mrs. Stevens, apparently for the first time, indicates that he too finds little if any disability attributable to the 1967 accident.

"Mrs. Stevens' own testimony, consisting almost entirely of subjective complaints, does little to sustain her burden of proof in this case. For instance on page 21 of the transcript, the following question and answer occurred:

> 'Question: Now, you say that this pain that you've indicated down the spinal column from the belt line down to the tip becomes worse at times. What activities make it worse?
>
> 'Answer: I really don't know for sure. Now, I know when I-- leaning will, if I do much leaning; I'm sure lifting would.'

"While this kind of testimony may well fit consistently into a picture of a serious injury with substantial disability demonstrated by corroborative testimony, it is of no value where the claimant's burden is one of meeting overwhelming medical testimony contrary to the claim. The Board can only affirm the determination of the disability evaluation committee, as also adopted by the Hearing Officer. The order subjected to this review is affirmed."

WCB #68-412 January 16, 1969

Darrell Lee Smith, Claimant.
H. L. Seifert, Hearing Officer.
Jonathan Purver, Claimant's Atty.
Quintin B. Estell, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 60% loss function of right ring finger. Claimant suffered a compound fracture of the distal phalange of the digit in a crushing type injury. Claimant's finger is now extremely sensitive and interferes with his work. Claimant wants a forearm award. It appeared that the injury was confined to the finger and the difficulty to the hand was the difficulty of adjusting to a defective finger. See Graham v. SIAC, 164 Or 626, 102 P2d 927. In this case there were no unexpected or unusual complications attending the injury. But see Kajundzich v. SIAC, 164 Or 510, 102 P2d 924; Walker v. SCD, 85 Adv Sh 531, where awards beyond injured area have been sustained. Determination affirmed. WCB affirmed.

WCB #68-228 January 16, 1969

David Bartlett, Claimant.
Mercedes F. Deiz, Hearing Officer.
William D. Scalf, Claimant's Atty.
Darrell E. Lee, Defense Atty.

Appeal from notice of denial. Claimant is a gas station mechanic who alleges a knee injury. Claimant suffered a series of knee incidents, some on the job and some off the job. There was a description of a squatting and turning incident while removing a gas cap from a car. Dr. Gambee reported, "This man sustained almost a classical knee injury while genuflecting to open the gas tank of a car while at work some weeks ago." Claimant was operated on for a torn medial meniscus. There was evidence that the employer had direct knowledge of the knee difficulty, thus failure to give written notice within 30 days is excused. The Hearing Officer ordered the claim accepted and allowed $500 in attorney's fees. On review the Board affirmed and allowed an additional $250.

WCB #68-222 January 17, 1969

Lester W. Blackmore, Claimant.
John F. Baker, Hearing Officer.
David A. Vinson, Claimant's Atty.
Scott M. Kelly, Defense Atty.
Earl M. Preston, Defense Atty. for 2nd Employer.

Appeal from a denial of an aggravation claim. Claimant sustained a compensable injury to his low back in March 1966, when he fell on a rock. A determination of October 1967, allowed 50% loss arm by separation. Claimant then returned to work and in rapid succession worked for three employers. His duties included setting heavy concrete tile, hooking chokers and unhooking chokers. By October 31, 1967, claimant's back became bothersome. Claimant was hospitalized in mid-November for about a week and first filed a claim with his last employer and then withdrew it and filed an aggravation claim for the 1966 injury, which was denied. There was no evidence of a new injury. Dr. Brooke connected the time loss from October 30, 1967, to the previous problem. The Hearing Officer ordered the aggravation claim accepted. The Hearing Officer further found that claimant had been overpaid for temporary total disability for the summer of 1967, and ordered this as a credit to the disability now due and payable. On review the Board affirmed the disallowance of temporary total disability for the summer of 1967, but assessed attorney's fees against the employer for their outright denial of the aggravation claim.

WCB #68-33 January 17, 1969

Faye B. Dingman, Claimant.
H. Fink, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Quintin B. Estell, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant alleges injury while lifting heavy pallets. Claimant is a slight 5'3", 93 pound woman whose work required the lifting of 4' x 8' pallets with the help of a co-worker. After lifting claimant suffered immediate pain and thereafter, rectal bleeding. Dr. Denker diagnosed "descensus uterus -- prolapse rectum." Dr. Glenzen attributed the uterine decensus to prior child bearing. It was conceded that lifting could cause aggravation. The Hearing Officer noted that the facts about how the claimant thought the accident had happened varied from time to time and affirmed the denial of the claim. On review,

"The Board, after weighing all of the medical evidence in the record, concludes that the lifting was a material contributing cause of the rectal relapse but <u>was not</u> a material contributing cause of the uterine condition.

"For the reasons stated, the order of the hearing officer and the denial of the claim by the State Compensation Department are hereby reversed and the claim remanded to the State Compensation Department for acceptance of the claim for the rectal prolapse, and for the payment of benefits in accordance with the Workmen's Compensation Law."

WCB #68-436 January 17, 1969

Roy Potter, Claimant.
H. Fink, Hearing Officer.
Marion B. Embick, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. The Hearing Officer affirmed the denial. On review the majority of the Board affirms. Mr. Callahan dissenting, states ten reasons why the claim should be accepted. The Majority opinion states:

"The above entitled matter involves a claim for wrist injury allegedly suffered by the fall of a spray nozzle.

"The claimant was working at a Salem restaurant while on a work release program from the penitentiary. The filing of the claim and first visit to a doctor followed the claimant's release from imprisonment and also following the termination of his employment for allegedly not reporting to work and for reporting while incapable of working due to drinking.

compensation benefits should ever be denied an injured workman simply because of a criminal record. However, when the accident is unwitnessed and when the veracity of such a claimant is challenged, his position is one wherein his credibility is subject to discredit.

"In the system of de novo review currently applicable, it is only the hearing officer who has the opportunity to observe the demeanor of the witness. Whether the testimony of the witness is discredited goes beyond mere technical discrepancies in the evidence. The majority of the Board could accept claimant's explanation of all discrepancies in testimony and still conclude that the accidental injury did not occur. There is no presumption of truth in favor of the claimant. The hearing officer could accept or discount all of claimant's testimony dependent upon the degree of reliability placed on the witness. The majority also conclude that the failure to submit the one exhibit in advance of hearing was not a reversible error in this instance and that the decision would be the same in the absence of that exhibit."

WCB #67-1472 January 17, 1969

Jimmy L. Garrigus, Claimant.
Forrest T. James, Hearing Officer.
Robert G. Sevier, Claimant's Atty.
Philip A. Mongrain, Defense Atty.

Appeal from determination awarding no permanent partial disability on a back injury case. The consensus of several doctors is that his subjective complaints greatly outweigh his symptomatology. The psychological findings were that claimant's preexisting fear of accidental injury was reinforced by the injury actually suffered, and that the claimant would be in grave danger of further injury should he return to millwork. The claimant persently complains of restricted motion in his neck. The Hearing Officer granted an award of 10% loss arm for unscheduled disability. The employer withdrew his request for review.

WCB #68-434 January 20, 1969
and
WCB #68-435

Coye C. Bryan, Claimant.
Page Pferdner, Hearing Officer.
James B. Griswold, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Allen G. Owen, Defense Atty.
Request for Review by Claimant.

Appeal from award on no permanent partial disability. Claimant sustained successive back injuries with successive employers who had different insurers. The

injury was the result of a fall and required one doctor's treatment for pain between the shoulder and severe low back pain. Six months later claimant was "high-scaling," which means that the claimant is suspended over a cliff in a bosun's chair scraping loose rocks and dirt off a face of a cut, when a falling rock struck the claimant between the shoulder blades. Claimant was hospitalized for three days and apparently recovered some two weeks later. Over a year after this, claimant was pulling on the veneer chain, when it "Felt like somebody hit me right between the shoulder blades with a sharp knife and then driven her in with a double-jack." The Hearing Officer concluded that the latest episode was a new injury, but awarded 5% loss arm for unscheduled disability for the falling accident and 10% loss arm for unscheduled disability for the rock accident. WCB affirmed.

WCB #68-1150 January 20, 1969

John R. Lowe, Claimant.
Page Pferdner, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Claimant.

Appeal from determination awarding temporary total disability and not awarding any permanent partial disability. The determination order states:

"Note; This is not a determination of the necessity of psychiatric care or any permanent partial disability, if any, as your insurance carrier has denied responsibility for this condition in their letter to you dated June 6, 1968."

Claimant protests. He wants more medical treatment, and/or permanent partial disability and penalties and attorney's fees. Claimant was hit on the chest and arm by a flying 2 x 4 on June 1, 1967. The diagnosis was "contusion of left anterior chest with tenderness and slight splinting and abrasion of left arm and forearm. Sharp pain into left arm with numbness. Tenderness of cervical vertebra 7." Claimant alleges a stiff neck and disabling pain in the shoulder and arm. The Hearing Officer allowed no permanent partial disability and no further medical care. The movies indicated that the claimant could and did move his arm and turn his head. On review the Board commented:

"The Board does not label any claimant a malingerer or liar. The Board recognizes that the motivations of individuals and their reactions to situations may produce bizarre but non-compensable claims of non-existent or non-related disabilities."

WCB affirmed.

WCB #68-1809 January 20, 1969

Wm. A. Von Kienast, Claimant.

Appeal from denial of a claim on August 29, 1968. Claimant had no attorney. The request for hearing arrived at the Workmen's Compensation Board on November 6, 1968, having first been sent to the State Compensation Department, who admitted receiving it on October 29, 1968, or the 61st day from mailing of the denial. The Hearing Officer dismissed the request for review on November 29, 1968, as untimely filed. The request for review was filed December 24, 1968, or more than 30 days after the filing of the Hearing Officer order. The Board affirmed the Hearing Officer and then dismissed the review as being untimely filed.

WCB #67-1506 January 21, 1969

Granville White, Claimant.
John F. Baker, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
James P. Cronan, Jr. Defense Atty.
Request for Review by Claimant.

Appeal from a partial denial and a determination awarding 20% loss of an arm for unscheduled disabilities. Claimant, a logger, was injured when crushed by a rolling snag. The department accepted responsibility for injury to the lumbar spine and for an epigastric hernia. Responsibility for knee and shoulder difficulties was denied. Claimant suffered a fracture of D-12 for which a back brace was prescribed. The hernia was repaired and recovered uneventfully. It was Dr. Van Olst's impression that claimant was suffering from residual post traumatic capsulitis of the left shoulder and knee joints, secondary to his trauma. Otherwise the record is confused about the nature of the knee and shoulder injuries. There was some evidence of prior difficulties with the shoulder and knee. The Hearing Officer affirmed the determination as to the back and remanded the shoulder and knee problems to the Department for acceptance. On review the Board affirmed.

WCB #67-1113 January 21, 1969

Lester Lee Harman, Claimant.
J. David Kryger, Hearing Officer.
Hale G. Thompson, Claimant's Atty.
Philip Mongrain, Defense Atty.
Request for Review by Employer.

Appeal from a determination awarding 10% loss arm for unscheduled disability. Claimant, a 32-year-old logger, was hit in the back of the head by a choker. The diagnosis was "Severe cervical cephalgia." Later Dr. Larson noted a "marked over-reaction on his part and would question whether this patient may be malingering." Claimant alleges that he can't bend over, can't work, and can't remember instructions. The defendant's movies indicated substantially more ability to bend and flex than the claimant admitted. Dr. Hessel found a "definite bruit

over both subclavian vessels on limited motion of either arm in extension or external rotation" with moderate motion of the arm may complete obliteration of the radial pulse. The Hearing Officer awarded 10% loss function to each, the left arm and the right arm in addition to the determination. The Board affirmed, allowing $250 attorney fees.

WCB #68-994 January 21, 1969

John E. Galvin, Claimant.
Page Pferdner, Hearing Officer.
Don R. Wilson, Claimant's Atty.
Scott M. Kelley, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 20% loss arm for unscheduled disability. Claimant is a long-haul beer truck driver who injured his back while unloading kegs in Salt Lake City. A myelogram revealed intervertebral disc lesions at two levels which were surgically corrected by Dr. Hiestand. Claimant is still able to do most of the tasks related to truck driving and maintenance that he did before. Dr. Geist evaluated claimant's medical impairment at 21% of the whole man. The Hearing Officer awarded 35% loss arm for unscheduled disability. On review the Board affirmed, commenting:

"Even if the matter was to be strictly based upon the American Medical Association schedules, the Board finds that the various limitations add up to but 17.5% rather than the 21% figure utilized by Dr. Geist and that calculated for a two level fusion, the gross award would properly be from 30 to 35%. Dr. Geist found greater restriction than the earlier examination by Dr. Hiestand. Accepting the later examination of Dr. Geist justifies the increase above the findings of Dr. Hiestand but not in excess of the 35% of an arm awarded by the hearing officer."

WCB #67-1586 January 21, 1969

Cecil B. Lee, Claimant.
John F. Baker, Hearing Officer.
Bert McCoy, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding permanent partial disability equal to 40% loss arm for unscheduled disability. Claimant, a logger who is 58-years-old, was struck violently in the back by a log. Immediately the claimant was hospitalized for deep shock. Subsequent findings and diagnoses included: "A huge subcutaneous echymosis encompassing the entire lumbar back, undisplaced fracture of the right pubic bone, sacro-iliac joint strain and traumatic arthritis of the right hip joint. On February 7, 1967, a left thoracotomy was performed which disclosed a diaphragmatic hernia in an unusual position. Dr. Robert L. Bowen, the thoracic surgeon, relates the hernia to the accident in question. However, there is virtually no medical evidence of any disability resulting from the hernia. Claimant does complain of residual numbness and a lump under the ribs

and it is his belief that cutting of the muscles on the left side under the shoulder blade results in a loss of strength in the left arm. This is unsubstantiated by the medical evidence of disability resulting from the hernia itself or the thoracotomy."

Subsequently, while carrying out prescribed exercises, claimant sustained a mild compression fracture of the body of T12. The closing report of Dr. Baker revealed that the range of motion of the lumbar spine was limited 50% in all planes. Claimant has had a sixth grade education and knows nothing but logging. The Hearing Officer increased the award to 65% loss arm for unscheduled disability. WCB affirmed.

WCB #67-1672 January 21, 1969

George A. Klinski, Claimant. (Deceased)
Page Pferdner, Hearing Officer.
A. J. Johnson, Claimant's Atty.
Thomas S. Moore, Defense Atty.

The facts of this case reported at II VanNatta's Comp. Rptr., page 3.

"Pending Board review, the claimant purportedly committed suicide. The Board proceeded to issue its order on the merits and on the appeal to the Circuit Court, the employer opposed the substitution of the widow and administratrix.

"The matter was remanded to the Board. The Board concludes from Heuchert v. SIAC, 168 Or 74 and Mikolich v. SIAC, 212 Or 36, that a widow or administratrix has a clear right to be substituted with respect to any benefits accruing to the workman or widow prior to his death.

"The employer asserts that ORS 656.156 (1) relating to suicide precludes all benefits. It is obvious that this provision is intended solely to preclude benefits from being based upon deliberate self-inflicted death. There was no legislative intent to destroy rights accruing prior to such suicidal death.

"It should also be noted that the 1965 Act contemplates that processing of claims is now the responsibility of the employer. ORS 656.262 (1) and 656.401 (1). It is not in keeping with the spirit and intent of the law that the employer so seek to avoid its liability.

"The motion to substitute Rose J. Klinski, Administratrix, as personal representative of the deceased claimant and as surviving beneficiary is allowed."

WCB #68-471 January 21, 1969

Leroy M. Shuey, Claimant.
Page Pferdner, Hearing Officer.
Richard P. Noble, Claimant's Atty.
Richard L. Lang, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 85% loss use left forearm. In 1957, claimant sustained an amputation type injury to his right hand in which he lost the tips of all fingers on his right hand. The injury in question occurred when claimant, age 62, caught his left hand in a press roll and sustained a massive injury of the degloving type with multiple open fractures and avascular fingers. The only digits remaining are the thumb and little finger. Extensive skin grafts were made to cover the palm of the hand. Function in the hand is limited to a weak pinch, and motion in his thumb, little finger, wrist, and shoulder is limited. The Hearing Officer concluded that the shoulder and neck problem was connected to the hand injury. The Hearing Officer awarded 95% loss arm and an additional 5% loss arm for unscheduled shoulder and neck disability. On review the question was whether permanent total disability was available to the claimant. The Board denied permanent total disability, observing, "The Hearing Officer notes that the previously injured right hand has 'all of the nails missing...and the distal ends of some of the fingers were only flesh and cartilage.' However, he learned to use the hand well." The Board held that permanent total could not be allowed under the rule of Chebot v. SIAC, 106 or 660.

WCB #68-5 January 22, 1969

Tim M. Shaver, Claimant.
H. L. Seifert, Hearing Officer.
Harry F. Elliot, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Employer.

On appeal from a notice of denial. On October 18, 1967, claimant, a 20-year-old laborer in a lumber company, filed a report of injury, indicating that his back had grown painful over the preceding 10-month period while handling veneer. Eventually a back operation was required at L4-5. Claimant still suffers pain. The Hearing Officer found adequate cause for not giving notice within 30 days. There was no identifiable trauma or medical evidence connecting the gradual onset of pain to the work. The Hearing Officer found the claimant's testimony credible and ordered the claim accepted. On review the Board affirmed, commenting: "The record basically is limited to the testimony of the claimant. One would prefer that some medical evidence be adduced to support the claim, but in light of Uris v. SCD, (247 Or 420, 427 P2d 753, 430 P2d 861), the Board concludes that it is not required to support the claim. The Board also recognizes that ordinarily an accidental injury, to be compensable, must be one which can be identified as to time and place."

WCB #68-1783 January 23, 1969

Ivan W. Davidson, Claimant.

An appeal is pending in this case on the merits on the Circuit Court. The question is whether an attorney fee, payable from an award of compensation, must be paid pending review and appeal from an order awarding compensation. It appears that the Department had paid all compensation due directly the claimant, but withheld that part which would be directed to the claimant's attorney. "The Board concludes that when compensation is ordered paid to a claimant, the sums due do not lose their character and identification as compensation simply because the claimant is obligated to pay a portion of that compensation to an attorney as a fee." A $250 fee payable by the Department was allowed pursuant to ORS 656.382 (1) for this hearing and review.

WCB #68-353 January 23, 1969

Wesley H. Franklin, Deceased.
H. Fink, Hearing Officer.
William M. Holmes, Claimant's Atty.

Claimant was killed in an admittedly compensable logging accident. The question is as to the identity of his employer.

"One of the parties involved as possible employers was DLCO Logging, Inc. DLCO contracted with a J. E. Johnson and William E. Johnson for the Johnsons to haul logs for DLCO. The trucks were in the possession of the Johnsons as lessees or time purchasers, the precise ownership being unimportant to this case. When the younger Johnson lost his driving privileges, Mr. Franklin undertook with the Johnsons to drive one of the Johnson trucks.

"The claim made against the State Compensation Department as insurer of DLCO was denied by the State Compensation Department on the basis that DLCO was not Mr. Franklin's employer. About the only relationship between DLCO and Franklin was the payment of compensation directly to Franklin by DLCO but this was for the convenience of the parties and at the direction of the Johnsons. Payroll does not necessarily impute employment under such circumstances. See Morey v. Redifer, 204 Or 195. The direction and control of the workman is the prime factor and the hearing officer found that the direction and control in this instance remained with the Johnsons.

"A further case in point where logging truck owners who might themselves be workmen in the operation of a truck were held to be employers as to a driver hired to operate one of the trucks is Brazeale v. SIAC, 190 Or 656.

"In finding that the Johnsons were the employers of Mr. Franklin, the State Compensation Department remained a party with contingent interest pursuant to ORS 656.054. The Johnsons had not qualified in the manner required by the law in ORS 656.016. As such, they were noncomplying employers and injury or death to one of their workmen became compensable under ORS 656.054. Payment of compensation is then made by the State Compensation Department with a right of recovery from either the employer or, failing that, from the administrative fund maintained by the Workmen's Compensation Board."

"The Hearing Officer concluded that DLCO was not the employer and that J. E. Johnson, also operating as Johnson Logging CO., had the basic right to direct and control the services of Franklin and thereby became the employer of the decedent Wesley Franklin. The Board also concludes that the weight of the evidence bears out this finding and the Board so finds.

"The order of the hearing officer is therefore affirmed, finding J. E. Johnson, also known as Johnson Logging Co., to have been the employer of Wesley Franklin at the time of his death and that Johnson was a noncomplying employer with respect to that employing relationship. The Board further finds that DLCO was not an employer of Franklin."

WCB #68-352 January 23, 1969

Orvel A. Spenst, Claimant.
Page Pferdner, Hearing Officer.
Richard Egner, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant alleges right ear injury which was variously diagnosed as "external otitis" and "pseudomonas infection." The injury occurred when a short blast of compressed air was directed into claimant's ear. There were witnesses and claimant consulted the plant nurse who referred claimant to a doctor. Claimant then filed a claim with an off-the-job insurance carrier and no formal notice of injury was filed for fourteen months. The Hearing Officer found that the claim was barred by the lapse of more than a year, and that the alleged notice to the plant nurse was not adequately specific to put the employer on notice that an injury had occurred. On review the Board noted that the request for hearing was not timely because no benefits and no medical services had been provided within one year prior to the request for hearing as required by ORS 656.319. On the merits the Board added that there was no compensable injury proved.

WCB #68-440 January 23, 1969

Gene F. Pierson, Claimant.
H. Fink, Hearing Officer.
Conrad Schultz & Hale Thompson, Claimant's Attys.
Allan H. Coons, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 40% loss arm for unscheduled disability. Claimant was injured when the vehicle in which he was riding was knocked off the road during the Ox Bow fire by a sliding snag. The same day Dr. McHolick found extensive scalp lacerations, contusions to the face and kidney, cerebral concussion, a tear of the anterior longitudinal ligaments, and a compression fracture of the spine. At the time of the hearing, claimant's physical complaints consisted of: "a constant pain in the back, above the belt line; a constant, light headache; occasional shooting pains in the head which were of short duration; the forehead is numb; the left arm tingles down to the hand; an

inability to grasp or handle small objects with the left hand because of a numbness in the left thumb and index finger; turning of the head from side to side is limited because of restricted neck motion; an inability to work more than three hours at one time (and then only if he is not in an awkward position) without stopping for rest; occasional dizzy spells; a restriction on the weight he can lift. Claimant felt he could lift ten pounds easily from the floor by stooping or squatting, but not by bending over. Claimant also felt he could lift 50 pounds if he could pick it up from approximately waist level."

The Hearing Officer affirmed the determination. On review the Board affirmed. The claimant had sought an award of 100% loss arm but the Board noted that the claimant was retraining for an automotive tune-up mechanic, and that if his physical diability permits his newly chosen profession, his loss would have to be less than 100% of an arm, because "an auto mechanic completely deprived of one arm would be normally as unproductive as the proverbial paper hanger."

WCB #68-611 January 23, 1969

Jack Robinson, Claimant.
Forrest T. James, Hearing Officer.
Reese Wingard, Claimant's Atty.
John E. Jaqua, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding no permanent partial disability. Claimant suffered a neck injury when he was propelled backwards against a barrel by a fellow employee's fist. Claimant had suffered a prior similar injury, but the award was not made part of the record. There was medical evidence that claimant was no worse now than before the injury. There are no objective findings independent or in addition to those of the first accident. Claimant has continued to work full time as a millwright. Determination affirmed. WCB affirmed.

WCB #67-1023 January 24, 1969

Clyde C. Brooks, Claimant.
John F. Baker, Hearing Officer.
Ernest Lundeen, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 10% loss arm for unscheduled disability. Claimant suffered a low back injury while doing heavy lifting. Claimant had had one prior back problem, which involved the area between the shoulders. Claimant complains of internal disorders resulting in loss of control of bladder and bowels. He testified that these symptoms came on right after the laminectomy. The Hearing Officer increased the award to 25% loss arm for unscheduled permanent partial disability. On review the Board concluded that the Bowel-urinary condition was one which required expert testimony to determine whether it was related to the accidental injury or surgery, and whether it was permanent. Accordingly, the matter was remanded for the further taking of evidence.

WCB #68-1227 January 24, 1969

Eunice Powers, Claimant.
Richard H. Renn, Hearing Officer.
Jason Lee, Claimant's Atty.
Lawrence J. Hall, Defense Atty.

Appeal from a determination awarding temporary total disability to June 5, 1968, and awarding no permanent partial disability. Claimant was injured in a fall. The Hearing Officer affirmed the determination. The request for review was dismissed by consent upon a stipulated settlement allowing an additional one-month's temporary total disability.

WCB #68-317 January 24, 1969

Larry J. Rogers, Claimant.
H. Fink, Hearing Officer.
Keith Burns, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 45% loss use arm. Claimant, age 23, pulled a muscle in his right arm while starting an outboard motor. Dr. Palmrose diagnosed "Traumatic myositis." Dr. Inahara found after testing, a complete obstruction and obliteration of the right axillary and subclavian vein. In November 1966, claimant was operated for insertion of a saphenous vein bypass graft of the right shoulder area. The bypass graft was inserted from the right axillary vein to the right internal jugular vein. The surgical procedure required a partial resection of the clavicle. Subsequently an examination by Dr. Hopkins revealed a weakness of grip of the right hand and a marked deformity in the right clavicle. He felt, claimant was suffering from a shoulder-arm syndrome of the right arm, secondary to vascular injury with subsequent non-union of the clavicle and capsular tendinitis of the shoulder. Dr. Hopkins recommended conservative treatment in the form of injections and indicated surgery may be required upon the clavicle at some later date. The Hearing Officer affirmed the determination. On review, "The Board concludes that the diminished circulation, defective clavicle and symptoms such as a stiff neck, constitute one of the unusual cases where the disability should have been evaluated both with respect to scheduled and unscheduled disabilities. In this connection the Board particularly notes that the report of Dr. Hopkins of January 30, 1968, was not before the Closing and Evaluation Division of the Board when the Determination was issued. The Board affirms the award of 45% loss of an arm for the arm, but modifies the order of the hearing officer by finding that the claimant also has an unscheduled injury for which a further award is made equal in degree to loss by separation of 30% of an arm"

WCB #67-912 January 24, 1969
and
WCB #68-347

Doris M. Fessler, Claimant.
John F. Baker, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

Consolidated hearing, 67-912 being a rehearing pursuant to a remand from the Board, and 68-347 being an appeal from a determination on an aggravation claim allowing additional permanent disability equal to 20% loss arm for aggravation resulting in a total award of 30% loss arm for disability resulting from the injury of August 24, 1966. The present issues pertain to additional temporary total disability and additional permanent partial disability.

Claimant sustained a low back injury while pulling a cart loaded with bags. Dr. Yeager's final diagnosis was chronic recurrent lumbosacral strain as a result of the injury of August 24, 1966. It is Dr. Kimberley's opinion that taking into consideration claimant's home situation, surgery is inadvisable. Otherwise, he would advise a spinal fusion, L-4 to sacrum. He evaluated her disability at 50% loss function of an arm. Dr. Kimberley believes that claimant is unable to do heavy work, but would be able to work as a waitress if she wore a back support. The Hearing Officer increased the award to 40% loss arm for unscheduled disability. No additional temporary total disability was allowed. WCB affirmed.

WCB #68-690 January 24, 1969

Don Farley, Claimant.
H. L. Pattie, Hearing Officer.
Tyler Marshall, Claimant's Atty.
Thomas A. Davis, Defense Atty.
Request for Review by Claimant.

Appeal from a denial pertaining to an elbow injury and appeal from a determination awarding 20% loss arm for low back difficulty. Claimant was knocked from a scaffolding and fell some 20 feet, landing on his back and elbows. The present back complaints are described as a limitation of back motion of about 20%. Claimant also suffers continuing disabling pain. The determination as to the back was affirmed. As to the elbow denial, the condition is diagnosed as an ulnar nerve palsy, which can develop without a history of unusual trauma. It does not appear that the elbow condition was reflected as a medical problem until at least seven months after the accident. The medical evidence connecting the elbow to the fall was equivocal. The denial was affirmed. WCB affirmed.

WCB #68-1204 January 24, 1969

Theodore M. Fake, Claimant.
H. L. Pattie, Hearing Officer.
Bernard Jolles, Claimant's Atty.
Robert E. Joseph, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 15% loss arm for a back injury. Claimant suffered successive back injuries on an obscure date in the Spring of 1966, while lifting and unloading quarters of beef. Only one claim has been filed, and it was accepted and there is no issue as to the exact date of the injuries and no attempt has been made to sort out the respective disabilities from the two injuries. The issue is the extent of disability from the combined injuries. There has been no back surgery and the treatment has been classed as conservative. Claimant now works as a bartender and must avoid heavy lifting. Claimant cannot sit for prolonged periods of time such as is required for over-the-road trucking. The Hearing Officer affirmed the determination. The Board affirmed.

WCB #68-949 January 24, 1969

Geanella V. Entler, Claimant.
H. L. Pattie, Hearing Officer.
Tyler Marshall, Claimant's Atty.
Donald McEwen, Defense Atty.
James A. Blevins for the Board.

This is a subjectivity hearing pertaining to Hemp, Inc. Hemp, Inc. seeks to fit under the exemption provided in ORS 656.027(3). The employer owned and operated a ten-unit apartment complex. Claimant was employed as a manager and her compensation consisted of her being provided with an apartment in which to live and her light bill being paid. The value of this was less than $80.00 per month. The Hearing Officer found that claimant was a casual employee, and that the employer's payroll was less than $100.00 per month. On review the Board reversed, commenting:

"The issue requires the interpretation of ORS 656.027 (3) and particularly whether the employer and this workman were nonsubject, since this was the only employe and this was the only wage paid. If non-subject, it would be so by virtue of the casual exemption. The ordinary definition of casual by its very nature excludes any regularity. The claimant urges that work by corporate officers and others extended beyond the limitation of $100 wages in 30 days. The Board concludes that this is immaterial in light of the regularity of the employment.

"This lady worked regularly, although for a small remuneration. Casual employment is spasmodic.

"ORS 656.027 provides all workmen are subject to ORS 656.001 to 656.794, except those non-subject workmen described in the following subsections:

'(1) A workman employed as a domestic servant in or about a private home. For the purposes of this subsection 'domestic servant' means any workman engaged in household domestic service.

'(2) A workman employed to do gardening, maintenance, repair, remodeling or similar work in or about the private home of the person employing him.

'(3) A workman whose employment is casual and either:
(a) The employment is not in the course of the trade, business or profession of his employer; or
(b) The employment is in the course of the trade, business or profession of a non-subject employer.

'For the purpose of this subsection, [casual] refers only to employments where the work in any 30-day period, without regard to the number of workmen employed, involves a total cost of less than $100.'

"Subparagraphs 1 and 2 do not apply in the instant case, because the claimant was employed as a manager of an apartment.

"We then have to look at subparagraph 3. In order to qualify as 'causal', there are two qualifications: a) The employment is not in the course of the trade business, or profession of his employer; or, b) The employment is in the course of the trade business or profession of the non-subject employer.

"The employment status in the instant case does not qualify under subparagraph (a), because the employment was in the course of the business of the employer. The business of the employer being owning and operating apartments.

"The instant case does not qualify under subparagraph (b), because obviously the employer is not a non-subject employer.

"The last paragraph of subsection (b) is as follows:

'For the purpose of this subsection, [casual] refers only to employments where the work in any 30-day period, without regard to the number of workmen employed, involves a total labor cost of less than $100.'

"If it was intended that employments of less than $100 per month were not to be subject to the law, there would be no need to have any mention of casual.

"Oregon's Workmen's Compensation Law has long been noted for having no minimum requirements to make employment subject. If the employment was subject as defined or described by the statute, one workman employed, regardless of other matters, made coverage mandatory.

"The 1965 Act brought employment, of the type with which we are concerned, subject to the law prior to this injury.

"The 1965 Act exempted casual employment but the final paragraph of subsection (b) makes even casual employment subject to the law if the work involves a total labor cost of $100 or more in any 30-day period, regardless of the number persons employed."

WCB #68-797 January 27, 1969

Cecil V. Groseclose, Claimant.
H. Fink, Hearing Officer.
E. B. Sahlstrom, Claimant's Atty.
Allan H. Coons, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing no permanent partial disability. Claimant, a 63-year-old painter, sustained a cervical spine strain when he slipped and fell at work and struck the back of his head against a concrete foundation. Presently claimant complains of constant pain in the head, neck, and back; loss of equilibrium, high blood pressure, and a hearing loss in the left ear. The Hearing Officer allowed an unscheduled award of 25% loss arm. On review the Board affirmed, commenting:

"The claimant has not favored the Board with any brief though he is represented by counsel. With 121 pages of transcript, 16 exhibits and 2 prior orders of record, a party failing to avail himself of the opportunity to be heard on issues arising therefrom is not completely exhausting his administrative remedies. The Board review of such matters, however, is no less thorough."

WCB #67-636 January 27, 1969

Clarence G. Rogers, Claimant.
H. Fink, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Richard W. Butler, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 30% loss arm for unscheduled disability. The Hearing Officer increased to 50% loss arm. On review the Board affirmed, commenting:

"Mr. Rogers sustained a strain in the upper lumbar area of his back on March 29, 1966. The strain was in the area which had been fused in 1947. During treatment subsequent to the accident of 1966, it was found that he had a crack or pseudoarthrosis in the fusion. As a result another spinal fusion was performed on July 14, 1966 which included one more vertebral body.

"The medical opinion represented in the record varies, as related to a conclusion on the amount of disability. Mr. Rogers reports continued difficulty. There is some medical opinion support for the prediction that Mr. Rogers will not be able to return to his regular work as a carpenter. On the other hand, the medical reports indicate uniformally that the refusion was effective in repairing the prior defect.

"As always, the intention of the claimant, (to the extent that it can be evaluated by his statements and demeanor on the stand) is of great importance in evaluating the effects of the injury on the ability to return to regular work. In this instance the Hearing Officer, balancing all of the factors contained in the record, determined that a fair award would be 50% loss of an arm in separation for unscheduled disability. After individual extensive review of

the evidence the members of the Board find no basis upon which that evaluation could be changed. This is also true of the allegation on review concerning temporary total disability. The Board therefore adopts the findings and conclusions of the Hearing Officer and affirms his order stated in this case."

WCB #68-143 January 27, 1969

Don S. Conner, Claimant.
John F. Baker, Hearing Officer.
C. H. Seagraves, Jr., Claimant's Atty.
Lyle C. Velure, Defense Atty.
Request for Review by Claimant.

The issue is whether there is a proper aggravation claim, and, if so, whether there has been unreasonable resistance or delay. The Hearing Officer found that claimant had failed to sustain the burden of proving the requisite casual relationship between the injury of April 13, 1966, and his recent condition which required medical care and treatment, including surgery. The Board affirmed, commenting:

"A laminectomy for a recurrent lumbosacral disc was performed on Mr. Conner at Medford, Oregon in December of 1967. The operation was in the same area of which a laminectomy had been performed in November of 1963. Subsequent to this 1963 operation, Mr. Conner continued to work in the construction business operating heavy equipment.

"On April 13, 1966, he suffered a wrench to his back while carrying a jack and was treated by an osteopathic physician until May 5, 1966. Then he was discharged, with his condition much improved, although he still complained of some minimal back pain.

"The main issue presented on this review is whether the operation of December, 1967, is the result of aggravation of his condition by the April 1966 accident. The Board concurs in the finding that insufficient evidence is contained by the record to justify a conclusion that the April 1966 accident was in fact causally related to the 1967 operation.

"After his discharge from treatment in 1966, the claimant continued to operate heavy equipment. Subsequent to the winter lay-off, he worked into 1967 until the middle of May. Not much difficulty with his back was experienced until after July, 1967. Under these circumstances, the findings and conclusions of the Hearing Officer are sustained and the order subjected to this review is affirmed."

WCB #68-533 January 28, 1969

Alvin L. Cole, Claimant.
Norman F. Kelley, Hearing Officer.
Harl Haas, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 5% loss use of the leg. Claimant fell backwards with his leg doubled underneath. Claimant suffered an injury to his knee. Claimant has a throbbing pain in his knee when he uses it a lot such as in bowling. Claimant enjoys bowling and generally bowls in two separate leagues. The Hearing Officer affirmed the determination and the WCB affirmed, commenting:

"Beyond this is a discussion in both briefs of parties urging doctors to assume the ultimate responsiblity of making the disability rating. The Board policy has been to discourage the doctor from making the ultimate rating and to seek from the doctor the findings in terms of loss of motion, loss of strength and similar factors which are factors in the determination of disability. The Board does not 'reject' reports of doctors containing disability ratings. The Board places more value on the findings of disabling factors and minimizes the assumption by the doctor of the ultimate Board function.

"The employer asserts that a double standard is in the making in that claimant's counsel promotes the practice of seeking ultimate percentage figures from doctors, while the employer and insurer attempt to follow the Board policy.

"It would be impractical to return or refuse to accept medical reports which contain a doctor's ultimate estimate of disability. No double standard will be tolerated nor will the Board condone a practice where the parties 'shop' for ratings to be 'averaged' or become the basis for bargaining."

WCB #68-683 January 28, 1969

Maurice Boles, Claimant.
George W. Rode, Hearing Officer.
Maurice V. Engelgau, Claimant's Atty.
Lynn McNutt, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 10% loss arm for unscheduled disability. Claimant fell into a mill pond striking his upper back on a log. Claimant, age 42, is suffering a stiff upper neck and back. He has difficulty lifting more than 15 pounds. Claimant has not sought any employment and has not been offered rehabilitation. Claimant has been picking ferns with his wife for about the past two months. Claimant's discussions with doctors herein indicated to him, that if he had an operation he could never resume the heavy work he had done previously. He is not interested in any operation that will improve his condition unless the operation will improve it sufficiently to enable him to do heavy work, since he feels that with his 3rd grade education anything less would not increase his earning power. The Hearing Officer increased the award to 25% loss of an arm for unscheduled disability. WCB affirmed.

WCB #68-1115 January 28, 1969

Melben Dollarhide, Claimant.
H. Fink, Hearing Officer.
C. H. Seagraves, Jr., Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 35% loss use of right leg. Claimant, a 35-year-old jitney driver, sustained a right knee injury which twice required surgery. The second surgery consisted of a right patellectomy. With the aid of a leg brace, claimant has been able to return to his regular employment. The Hearing Officer affirmed the determination. On review the surgery is described as the "removal of the kneecap." The Board affirmed.

WCB #68-671 January 28, 1969

Lila Johnson, Claimant.
Page Pferdner, Hearing Officer.
Garry Kahn, Claimant's Atty.
David C. Landis, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 5% loss function each leg. Claimant, a 37-year-old cook and counter girl, fell while carrying a pan of hot grease. She suffered various degrees of burns, primarily to her legs. Skin grafts were applied to the thighs and to the left leg and ankle. Recovery was generally good, but there is evidence that claimant will need to wear support hose for at least a year and there is a possibility that some keloid scars on the inner aspects of claimant's thighs will have to be removed someday. Claimant has made unsubstantiated complaints of weakness in her legs. The Hearing Officer directed the defendant furnish the support hose to the claimant as long as was necessary and affirmed the determination. The Board affirmed, noting that if the scars eventually needed treatment, they would be the proper subject of an aggravation claim.

WCB #68-1097 January 28, 1969

Charlie W. Owen, Claimant.
George W. Rode, Hearing Officer.
M. V. Engelgau, Claimant's Atty.
E. F. Malagon, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding no permanent partial disability. Claimant suffered an undescribed back injury. Claimant complains of back pain after working. The Hearing Officer awarded 10% of a workman as unscheduled disability. The primary contention was apparently that claimant was not medically stationary, but the Hearing Officer found that the treatments by the osteopath were palliative only. On review the Board affirmed the award of 32 degrees of disability.

WCB #68-2024 January 28, 1969

Howard Eveland, Claimant.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether a workman and his employer who were not subject to the Workmen's Compensation Law in December of 1963, can be brought under the continuing jurisdiction of the Workmen's Compensation Board by virtue of the general overhaul of the law by the 1965 Act.

"While the Supreme Court has granted broad scope to the former State Industrial Accident Commission and now the Workmen's Compensation Board with respect to continuing jurisdiction over claims which were established as subject claims in the first instance, there appears to be no legal basis upon which the Workmen's Compensation Board could in 1969 assume jurisdiction over a claim for injuries incurred in 1963, when neither the employer nor workman were subject to the compensation law."

WCB #68-213 January 29, 1969

Clifford Fagaly, Deceased.
H. L. Seifert, Hearing Officer.
F. P. Stager, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.

Appeal from a notice of denial. Decedent, a 55-year-old restaurateur, suffered a heart attack and died in the kitchen of his restaurant. Decedent was making a pie, when his wife came back to talk to him about 10:30 a.m. and noticed that he put his hand on his head and looked pale. He fell into her arms and died instantly. He had worked from 9 a.m. to midnight the previous day. Claimant had suffered a mild heart attack in 1964. There was no evidence of any special exertion, either on the day of claimant's death or on the day before. The Hearing Officer found no medical causation. The Board affirmed, commenting:

"The claimants assert that the work tensions or wear and tear of engaging in the deceased's chosen work of operating his restaurant from his attack in 1964, until the fatal attack of December 20, 1967, constitute a basis for awarding compensation.

"The issue to be decided is whether or not the deceased suffered an accidental injury that resulted in his death. It is necessary that there be both legal causation and medical causation in order for the claim to be compensable. Coday v. Willamette Tug & Barge, 86 Adv 751, 440 P2d 224. There was an unfortuante result but the hearing officer did not find nor does the record reflect any exertion on December 19 or December 20, 1967, which is said to have been a material contributing cause of that result. Olsen v. SIAC, 222 Or 407, 352 P2d 1906."

WCB #68-1571 January 29, 1969

Charles H. Petersen, Claimant.
H. L. Seifert, Hearing Officer.

The Hearing Officer dismissed the Hearing as not timely filed.

The Board remanded, commenting,

"The Claimant asserts that ORS 656.283 grants an aggrieved party the right to hearing. He is in error in asserting that the right is absolute. ORS 656.319 (1) recites that a hearing shall not be granted and the claim is unenforceable unless filed within certain times among which limitations extend variously for one year from the date of the accident, one year from the date of last provision of medical services or disability payments and six months after the removal of mental incapacity. It should also be noted that ORS 656.319 (2) grants rights to hearing for 60 days after a denial. If the claim becomes unenforceable pursuant to ORS 656.319 (1) does a subsequent denial by the employer revive the claim to then permit a hearing on the denial?

"These various questions require a record from which a decision can be made. Even if a full hearing is not permitted by law, the questions of whether medical services have been provided, whether compensation has been paid, whether the employer had actual knowledge of the injury and whether the claimant was mentally incompetent must be resolved of record if these facts are necessary to a determination of the timeliness of notice or timeliness of requesting a hearing."

WCB #67-1283 January 29, 1969

Ben C. Flaxel, Claimant.

As previously reported this claim was ordered accepted by the Hearing Officer. The Board subsequently reversed on December 20, 1968. In the interim the Department had submitted the claim to the Board for a determination which was issued on December 13, 1968. The claimant sought hearing on the State Compensation Department delay in seeking the determination, for failure to pay pending review and for a hearing on the determination. The Board solved this problem by cancelling the determination. The problem is that if the determination had not been protested now, in the event that the claim was ultimately found compensable, the determination might be final and binding, no timely appeal having been made.

WCB #67-892 January 30, 1969

Robert L. Hanlon, Deceased.
Norman F. Kelley, Hearing Officer.
Jack L. Kennedy, Claimant's Atty.
Quintin Estell, Defense Atty.
Request for Review by Beneficiaries.

Appeal from a notice of denial. The Hearing Officer affirmed the denial. On review the Board affirmed, commenting:

"The decedent worked for a scrap metal company. The claim is based upon effort expended at work between Monday, May 29, 1967 and Wednesday, May 31. No work was performed on Memorial Day. The decedent collapsed and died just before 2:00 p.m. while working. He had exhibited signs of the coronary insufficiency over the several days. The work effort in which he engaged on the day of his death is unknown and subject to surmise and conjecture.

"The claimant cites the Olson and Kehoe cases. The test, in those cases, was whether there was any evidence to support the verdict. With conflicting medical evidence, a contrary decision would also have been sustained. The basic consideration must turn upon the expert medical testimony with respect to whether whatever effort may have been expended was a material contributing factor to the occulusion.

"The medical evidence supporting the claim is from a Dr. Rozendal, who is a general practitioner and Benton County Health Officer. The expert medical evidence relied upon by the State Compensation Department was provided by Dr. Crothers, a specialist in internal medicine. It is Dr. Crothers' opinion that it is unlikely that the work effort in this instance contributed to the death.

"The Board, in nowise disparaging Dr. Rozendal, recognizes that there are honest differences of opinion in the medical profession on the relation of effort to coronary occlusion. The Board must consider each case upon its own merits and weigh the qualifications of the respective experts as it weighs the evidence in its totality. It appears that, in this particular field, Dr. Crothers has the greater expertise and from this consideration the Board concludes that the decedent did not suffer a compensable injury arising out of his employment."

WCB #68-1078 January 30, 1969

Mary Etta McDonald, Claimant.
H. Fink, Hearing Officer.
C. H. Seagraves, Jr., and Jesse Calvert, Claimant's Attys.
Allan H. Coons, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant, a 51-year-old medical records clerk, alleges a gradually onsetting back injury from putting files on shelves. The shelves were open and no filing cabinets were provided. Claimant was ultimately operated on for the removal of a ruptured disc. The Hearing Officer affirmed

the denial of the claim. The Board reversed and ordered the claim accepted, commenting:

"The concept of accidental injuries is that to be compensable the disability must result from a cause, the time and place of which can be fixed with a reasonable degree of certainty. Where a part of the body gives way after a period of minor trauma, it is more difficult to ascribe the injury to the employment or to place the injury within the classical concept of an accidental injury.

"There is testimony from the claimant in this particular instance which relates that the symptoms experienced from stooping activity on the last day of employment were different in character than those previously suffered.

"Whether the analogy of a wire which gives way after prolonged series of bending motions may not be completely applicable from the standpoint of scientific physics and anatomy, it would appear that when the wire or physical structure gives way from the last bend, it cannot be denied that the last bend was a contributing material factor.

"From this analogy or merely acceptance of the fact that the physical activity on the last day imposed a disabling injury as opposed to prior symptoms of injury, the Board concludes that in the facts of record before the Board the claimant suffered a compensable accidental injury as alleged."

WCB #68-1219 January 30, 1969

John Mofford, Claimant.
Forrest T. James, Hearing Officer.
Request for Review by the Department.

Appeal from a determination awarding 15% loss use right foot. Claimant suffered a right foot and ankle injury when a shovel loader ran over his right foot. He suffered a crushing injury to his foot with minor fractures of the phalanges which have since healed. The most recent X-rays reveal some bony debris distal to the tip of the lateral malleolus. Claimant presently has a full-range of motion in the ankle but walks with a limp. The Hearing Officer increased the award to 35% loss use right foot. The Board affirmed, commenting:

"Though the claimant was able to return to his former employment, he walks with a limp which becomes progressively worse during the day. The claimant is unable to fully lace his shoe and splits the shoe to make it bearable. In addition the foot and ankle swell with use of the member. The condition is thus one in which the apparent disability would differ when examined under optimum clinical conditions as contrasted to examination after a period of use during normal working conditions."

WCB #68-183 January 30, 1969

Walter J. Noah, Claimant.
H. L. Seifert, Hearing Officer.
Don J. Wilson, Claimant's Atty.
Earl Preston, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 15% loss function left leg. Claimant, a 30-year-old logger, suffered a comminuted fracture, when his leg was struck by a log. Six months after the injury there was excellent motion in the left knee with some tenderness above the left upper fibula. The knee was stable, and claimant was authorized to walk on a level floor without use of a long leg brace. The fracture was at the lateral tibial plateau into the knee joint. Some time after this examination, the knee bolt was removed and claimant now walks with a slight limp with an impairment of knee motion of 6%. Claimant is now working in a mill, and his primary difficulty with the knee pertains to walking on rough ground and jumping. The Hearing Officer affirmed the determination. WCB affirmed.

WCB #68-871 January 30, 1969

Albert H. Workman, Claimant.
George W. Rode, Hearing Officer.
Thomas E. Sweeney, Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for Review by Claimant.

Appeal from determination allowing no permanent partial disability. Claimant suffered a low back injury while lifting a 40-pound object. The injury occurred on April 14, 1967 and claimant was found medically stationary on July 10, 1967. There is no evidence that any other than occasional palliative care may be indicated. There was evidence of low work motivation on the part of the claimant. The claimant also suffered from unrelated non-occupational bronchitis. The determination was affirmed. WCB affirmed.

WCB #68-1539 January 31, 1969

Jennie L. Claridge, Claimant.
Request for Review by Claimant.

The Hearing Officer dismissed the request for hearing as not being requested within one year after the determination, which was mailed on August 16, 1967. The request for hearing was received by the Board on September 20, 1968. The dismissal was affirmed by the Board with the suggestion, that if claimant's condition had become worse, an aggravation claim was a possible remedy.

WCB #68-1780 January 31, 1969

Edgar R. Burton, Claimant.
Request for Review by Claimant.

Board affirmed dismissal, where request for hearing was more than 60 days after a denial by the Department.

WCB #68-1149 January 31, 1969

Fredrick J. Licurse, Claimant.
J. David Kryger, Hearing Officer.
Alex Byler, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

Claimant was injured on October 19, 1965. Claimant failed to request a hearing within 60 days from the closing order as required by statute for injuries occurring under prior law. On Hearing, claimant made a constitutional argument that it was denying equal protection of the laws to give those injured after 1965, a different time in which to request a hearing than those prior to the 1965 Act. The constitutional argument was rejected. The Board affirmed, commenting:

"The claimant's injury occurred October 19, 1965. As such the responsibility for the claim was vested in the then State Industrial Accident Commission and its successor, as an insurer, the State Compensation Department. Though the State Compensation Department is basically a state operated insurance carrier as to accidents following January 1, 1966, the agency does retain certain quasi-judicial functions to hear, rehear and defend its decisions with respect to all claims arising prior to January 1, 1966. This includes the right of the claimant on appeal to trial by jury.

"Claimants so affected are given 60 days from such an order of the State Compensation Department after January 1, 1966, to elect between the jury or board review. The claimant in this case made no election, following the order of the State Compensation Department of May 7, 1968, until July 10, 1968. His election was to request a hearing before the Workmen's Compensation Board. The matter was dismissed by the hearing officer as untimely filed.

"The claimant argues upon review that where a claim is evaluated by the Workmen's Compensation Board pursuant to ORS 656.268, the claimant has one year to request a hearing. The claimant then argues that granting only 60 days for an election of remedies with respect to a State Compensation Department order is unconstitutional as a violation of equal rights provisions. The argument is that the same time should be permitted for hearing on an award by the insurance carrier as on a decision by the Workmen's Compensation Board."

WCB #68-588 January 31, 1969

Wayne McCaulley, Claimant.
J. David Kryger, Hearing Officer.
Tyler Marshall, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant.

This is an aggravation claim. As the result of a May 17, 1966, injury, claimant has been awarded permanent partial disability equal to 100% each to the right index finger, the right middle finger, right ring finger, and right little finger--all loss by separation. Additionally claimant was awarded 80% loss right thumb due to loss of opposition, 20% loss function of left third finger, 15% loss function left fourth finger, and 15% loss function right arm. The aggravation claim alleges aggravation of the shoulder and neck. The Hearing Officer held that an aggravation claim had not been perfected as to the neck, but had been as to the upper back and shoulder. The Hearing Officer found that claimant was suffering disabling pain in the upper back and awarded 15% loss arm due to aggravation of his preexisting upper back condition. Claimant was seeking an unscheduled award for his shoulder difficulty. The Hearing Officer noted that the 15% loss function arm award previously allowed was for the shoulder, and the mere fact that it should have been termed unscheduled did not mean that an unscheduled award should now be allowed. On the question of whether a shoulder disability should be scheduled or unscheduled, the Hearing Officer commented:

"This Hearing Officer has previously held that the shoulder area was a scheduled rather than an unscheduled disability (C. J. Tourville, WCB Case No. 67-301)." (I VanNatta's Comp. Rptr., P. 47) "The Tourville case, supra, was affirmed by the Workmen's Compensation Board, but on appeal to the Circuit Court, Judge Loren Hicks stated, 'The shoulder is an unscheduled part of the human body under Chapter 656 of the Oregon Revised Statutes. An industrial injury to the shoulder that results in a permanent partial disability in the shoulder entitles the workman to an award for unscheduled permanent partial disability. An industrial injury to an arm that causes an indirect injury to the shoulder and that results in a permanent partial disability in both the arm and the shoulder entitles the workman to separate awards.'"

WCB #68-516 January 31, 1969

John W. Viles, Claimant.
H. L. Pattie, Hearing Officer.
Edwin A. York, Claimant's Atty.
A. G. Owen, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 20% loss arm for unscheduled disability. Claimant, a 48-year-old telephone installer, suffered back and abdomen injuries, when his ladder slipped. Claimant had a previous injury to his dorsal back in 1952. Claimant's condition is fairly good. His biggest problem is that he now cannot long stand in climbing spurs. His doctor has advised him to

avoid strenuous lifting or climbing. The Hearing Officer affirmed the determination. There was substantial discussion which indicated that claimant had considerable preexisting disability, possibly related to his prior dorsal back injury. WCB affirmed also.

WCB #67-1459 January 31, 1969

Dorothy C. Vallance, Claimant.
Page Pferdner, Hearing Officer.
A. T. Murphy, Jr., Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

Appeal from determination awarding no permanent partial disability. Claimant, a 27-year-old nurse's aide, suffered a chronic neck strain, when a patient grasped her head. Claimant has various bizarre symptoms including aches and pains in the thighs, legs, and toes, also nausea and vomiting. There were no objective symptoms. The Hearing Officer affirmed the determination. On review the Board comments on the gross confusion of the procedural aspects of the case, as well as the facts. The Board affirmed.

WCB #67-1007 February 3, 1969

Marlin Williams, Claimant.
John F. Baker, Hearing Officer.
M. F. McClain, Claimant's Atty.
John E. Jaqua, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial of a heart attack claim. The Hearing Officer affirmed the denial of the claim. On review the Board affirmed, commenting:

"The above entitled matter involves the compensability of a heart condition diagnosed as an acute subendocardial infarction related to arteriosclerosis and narrowed coronary arteries.

"The alleged work association involved an episode on the evening of May 23, 1967, in trying to angle a dozer blade. Another episode of pain self-diagnosed as gas pains was experienced the morning of May 24, 1967, in removing the floor board from a piece of equipment. The claimant's condition was such that he drove to camp that afternoon and made out a temporary will. The claimant was first seen by a doctor on May 25, 1967.

"Again the issue becomes one of legal and medical causation. One would assume that from some of the work performed, the evidence would sustain a legal causation and the decision must rest upon medical causation to be determined in each case by the facts of that case and the expert medical evidence with relation to the medical causation."

"The record reflects diverse medical opinions which is often noted in such cases with the basic conflict over the role of effort when an artery, being gradually narrowed by natural processes of aging, hardening and narrowing due to deposits, becomes occluded.

"The Board, in weighing the reports of the respective doctors, notes that the reports of Dr. Miller are far more definitive in discussion of the relationship of the work effort to the cardiac problem. The record also reflects an additional 24 pages of examination and cross-examination of Dr. Miller. Though Dr. Wagner was not available for examination, the issue is largely one of opinion evidence. The claimant elected to proceed without Dr. Wagner and now requests a remand to obtain his testimony. The Board concludes that the matter was adequately heard.

"The Board concludes and finds that the claimant's problem was one of natural progression of the claimant's degenerative arteriosclerosis and that the infarction, for which claim was made, was not caused or compensably influenced by work activity of May 23 or May 24."

WCB #68-1984 February 3, 1969

Joseph Frank Guse, Claimant.

This matter presents the procedural issue of whether a person convicted of a felony and imprisoned in the state penitentiary as a result thereof, is entitled as a matter of law to have a hearing or Board review of an order of the Workmen's Compensation Board issued pursuant to ORS 656.268. The claimant urges that the decision of the Supreme Court in Boatwright v. SIAC, 244 Or 140, is limited to action in the Circuit Court. The Board directs attention to ORS 137.240 upon which the Boatwright decision was founded. That section of the law suspends the political and civil rights of a person imprisoned in the state penitentiary. Accordingly, it was found that the claimant was not entitled to an adversary proceeding pertaining to his claim. The Board policy has been to require employers and insurers to pay whatever compensation appears to be due to a claimant regardless of imprisonment. The Board also administers claims of such persons as provided by ORS 656.268. Beyond that point, the Board concludes that ORS 137.240 operates to bar hearing and review.

WCB #67-1294 February 4, 1969

R. L. Clower, Claimant.
John F. Baker, Hearing Officer.
Hal F. Coe, Claimant's Atty.
Robert D. Puckett, Defense Atty.

Appeal from a determination awarding 60% loss arm for unscheduled disability. Claimant is a 56-year-old logger who sustained a low back and right foot injury, when he was thrown into the air as a falling tree struck the end of the log opposite the end on which he was standing. Claimant alleges total disability. Claimant has an eighth-grade education with no special skills or training outside of heavy manual labor. Claimant owns a bar, which he helps operate

in the early morning for a couple of hours. He is unable to work a full-shift, helping to run the bar. Claimant attempted janitorial work, but had to give it up. The Hearing Officer awarded total disability. On review the Board remanded without reversing, commenting:

"There is a paucity of medical information in the record received from the hearing officer. It is inconceivable to the Board that a claimant injured severely enough to be classified as unable to work regularly at a gainful and suitable occupation without more medical reports than were made available to the Board. It is now three years since the accident.

"The Board is not satisfied that this matter was completely heard or sufficiently developed. The Board notes that its own records contain additional matters which should have been, but were not, incorporated in the record.

"The matter is therefore remanded to the hearing officer for the purpose of obtaining further evidence. Prior to hearing the claimant is to be referred to the back clinic maintained by the Physical Rehabilitation Center of the Workmen's Compensation Board for a work evaluation. The expense of the reference to and maintenance at the Center is to be borne by the employer.

"No alteration is intended or made in the order of disability subjected to appeal and compensation shall continue to be paid thereunder pending further order in the matter.

"The compensation, not having been reduced by this review requested by the employer, claimant's counsel is awarded the sum of $250 payable by the employer for services on review pursuant to ORS 656.382 (2)."

WCB #67-901 February 4, 1969

Nadine J. Firkus, Claimant.
J. David Kryger, Hearing Officer.
Frank Pozzi, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 10% loss arm for unscheduled disability and 5% loss function of the right arm. Temporary total disability was allowed to April 19, 1967. Claimant was injured in a fall in which she struck her head and shoulders on the ground. The immediate diagnosis was a "ligamentous sprain of the cervical spine -- contusions of occiput -- possible cerebral concussion." There was considerable evidence of psychological problem. Dr. Cherry recommended that the claim not be closed until psychiatric treatment was accomplished. This was recommended on January 23, 1967. It was not until December 8, 1967, that an examination was made for this purpose. The Hearing Officer ordered additional temporary total disability through December 4, 1967. Dr. Mighell reported a medical-causal relationship between the claimant's emotional disturbances and her industrial injury. The Hearing Officer allowed no additional permanent partial disability. On review the Board affirmed, commenting:

"The claimant has emotional problems. Her injuries, which otherwise might long ago have been resolved, continue to occupy a disproportionate facet of claimant's life. Medically, it appears the emotional condition is a continuing part of the total picture. The dilemma faced in such claims is that on the one hand the claimant may need further care, but on the other hand, the maintenance and continuation of the claim as the focus of her existence is one of the prime factors in preventing her recovery. Under the circumstances, the disability is not permanent and it is only the maintenance of contention itself that the disability continues.

"The Board concludes that if closure of the claim is part of the therapy, such closure is in order. It would be a sad result if the very administrative machinery designed to aid the workman became the trap to increase and perpetuate otherwise non-existent disability."

WCB #67-1562 February 4, 1969

Carl Edward Larson, Deceased.
H. L. Seifert, Hearing Officer.
F. P. Stager, Claimant's Atty.
Quintin B. Estell, Defense Atty.
Request for Review by Beneficiaries.

Appeal from a notice of denial. Claimant died of a coronary thrombosis while preparing to hose down a conveyor belt on a rock crusher. There were no witnesses to claimant's passing, but his normal duties involved merely supervising the operation of a rock crusher. Periodically it was necessary to hose out the conveyor with a high pressure water hose. Claimant's body was found with the hose, the water being partially turned on. Claimant was 55 years of age. There was also evidence that claimant may have lifted a 46-pound item a few minutes prior to death. The medical evidence was, as usual, conflicting. The claimant's doctor found a relationship to the work; the defendant's doctor did not. The Hearing Officer affirmed the denial of the claim. The Board affirmed, commenting:

"The claimant's brief asserts that finding a workman dead at the place of employment raises an inference of death from accidental injuries. If the workman is found dead from accidental injuries some inference may be drawn with respect to course of employment. However, in such cases, the premise requires that the workman be found to have died from accidental injuries before engaging in the inference. There is no inference or presumption that a person died from an accidental instead of natural death in coronary cases."

WCB #67-1142 February 4, 1969

John H. White, Claimant.
J. David Kryger, Hearing Officer.
Richard Kropp, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 10% loss arm for unscheduled disability. Claimant was knocked unconscious when he was struck on the back of the "hard hat" by a 300-pound crane boom. Presently the claimant complains of pain in his low back, commencing at the belt line and extending out to his hips. Activity exacerbates this pain, and the pain is most acute when rising from the sitting position. Claimant is unable to work in his yard for more than 10 to 15 minutes without resting. He is unable to lift 25 pounds and carry it more than 100 feet without back pain and leg weakness. Walking over five blocks in distance results in fatigue and a limp. Claimant has a stiff neck. Claimant has not returned to work since the injury, but is drawing unemployment compensation, although he indicates that he would be able to function only in light work such as a salesman. The right side of claimant's face below the right eye and down the side of his nose to and including his upper lip is numb. The Hearing Officer increased the award to 40% loss arm for unscheduled disability. Leg and visual complaints were excluded as not related to the injury at issue. Uris v. SCD, 247 Or 420, 427 P2d 753, 430p2d861. WCB affirmed.

WCB #68-826 February 4, 1969

Fred K. Tonkin, Sr., Claimant.
Norman F. Kelley, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Fred T. Smith, Defense Atty.
Request for Review by Claimant.

Appeal from determination awarding 25% loss function left foot. Claimant, while working as a faller and bucker, suffered a fracture of the distal third of the left tibia and fibula, when he was struck by a rolling stone. Claimant presently has considerable difficulty getting around on the rough ground as is required of a faller. Claimant previously worked as a "busheler," but now must work the slower pace of a day wage earner. The Hearing Officer affirmed the determination. WCB affirmed.

WCB #68-700 February 5, 1969

Edward K. Sommerfelt, Claimant.
Mercedes F. Deiz, Hearing Officer.
Herbert B. Galton, Claimant's Atty.
Thomas Wolf, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 50% loss arm for unscheduled disability. Claimant twisted his low back, when he stepped in a hole while carrying a ladder. Claimant, age 59, was a carpenter by trade with an eighth grade education. The objective findings were minimal. Defendant's investigator spent seven hours taking 5 minutes of motion picture film of claimant's fishing expedition. The movies showed claimant sitting in a folding chair at the water's edge and casting his line four or five times. Psychological testing indicated that claimant was probably psycholgically retired from the active work force. The Hearing Officer increased the award to 65% loss arm. On review the Board commented that the award was probably liberal, but did not reduce it. Claimant was seeking permanent total disability.

WCB #68-542 February 5, 1969

Herb M. Gullixson, Claimant.
H. L. Pattie, Hearing Officer.
E. A. York, Claimant's Atty.
A. G. Owen, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding no permanent partial disability. Claimant sustained a fracture at the base of the fifth metatarsal bone, when he fell on a loading ramp. Claimant has an incessantly sore foot with some pain radiating into the thigh. Claimant has a full-range of painless motion in the ankle and toes and normal circulation and sensation. No swelling was observed upon the medical examination by several doctors. Claimant walks with a limp. The Hearing Officer concluded that the radiating pain into the leg was not sufficient to sustain a leg award and accordingly awarded 20% loss function of left foot. WCB affirmed.

WCB #68-1064 February 6, 1969

Mildred F. Cleveland, Claimant.
H. Fink, Hearing Officer.
L. M. Swanson, Jr., Claimant's Atty.
E. M. Preston, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant seeks compensation for creeping numbness of the face which extended gradually over the shoulder arm and side. The diagnosis was "cervical cephalgia and left shoulder arm syndrome." Claimant was working, sorting moulding, no piece of which would weigh over four pounds. The Hearing Officer found that the medical connection was inadequate and affirmed the denial. The Board affirmed, commenting: "It is interesting to note that at one time the claimant related the problem to inhalation of certain fumes."

WCB #68-645 February 6, 1969

Raymond R. Hastings, Claimant.
Page Pferdner, Hearing Officer.
Quintin B. Estell, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant, age 31, alleges a low back injury. Claimant had a history of at least 18 hospital admissions. Claimant had claimed to have low back injuries on at least two prior occasions. The record is not clear, but the Hearing Officer concluded that the alleged unwitnessed accident while under a car never happened. Accordingly, the denial was affirmed. The request for review was dismissed for want of service on the State Compensation Department when requesting review. It also appeared that claimant had moved and left no forwarding address at the time of the review.

WCB #68-151 February 6, 1969

Kathryn Hutson, Claimant.
Mercedes Deiz, Hearing Officer.
Gerald Hayes, Claimant's Atty.
Scott M. Kelley, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 10% loss arm for unscheduled disability. Claimant tripped over a telephone cord and landed on her tailbone. A myelogram was negative and claimant was discharged from the hospital with a diagnosis of acute lumbar strain. Claimant now has a nagging backache. X-rays indicate a slight thinning of the fifth intervertebral disc space and the probability of a defect of the pars inarticularis at L5-S1. Claimant had a prior back injury from an automobile accident. The Hearing Officer affirmed the determination. A further factor is found in reports such as that of Dr. Schuler who recites a "voluntary restriction of straight-leg raising." WCB affirmed.

WCB #68-730 February 6, 1969

Neils Simonsen, Claimant.
Mercedes F. Deiz, Hearing Officer.
Don H. Joyce, Claimant's Atty.
J. F. Larson, Defense Atty.
Request for Review by the Department.

Appeal from a notice of denial on a heart attack victim. Claimant was a 64-year-old shovel and backhoe operator. Claimant was operating an antiquated cable controlled backhoe which required considerable manual effort on the levers, as there was no power assist on the controls. Claimant worked through the morning and took a half hour lunch break. Upon attempting to climb back on the machine, claimant suddenly felt "drain." The Hearing Officer concluded that claimant's work activity met the test of Coday v. Willamette Tug and Barge, 86 Adv 751, and ordered the claim accepted. The Board reversed, finding that the medical causation failed to meet the standard of proof required.

WCB #68-577 February 6, 1969

Norbert Otto, Claimant.
J. David Kryger, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Lawrence Hall, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 15% loss arm for unscheduled disability. Claimant injured his low back in a fall. Claimant also suffers from degenerative intervertebral disc disease. Dr. Kimberley found a "posterior osteoarthritic lipping" on L5 and recommended a spinal fusion. The Department expressed the urge to deny the claim, suggesting a hearing that the disability was all related to the disc disease. The Board commented: "Any issue rising to the dignity of questioning the claim per se which would require a denial by the employer or State Compensation Department should be formally denied by the party rather than by implication through counsel." The determination was affirmed.

WCB #67-626 February 6, 1969

Walter M. Morris, Claimant.
J. David Kryger, Hearing Officer.
D. R. Dimick, Claimant's Atty.
Eldon Caley, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 20% loss function left arm. Claimant, a 50-year-old logger, was struck on the left shoulder, arm and back by a falling log. Dr. Babbitt diagnosed multiple fractures of the left clavicle, multiple fractures of the left radius and left ulna, multiple rip fractures and severe contusions and abrasions of the left upper lumbar and flank. Claimant now has good shoulder function, but restricted motion in the forearm. Claimant has attempted to return to the woods but was laid off because of inability to perform duties required. Claimant's back bothers him also. The Hearing Officer increased the award for the arm to 30% loss function left arm. The Hearing Officer allowed 10% loss arm for unscheduled back disability. Also the Hearing Officer assessed penalties and attorney's fees against the nonpayment of temporary total disability pursuant to the determination. It appears from the record that the determination allowed temporary total disability for a period of some six months longer than the department actually paid. 25% penalties and a $500.00 attorney's fee was assessed. On review the Board affirmed.

WCB #68-522 February 7, 1969

Buddie L. Puckett, Claimant.
Norman F. Kelley, Hearing Officer.
Leeroy O. Ehlers, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant was employed as a choker setter. Claimant describes the onset of low back pain after stringing some rigging in difficult terrain. Claimant worked the rest of the day without complaint. Claimant reported for work the next day, but quit before working without telling the employer why. Claimant had a previous fusion in 1963, for which he had been awarded 60% loss function of an arm. Claimant did not mention the alleged back injury to his employer, when he picked up his pay check. The denial was affirmed. WCB affirmed.

WCB #69-36 February 12, 1969

Cynthia R. Brewer, Claimant.

Claimant's back claim was denied October 30, 1968. A request for hearing was received by the State Compensation Department on December 26, 1968. The Department returned the letter, and a request for hearing was not directed to the Workmen's Compensation Board until January 6, 1969. The Hearing Officer dismissed the request for hearing and the Board affirmed.

WCB #68-684 February 13, 1969

Henry L. Jones, Claimant.
Forrest T. James, Hearing Officer.
Dong G. Swink, Claimant's Atty.
Allen G. Owen, Claimant's Atty.
Request for Review by Department.

This is an aggravation claim. The claimant injured his low back on July 18, 1967. The determination allowed no permanent partial disability, but a subsequent hearing awarded permanent partial disability equal to 15 degrees. Claimant thereupon unsuccessfully attempted to return to work. After working a couple of days, claimant went to the doctor who suspected a herniated disc and requested that the claim be reopened, as he related the condition to claimant's previous back injury. The Department took no action with respect to the claim except to oppose the claim at the time of hearing. The Hearing Officer found the claimant's condition to have been compensably aggravated and assessed penalties and attorney's fees pursuant to ORS 656.262 (8) for unreasonable resistance. On review the Board affirmed, commenting:

"The only interpretation of the aggravation provisions of the 1965 Act by the Supreme Court to date is found in Larson v. SCD, 87 Adv 197. In that case, the State Compensation Department had denied a claim and the Supreme Court upheld the award of attorney fees. The law is not clear with respect to

how a claim for aggravation is processed. The Supreme Court indicates a claim must be 'filed.' The law is clear in ORS 656.271 (2) in requiring a request for hearing on increased compensation to be filed.

"The order of the hearing officer and briefs in the instant case make no mention of the Administrative Order of the Workmen's Compensation Board No. 5-1966, relating to rules of procedure adopted pursuant to ORS 656.726, adopted and published and of record with the Secretary of State since May 4, 1966. Rules 7.01 to 7.04 are as follows:

7.01 Where subsequent to the last award or arrangement of compensation there is an aggravation of disability resulting from a compensable injury, the law indicates aggravation claims should be initiated by a request to the Board for hearing accompanied by a medical report that there are reasonable medical grounds for the claim (ORS 656.271). The Board contemplates many such claims will be accepted by the employer or the Department without objection. Unless there is a question about the expiration of aggravation rights, claim for aggravation should be made to the employer or Department as for an original claim. The employer or Department shall, within 5 days, notify the Board of the filing of such aggravation claims. If the employer or the Department accepts the aggravation claim, it should notify the Board, and when the condition is again stationary requests should be made for disability determination. If the claim is denied the workman should then proceed to request hearing by the Board.

7.02 The employer or department shall, within 60 days, notify the workman and the Board whether such claims are accepted or denied.

7.03 All claims of aggravation accepted by the employer or department shall be referred to the Board for disability evaluation as provided for original determinations as set forth in these rules.

7.04 All claims of aggravation denied by the employer or department are subject to hearing and review by the Board upon request of the workman.

"It appears to the Board from the record that the present policy of the State Compensation Department is that it has no duty to act upon receiving a claim for aggravation. This may have been prompted by the Larson case (supra) in which a denial resulted in assessment of attorney fees. The Board is advised that the Larson claim is again before the Supreme Court and that a further decision therein might have some bearing upon this case. The foregoing rules of the Board do impress a duty upon employers and insurers including the State Compensation Department to act. ORS 656.262 (1) provides, 'processing of claims and providing compensation for a workman in the employ of a contributing employer shall be the responsiblity of the department.'

"There is a further factor in the processing of aggravation claims which should be noted. The law contemplates that hearings 'if necessary, be scheduled within 30 days after mailing of the notice of request.' The record does not reflect the reason for delay in this case. The legislative intent to expedite hearings on aggravation claims must be given effect by an administrative priority for scheduling such hearings."

"On the merits, the Board recognizes that the State Compensation Department had good reason to inquire whether the reoccurrence of the back problem might have resulted from a new injury. However, the Board finds that the State Compensation Department failed to fulfill its responsibility of processing the claim. The Board also finds that the claimant suffered a compensable aggravation as alleged and that the aggravation did not constitute a new and independent intervening accident."

WCB #68-419 February 14, 1969

Loretta M. Rawlings, Claimant.
George M. Rode, Hearing Officer.
W. A. Franklin, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

This case pertains to the computation of temporary total disability. Claim is being paid benefits applicable to a single person. She seeks to be paid the rate of a divorced person with two children. It appears that the claimant was divorced in 1960, and was awarded the custody of two minor children. She was also awarded support, but this has never been paid and never will be. Claimant's former husband is now 65 and claimant is receiving Social Security benefits for the minor children in the amount of $87.50 per month. Claimant remarried in 1966. Claimant's new husband never contributed to the support of the children, and since just prior to the claimant's injury, has been a resident of the Oregon State Penitentiary. ORS 656.210(9) provides for increased compensation if the workman is a divorced person or one who has been deserted. Here the claimant is married and not deserted and her husband is not an invalid, hence she is not entitled to increased compensation. WCB affirmed.

WCB #68-1132 February 14, 1969

Vaughn L. Kuhnhausen, Claimant.
Page Pferdner, Hearing Officer.
Donald Atchison, Claimant's Atty.
Scott M. Kelley, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding no permanent partial disability. Claimant suffered a neck and shoulder strain. Dr. Patton found some disability. Dr. Schuler found no impairment. The Hearing Officer awarded 15% loss arm for unscheduled disability. On review the Board set aside the award, commenting:

"Any award for injury after July 1, 1967, should have been expressed in degrees upon the basis of a maximum of 320 degrees by comparing the workman's disability before such injury and without such disability.

"The hearing officer cites Lindeman v. SIAC, 183 Or 245, to support a hypothesis that loss of capacity to earn is the basis for compensation. This was dicta in the Lindeman case since the issue of the basis for arriving at disability awards was not before the Court. The Oregon law measures physical

disability and not earning capacity. The workmen in the violinist-ditchdigger simile (posed in Kajundzich v. SIAC, 164 Or 510 and recently affirmed in Walker v. SCD, 85 Adv 531) have greatly differing losses in earning capacity. That does not warrant granting a greater award to the violinist.

"The hearing officer proceeded to recite that the claimant has moderate pain and discomfort without physical impairment. By the doctrine of Wilson v. SIAC, 189 Or 114, as affirmed by the Walker decision (supra), pain alone is not compensable and it is the disabling effect of pain which is considered in determining the disabling effect. It would appear that granting the award of disability in this instance was to circumvent the limitations on palliative care and to, in effect, grant an award for palliative care.

"The Board concludes and finds from its review of the evidence that the claimant has no permanent impairment of physical function and no residual permanent disability from the accident. In this connection the Board relies strongly upon the opinion of Dr. Schuler."

WCB #68-637 February 14, 1969

L. A. Faulkner, Claimant.
J. David Kryger, Hearing Officer.
Richard Kropp, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 15% loss arm for unscheduled disability due to aggravation of a preexisting condition. The Hearing Officer increased the award to 50% loss arm for unscheduled and 10% loss function of a leg. On review the Board affirmed, commenting:

"There is a factor of prior injuries which was substantially discounted by the hearing officer upon the basis of the Green v. SIAC decision, 197 Or 160. This decision should be read in conjunction with Nesselrodt v. SCD, (248 Or 452, 435 P2d 315) and ORS 656.222.

"The record in this claim reflects that the claimant on one occasion received the maximum award then permissable for back injuries equal to 100% loss function of an arm. On another occasion he was awarded disability equal to 1/3 of an arm for back injuries. The claimant's memory appeared hazy with respect to whether there were any awards for possible industrial injury in California. If this was a succession of injuries building to the point that the claimant could no longer perform work, one would be more impressed. On the contrary the claimant, with the supporting testimony of two fellow workers, impeached the validity of his former awards. Though those awards were for permanent disability, the claimant subsequently handled 'mankilling' chores without apparent difficulty prior to the incident at issue. Regardless of the technical application of the Green and Nesselrodt decisions as applied to ORS 656.222, the record does reflect a claimant who has successfully made the most of what proved to be non-permanent injuries in the past. It certainly serves to discount the extent and severity of the disability now allegedly associated with the last injury."

"Unfortunately, the record is not clear with respect to the areas of the back involved in prior awards and some new disability might exist with respect to the most recent injury. There is also some indication of possible need for surgery. Balancing all of the factors of the claimant's past receipt of moneys and his present motivation toward retirement, the Board concludes and finds that the claimant is not totally disabled and could certainly continue to perform lighter custodial duties. To the extent that there may be new uncompensated injuries, the Board reluctantly affirms what appears to be a rather generous increase by the hearing officer by finding the disability not to exceed the awards of 50% loss of an arm unscheduled and 10% loss of a leg, even though it is apparent that his gross disabilities do not equal the accumulation of awards."

WCB #67-370 February 17, 1969

Betty Jo Williamson, Claimant.
J. David Kryger, Hearing Officer.
D. R. Dimick, Claimant's Atty.
E. F. Caley, Defense Atty.
Request for Review by Claimant.

This case represents further proceedings pursuant to the order of remand by the Board of February 7, 1968 reported at I VanNatta's Comp. Rptr., p. 79. In summary, claimant has a back injury with a lot of subjective symptoms and few objective findings. The determination allowed temporary total disability through February 19, 1967. Since that date claimant has received approximately 29 treatments from Dr. Jeppesen. These treatments consisted primarily of physical therapy, in addition to various conservative treatments such as codine for relief of pain, and indocin to reduce inflammation, and a muscle relaxant. Dr. Jeppesen declared the claimant stationary on June 7, 1968. Claimant testified that the treatments were helpful and that she can now work 4 hours a day. Claimant still has many subjective back complaints. The Hearing Officer concluded that the additional treatments were curative, as they had benefitted the claimant. Accordingly, the claimant was found medically stationary as of June 7, 1968, and additional temporary total disability ordered accordingly. The Hearing Officer allowed 5% loss arm for unscheduled disability to the lumbar spine for permanent partial disability. The Board affirmed, noting that the claimant suffered from functional overlay.

WCB #68-282 February 17, 1969

Gordon M. Johnson, Claimant.
H. L. Pattie, Hearing Officer.
John J. Haugh, Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant is a 36-year-old school teacher who alleges he sustained an inguinal hernia while lifting channel iron from a rack where he taught "shop." The claim form recites that the injury happened sometime between October 21, 1966, and Christmas of the same year. The claim was filed in October of 1967. Claimant testifies that he did not know that he was covered by the Workmen's Compensation Act at the time. Claimant has not had the hernia repair as yet. The Hearing Officer affirmed the denial. WCB affirmed.

WCB #68-1469 February 17, 1969

Ben C. Flaxel, Claimant.

The sole purpose of this order is for further identifying the proceedings by adding the proper case identification of WCB #68-1469, which had been given the subsequent proceedings. Proceedings prior thereto are identified as WCB #67-1283.

WCB #68-806 February 19, 1969

Rodney Rosencrantz, Decedent.
Page Pferdner, Hearing Officer.
Dong G. Swink, Claimant's Atty.
Robert P. Jones, Defense Atty.

Appeal from a notice of denial. The Hearing Officer ordered the claim accepted. The Board affirmed. Herewith are selections from the Hearing Officer's five-page opinion:

"Decedent was a 55 year old insurance agent employed by Insurance Service Company, who was struck by an automobile while crossing the highway in front of the Three Star, a restaurant and nightclub, at 10:30 p.m. on February 8, 1968. Claimant contends decedent was to meet Victor and Leonard Harris at the Three Star to obtain a quantity of checks in payment of a delinquent note. Defendant contends the visit was motivated by a desire to visit and assit Gari Gaucher, a girlfriend, with her financial problems.

"Insurance Service Company employed Rodney Rosencrantz as an insurance agent for 25 years prior to his death. Victor Harris, one of the owners of the Three Star, was a lifelong friend of decedent and decedent had been furnishing Three Star's insurance for 10 or 15 years. In the years prior to November, 1967, the unpaid premiums mounted until they exceeded $10,000.00, whereupon the Three Star gave Insurance Service Company a note in the amount of the accrued premiums upon which they agreed to make payments at the rate of $175.00 a week. To be certain the payments were made as agreed, a quantity of post-dated checks in the sum of $175.00 each, dated a week apart, were given to the creditor, with the intention that the checks be deposited in accordance with their dates. The first group of checks were dated from September 14 through December 26, 1967, and before the last of these was deposited, Insurance Service Company began trying to get the next group of checks. Since the Three Star was short of money, a stall was instituted.

"Gari Gaucher is a 25 year old cocktail waitress who had been one of decedent's paramours for approximately five years. She and decedent usually had a telephone conversation each day, and on February 8th she informed him her grandfather had just died. Decedent told her he would see her that night and give her the money to purchase flowers for the funeral. Apparently he also intended to reimburse Victor Harris for rent money advanced to Gaucher.

"Absent the testimony of Leonard Harris and weighing the evidence of Gari Gaucher on the scale of reasonable probability, it is possible to conclude decedent had dual purposes for visting the Three Star at the time of his demise.

His employer was prompting decedent on the Three Star collection and understood decedent was to visit the Three Star that evening for that reason. During the morning of February 8th, Mrs. Lucille Elliott, bookkeeper for Insurance Service Company, informed decedent the expected checks had not been received that day as promised, whereupon he informed her she would have them in the morning as he would go get them. He apparently did not indicate where he intended to go to obtain them. Both Mrs. Logerwell and Victor Harris testified decedent was expected at the Three Star that night, but this may have been in connection with reimbursing the Three Star for Gaucher's rent advance.

"Assuming the evidence were sufficient to establish both motives for the visit, the leading case on dual prupose trips is Marks Dependents v. Gray, 251 NY 90, 167 NE 181, and the entire concept is discussed in Larson's Workmen's Compensation Law, 294.3; Section 18 et seq, and in 7 Workmen's Compensation Text, 422 (Schneider, Permanent Edition) Sections 1690 et seq. The rule in Marks v. Gray as expounded by Judge Cardozo is stated as:

> 'We do not say that service to the employer must be the sole cause of the journey, but at least it must be concurrent cause. To establish liability, the inference must be permissible that the trip would have been made though the private errand had been cancelled.
>
> 'The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own....If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been cancelled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk.'

"Here it appears likely the journey would have gone forward though the business errand had been cancelled, as decedent was apparently quite solicitous of Gari Gaucher and her financial welfare. The funeral of her grandfather would not wait for decedent's return from Eugene, but the flowers could have been charged. Why she had to have the funds in advance was not explained.

"Although the checks were blank they were ultimately filled out in the total sum of $4900.00. Therefore, although the checks were blank, decedent may not have known they were blank, and even if he had this information he should have been aware there would be a number of checks which could ultimately have a value of several thousand dollars. It is obvious we are not concerned with a trifling sum equivalent to the leaky faucets in Marks V. Gray (supra).

"To apply the test outlined by Judge Cardozo in Marks v. Gray, we must determine whether or not decedent would have, at the time, or at some other time, or whether some other person would have been required at that time or some other time, to go to the Three Star to obtain the checks. We must also determine whether or not decedent would have gone to the Three Star had the checks been delivered to his office prior to his departure; or, if he would have gone to the Three Star at that time for business reasons had he learned Gaucher's financial problems had somehow been solved without his intervention. It is clear decedent would not have been required to go to the Three Star to obtain the checks at that time or at any other time, nor would any other employee of Insurance Service Company have been required to go to the Three Star

to obtain the checks, since somehow, subsequent to his demise, Leonard Harris or someone else on behalf of the Three Star, delivered the checks to Insurance Service Company's office. But the responsibility for collecting the account was decedent's, and I judge it was his impression the stall would continue until he took assertive action, the time for which had arrived. Therefore, I deem that he considered the visit to the Three Star to be necessary at that time.

"Had the checks been delivered to Insurance Service Company's office prior to decedent's departure on the afternoon of February 8, it was still necessary that he reimburse the Three Star for the advance on account of Mrs. Gaucher's rent, and to furnish Mrs. Gaucher with funds with which to purchase flowers for her grandfather's funeral. For some reason he apparently deemed it necessary prior to his departure for Eugene. Thus, had the business purpose been removed, the likelihood is that claimant would have gone to the Three Star to consummate his personal business anyway. Had he been advised Mrs. Gaucher's financial problems had been solved without his intervention, including reimbursement of the rent advance to Mrs. Gaucher, it seems likely he would have gone to the Three Star to obtain the blank checks. Thus, it appears his purposes in going to the Three Star at that time were twofold, and falls squarely within the dual purpose rule."

WCB #68-777 February 19, 1969

Gerald R. Ross, Claimant.
Forrest T. James, Hearing Officer.
Patrick D. Gilroy, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Claimant.

This is an aggravation claim. The claim was originally closed with a determination awarding 20% loss arm by separation for permanent partial disability. The Hearing Officer concluded that there was a new injury; the Board affirmed, commenting:

"The claimant temporarily returned to the same employer, but could not successfully perform his former labors. He then obtained reemployment he could tolerate, but reduction in the work force laid him off. He then obtained work in June of 1967, pushing metal wheelbarrows weighing approximately 300 pounds loaded. Three days of this work produced further back disabilities.

"In lieu of instituting claim proceedings against the last employer, a proceeding was commenced by way of a claim for aggravation. The issue is thus framed as to whether the employer involved in the October 3, 1966, injury is responsible for the disability incurred by employment for the last employer.

"The hearing officer concludes that the symptoms arising from the last employment constituted an intervening incident which would be compensable in its own right as the basis for a claim. The terms such as 'aggravation,' 'worsening,' 'exacerbation,' have certain overlapping meanings. However, a workman who has tolerated work following an accidental injury and then is so disabled by physical efforts of a job beyond his capabilities should basically look to the employment producing the new disability."

"The Board concludes and finds that the work of June, 1967, constituted a new and intervening trauma and, as such, the disability arising therefrom is not chargeable to the original injury as an aggravation resulting from the original injury."

WCB #68-1027 February 19, 1969

Charles R. Spencer, Claimant.
H. Fink, Hearing Officer.
Thomas E. Wurtz, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

Claimant fell from a lumber stack, and then the lumber stack fell on him. A determination allowed 35% loss arm for unscheduled disability. Dr. Varney diagnosed "Massive abrasions with hematoma from L2 to D8. Bone fragment avulsed lt. lat. inferior of L1. Bone fragment from the spinous process of L2." Claimant had a World War II disability award of 60% for shrapnel wounds in the hips, left leg and right arm. Claimant's disability with regard to his back has been described as "minimal" and "moderate." The Hearing Officer affirmed the determination. The Board affirmed, commenting:

"Among the factors which make the administration of this claim difficult is the fact that the claimant has a fairly large stump ranch located in the foothills some distance from town and does not drive a car. He did not drive before the accident but did operate the farm tractor. The claimant's mode, manner and location of living are thus a part of the problem in evaluating whether he is able to return to work. The entire problem is obviously not that of physical disability. A workman may obviously be classified as permanently and totally disabled despite an ability to perform isolated farm chores. The Board concludes that the claimant is not motivated to return to the regular labor market and that the claimant could regularly work at a gainful and suitable occupation."

WCB #68-544 February 19, 1969

Edward J. Pittsley, Claimant.

"Following an award of disability made pursuant to ORS 656.268, the claimant, then represented by counsel, made an application to the employer that his award be paid in a lump sum. The award was so paid in a lump sum. The claimant requested a hearing on the merits of the claim.

"The hearing proceeding was dismissed by the hearing officer pursuant to ORS 656.230 and 656.304 on the basis of the waiver of the right to hearing where a lump sum commutation of award is obtained upon the application of the claimant.

"The order of dismissal by the hearing officer was issued and mailed January 9, 1969. A request for review by the Board, entitled Notice of Appeal, was not filed with the Workmen's Compensation Board until February 17, 1969. The order subjected to possible review was made final pursuant to ORS 656.289 (3), for failure to file the request for review within 30 days of January 9, 1969."

WCB #68-938 February 19, 1969

James A. Brooks, Claimant.
George Rode, Hearing Officer.
Keith Burns, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding no permanent partial disability. Claimant was injured when he rolled his log truck. The medical reports are replete with comments to the effect that claimant's symptoms are vague and do not correlate with any medical findings. Claimant's testimony at the Hearing was likewise vague and indefinite as to the number and location of his physical complaints. The Hearing Officer allowed 5% of a workman or 16 degrees disability. Claimant had no counsel on review. The Board found that "There appears to be no sound medical basis for concluding that the accident at issue ruined or even affected his back, neck, sexual functions, left elbow and aggravated his heart and diaphragmatic hernia as claimant related to a doctor." Whereupon the Board set aside the award of permanent partial disability.

WCB #68-657 February 19, 1969

Bernard D. Bearss, Deceased.
George W. Rode, Hearing Officer.
Bruce Smith, Claimant's Atty.
Evohl Malagon, Claimant's Atty.
Request for Review by Beneficiaries.

Appeal from a notice of denial. Claimant suffered a subarachnoid hemorrhage. He died two months later, essentially from multiple aneurysms of the brain and the bleedings associated therewith. The critical question is, as to whether the strains, worries and anxieties associated with claimant's work were a material contributing cause in the occurrence of the cerebral hemorrhage. The claimant was a promoter by profession. The Hearing Officer affirmed the denial. The Board also affirmed, commenting:

"The death certificate reflects that the immediate cause of death was uremia from an associated kidney condition diagnosed as chronic glomerulo nephritis. The decedent also had congenital arterial defects known as aneurysms. The record reflects the decedent's personal health habits produced overweight stemming from dietary problems of both food and drink. He had a long-standing hypertension.

"No claim is made of job related physical exertion. The decedent, on a Sunday morning was assisting his wife in making out an automobile accident report for an accident involving her driving. Decedent then walked out of his house and up to a stable, (not connected with his business) that was being built when he was stricken. If the claim is compensable, every person with hypertension whose system gives way to the degenerative processes at any time, would have a compensable injury. It is relatively unimportant whether worries about work are generated by a white collar or blue collar workman."

"The decedent actually died of disease processes. Even if some personal concern about his work could be said to enter the total picture, there is absolutely no basis for classifying his death either as one by accidental injury or as occurring in course of employment."

WCB #68-478 February 20, 1969

Edward F. Jones, Claimant.
Forrest T. James, Hearing Officer.
Robert L. Burns, Claimant's Atty.
James P. Cronan, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 5% loss arm for unscheduled disability. Claimant, a 26-year-old painter, fell off a ladder and injured his right shoulder and cervical spine. The diagnosis was a cervical sprain. Claimant suffers from a stiff neck. The possibility of a ruptured cervical disc was contemplated, but claimant indicated that he has just changed jobs and "doesn't feel that he could take time off to have the myelogram performed." ORS 656.325 (2) provides for the suspension of benefits, if there is unreasonable refusal to submit to essential surgical treatment. The Hearing Officer concluded that the refusal was unreasonable and dismissed the appeal. On review the Board considered the matter on the merits and "finds there is no disability to make the refusal of a myelogram of any consequence." This has the effect of affirming the determination.

WCB #68-1182 February 20, 1969

Frank Davis, Claimant.
H. Fink, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

This is an aggrvation claim. A determination awarded no permanent partial disability. Claimant, a 56-year-old logger, injured his low back, when he slipped and fell from a snow-covered log. The diagnosis was "acute muscle strain lumbar region." The Hearing Officer denied the claim. The Board affirmed, commenting:

"The claim of aggravation was denied, largely on the basis of a subsequent intervening work exposure. Some of the logic of the argument in favor of the claimant would be more plausible if it were not for some basic flaws in the picture. Claimant's counsel referred the claimant to a Dr. Anderson in March of 1968. The claimant related to Dr. Anderson that the intervening logging work consisted of sitting and blowing a whistle. Claimant's counsel was lulled into the same error in his brief before the Board. Page 40 of the transcript is at odds. There the claimant relates 'you take rolls of wire and run down over the hill' and further affirmed that the work involved climbing up and down hills over rough terrain and over logs."

"In retrospect, it would appear that having waited so long after the September, 1967, incident it was thought the claim strategy might better succeed to ignore the employment which produced the current disability and proceed against the earlier employer. The earliest back difficulty acknowledged was in employment in California variously recited as in 1955 and 1958 with 'only a couple of weeks time loss.'

"The claimant obviously has natural degenrative changes in his spine attributable to the aging process. A strain imposed upon such structures will produce a temporary disability or may be sufficiently severe to superimpose a permanent disability upon the underlying degenerative process. There is actually an attempt in this claim to now collaterally impeach the former order by asserting that claimant had a continuing permanent disability for which no award was made. The 1966 injury was temporary only in its effect. It is now contended that the current problem is an aggravation of the 1966 injury. The only 'aggravation' is a new strain imposed upon the degenerative back."

WCB #68-732 February 24, 1969

Dennis John Purkerson, Claimant.
Forrest T. James, Hearing Officer.
Tyler Marshall, Claimant's Atty.
Allan H. Coons, Defense Atty.

Appeal from a notice of denial. Claimant, a 19-year-old mill worker, alleges injury to the right shoulder, arm and back. No specific incident is alleged. There was a disputed phone call to a supervisor the following day. Claimant then worked for a month before visiting a doctor. The diagnosis was a chronic right shoulder strain. The Hearing Officer affirmed the denial, finding that there were too many holes and conflicts in the claimant's case. The Board remanded, commenting,

"Though there is testimony for the claimant that he first sought medical treatment following the alleged injury from a Dr. G. M. Chatburn, there is no medical report from Dr. Chatburn to confirm whether treatment was so sought or on which dates or for what complaints.

"Where an unwitnessed accidental injury is claimed and denied and the claimant asserts that he soon thereafter sought medical treatment for the injuries, but no evidence is obtained from the doctor, the case has certainly been incompletely and insufficiently heard. Where the parties fail or refuse to produce the evidence, the hearing officer should take it upon himself to obtain the evidence and by subpoena if required.

"The matter is therefore remanded to the hearing officer to obtain further evidence from Dr. Chatburn including the dates of treatment of the claimant by the doctor, the complaints for which the claimant was treated and the history given the doctor by the claimant with respect to the origin of the complaints."

WCB #68-437 February 27, 1969

Irene Bennett, Claimant.
H. L. Pattie, Hearing Officer.
Allen T. Murphy, Jr., Claimant's Atty.
Robert G. Simpson, Defense Atty.
Daryll Klein, Defense Atty.

Appeal from a denial. Claimant, a registered nurse who worked as an anesthetist, contracted tuberculosis. Testimony shows that 50% of the patients vomit during the process of being anesthetized, and most patients cough or sneeze as the claimant is working over them. Claimant is therefore subjected to an unusual amount and variety of infectuous sputum and regurgitated matter which contacts her skin and clothing and permeates the air around her. Patients are not screened for active TB prior to the time that claimant works around them. Dr. Tuhy was of the opinion that claimant contracted TB while working at the hospital. From a procedural standpoint the insurance carrier denied the claim on the grounds that TB was not contracted during the period of their policy. The employer ignored the claim which was filed in the form of an occupational disease. The claim was ordered accepted by the Hearing Officer and penalties and attorney's fees were allowed. The Hearing Officer attached the notice of appeal rights relevant to an accidental injury, but apparently the case was treated as an occupational disease. The Board denied the request for review, commenting:

"The employer's rejection of the hearing officer order was filed with the Workmen's Compensation Board on February 21, 1969, which is the 91st day following the order of November 22, 1968. Pursuant to ORS 656.808, the rejection is untimely filed.

"Despite the fact that on the record available to the Board the claim appears based largely on speculation in the absence of any proof of occupational exposure to tuberculosis, the Board deems the rejection of the hearing officer order to have been untimely filed.

"The rejection of the order of the hearing officer is therefore not allowed and no Medical Board of Review will be constituted due to the loss of jurisdiction as a matter of procedure."

WCB #68-1015 February 28, 1969

Paul Chambers, Claimant.
H. L. Pattie, Hearing Officer.
Don Atchison, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Department.

This is an aggravation claim for a low back injury. The Hearing Officer ordered the aggravation claim accepted. On appeal the Board reversed, commenting:

"The above entitled matter involves the issue of whether an incident of back disability made symptomatic while lifting a box of household implements in

the process of moving his own household effects from one residence to another is compensable as an aggravation of industrial injury of March 12, 1966. The household incident was February 14, 1968.

"The March 12, 1966, injury claim was accepted by the State Compensation Department as insurer of the employer. The claimant underwent surgery on March 21, 1966. His claim was eventually closed March 20, 1967, with an award for unscheduled disability equal in degree to the loss by separation of 30% of an arm. This award was increased to 60% of an arm by the hearing officer.

"The claimant's history includes a previous award for unscheduled injuries dating from 1948 for upper back injuries equal to the loss of use of 15% of an arm. Subsequent to the closing of the claim, the claimant in September of 1967, was involved in an automobile accident with a hospital admission reflecting possible rib fracture and spleen damage. On May 14, 1968, the claimant allegedly fell and hurt his back in another industrial injury. This claim is being independently processed on the denial of that claim by the State Compensation Department. The claimant was hospitalized July 14, 1968, for another automobile accident.

"The hearing officer apparently concludes that any exacerbation of a prior injury is compensable as an 'aggravation.' While the mere happening of a subsequent event may not bar a claim, the Board concludes that the trauma of lifting the 50 pounds or more of household goods was such a subsequent intervening event in light of this claimant's degenerative back that it constituted an independent injury. Aggravation of injuries must also have both medical and legal causation. The fact that a doctor testifies that a new injury affected a prior injury does not shift the burden of successive injuries to any one of a series of prior events. If one were looking for the real medical cause, it would of course be the degenerative process of the back. In looking for the legal cause, it is whatever process made the degenerative process symptomatic. That was the insult imposed by lifting excessive weights at home.

"The Board concludes and finds that the incident for which the claimant sought reopening of his claim did not constitute a compensable aggravation and that the incident was an intervening noncompensable trauma."

WCB #68-673 March 4, 1969

Isaac M. Young, Claimant.
H. L. Pattie, Hearing Officer.
Don S. Richardson, Claimant's Atty.
J. Wallace Fitzgerald, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 10% loss use of the left leg. Claimant suffered a fractured pelvis and contusions when a large door fell on him. The Hearing Officer affirmed the determination as to permanent partial disability, but allowed five additional time loss days. The Board affirmed, commenting:

"The claimant is a 64 year old mechanic whose leg injury of November 28, 1966, was incurred when he was struck by the falling panels of a door."

"Though the claimant walks with what may be termed an unusual gait, it is not classified as a limp nor is it related medically to the injury. The injury has apparently affected the speed with which the claimant could move before the accident and one other work factor indicative of disability is a limitation in the use of ladders.

"The Board finds from its review of the evidence that the permanent loss of physical function of the leg is relatively minimal. The evidence indicates that the claimant is performing his former work activity with no observable diminution in quantity or quality of work."

WCB #68-869 March 4, 1969

Artice L. Wright, Claimant.
Mercedes F. Deiz, Hearing Officer.
Daryll E. Klein, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

The Board affirmed the Hearing Officer, stating:

"The sole issue before the Board is whether the workman's injury is only partially disabling or whether he is now precluded from regularly performing work at a gainful and suitable occupation.

"The claimant is only 44 years of age. About ten years ago he developed anginal pains and has apparently had at least two coronary occlusions. The accident at issue was to the claimant's back. The degree of back injury is subject to dispute. Whatever the degree of back injury may be, the diagnosis and cure is limited by the claimant's cardiovascular problem, by the claimant's overweight and by the claimant's motivation and emotional problems. None of the latter are in any wise established medically as caused or exacerbated by the back injury.

"The claimant even abandoned the effort to further educate him to utilize his remaining physical abilities. Though only minimal and occasional palliative relief was sought, the claimant purports to be unable to tolerate even sedentary training. Since the claimant is obviously not bedfast and obviously not a hopeless cripple, the issue becomes one of analyzing whether his failure and resistance to re-employment is indicative of true physical disability of the magnitude asserted. The claimant would have all of the history he has recited to various doctors accepted as prima facie evidence that such histories are true. The Board does not so construe the law. The doctors' findings and opinions are given status but this does not extend to establish as prima facie evidence every bit of history recited by the patient.

"The determination of disability found in this case pursuant to ORS 656.268 was that the disability was only partially disabling and does not exceed in degree by comparison the loss by separation of 25% of an arm. This finding was modified by the hearing officer who found and awarded a disability of 35% loss of an arm. The hearing officer of course had the benefit of a personal observation of the claimant which is particularly helpful in cases where the claimant is professing to be totally disabled."

"The Board recognizes that a finding of permanent total disability does not require that a claimant be a helpless cripple and also recognizes that pre-existing disability may be taken into consideration. This does not require that a workman who ceases to work and who ceases to utilize his remaining physical abilities is necessarily totally disabled. Each individual owes to himself and to society the duty to remain a constructive member of society if possible. The magnification of complaints and exaggeration of symptoms reflected weigh heavily against a finding of total disability."

WCB #68-1025 March 4, 1969

Donald Gene Stewart, Claimant.
J. David Kryger, Hearing Officer.
Robert A. Boyer, Claimant's Atty.
Allan Coons, Defense Atty.
Request for Review by the Department.

Appeal from a determination awarding 5% of a workman for unscheduled disability. Claimant, age 22, slipped and fell on his back while working as a roofer. The diagnosis was an acute lumbosacral strain. X-rays indicated a bilateral spondylolisis at L5. Claimant indicates some difficulty in doing heavy manual labor such as rolling peeler cores, but he lost no time from work. Claimant's doctor recommends light work, but claimant cannot find a light job and works on because he needs the money. The Hearing Officer allowed 20% of the workman for unscheduled disability. On review the Board reversed, stating:

"Much of the discussion centers around the medical advice to avoid strenuous work due to the likelihood of a recurrence of strain type injuries. The disability cannot be fairly measured upon this basis since the medical advice to anyone with such congenital and developmental defects would be given whether or not an accidental injury had produced some temporary symptoms or produced some degree of permanent exacerbation of the underlying weakness.

"The disability in this instance was determined to be 16 degrees on the basis of a comparison of the workman before the injury and without the disability on a scheduled maximum of 320 degrees. This was increased to 64 degrees by the hearing officer.

"The Workmen's Compensation Board finds no basis in the record to justify the increased award. The claimant recovered almost completely from the effects of the strain. He is engaged in very heavy work against the advice of doctors but his permanent condition prior to the accident was such that he should not engage in such activity. The need to avoid such work may have become more evident as the result of the accident but it was not caused by the accident.

"The employer takes a workman as he finds him and must compensate for additional injury imposed upon weak links of the body. The employer, however, does not assume responsibility for making an award of disability to cover pre-existing disability."

"The Board finds and concludes that the injury at issue produced only minimal permanent results and that the determination of 16 degrees against a maximum of 320 degrees is an adequate award in comparing the workman before the injury and without such minor added disability."

WCB #68-652 March 4, 1969

Joseph Frank, Claimant.
J. David Kryger, Hearing Officer.
Richard Kropp, Claimant's Atty.
Philip Mongrain, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 15% loss arm by separation for unscheduled disability to the back. Claimant, age 62, has an extensive medical history of prior injuries. A 25% loss function award was allowed for a 1963 injury to the back. The Hearing Officer affirmed. The Board affirmed, commenting:

"The claimant has had a succession of injuries. Much of the dispute centers about a prior award for low back injury in 1963. The claimant argues that his condition improved following the award in 1963, and that the present low back injury has caused the condition to regress to the point where it was when the award was made in 1963. Despite the language of the Green decision cited by the claimant, the Board concludes that if the back condition is the same now as at the time of the 1963 award, no further award of permanent partial disability is payable. Nesselrodt v. SCD, 85 Adv 797, is of interest.

"The claimant admittedly does have some cervical difficulty from the present injury and this has been evaluated pursuant to ORS 656.268 to be equal in degree to the loss by separation of 15% of an arm.

"The Board's consideration on review has been made with special concern for the application of ORS 656.222 relating to successive injuries, with regard to the combined effect of the injuries and with regard to increased disability caused by the accident at issue."

WCB #68-906 March 4, 1969

James Jefferson Butler, Claimant.
Norman F. Kelley, Hearing Officer.
Michael F. McClain, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 15% loss arm for back injury. The Hearing Officer affirmed, as did the Board. The Board stated:

"The above entitled matter involves issues of disability from an incident or incidents of December, 1966 when he developed back pain.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have suffered an unscheduled disability equal in degree to the loss by separation of 15% of an arm. This determination of disability was affirmed by the hearing officer.

"In the administration of the claim the claimant was referred to an examined by the Physical Rehabilitation Center maintained by the Workmen's Compensation Board. It appears that the consensus of this division was that the claimant's disability was minimal.

"An inaccurate history by a claimant to a doctor may cause the doctor to arrive at erroneous conclusions. The value of reports from doctors so misled by the patient is of course minimal. The claimant appears poorly motivated to return to work and he also appears to have other personal problems which interfere with his work capabilities.

"The Board concludes and finds from its review of the evidence that the disability attributable to the injury at issue does not exceed in degree the 15% loss of an arm by separation. The order of the hearing officer is therefore affirmed."

WCB #68-506 March 5, 1969

Erwin W. Bazer, Claimant.
Forrest T. James, Hearing Officer.
Ernest W. Kissling, Claimant's Atty.
Allen Owen, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 50% loss arm for unscheduled disability. Claimant suffered a low back injury which lead to two and one-half years of medical and surgical treatment, including a laminectomy, a repeat laminectomy and a fusion of the L4 to the sacrum. The Hearing Officer affirmed, as did the Board. The Board stated:

"The claimant was only 23 years of age when injured. The injury was diagnosed as involving a intervertebral disc. Two major surgeries have been performed and the claimant returned to work.

"As a pre-1966 injury the evaluation of disability subjected to hearing was made by the State Compensation Department. The disability, being unscheduled, was evaluated as equal in degree to the loss by separation of 50% of an arm.

"The claimant elected to have the matter subjected to the procedures provided by the 1965 Act. The award of disability was affirmed by the hearing officer.

"The record reflects a long and difficult course of treatment but there is not evidence to support any further medical care. There is some dispute over an item or items of medical services allegedly unpaid by the State Compensation Department. However, the claimant failed to support his claim in this respect after the hearing officer had held the record open for several weeks.

To support a definitive order, any claim of unpaid medical services must reflect that the services were in fact rendered, rendered for a condition causally related to the injury and be in fact unpaid.

"The Board notes that the very problem of resolving the issue of disability has entered the picture and that a final resolution of the issue must be reached before the claimant accepts the fact that he has a permanent disability and accepts the fact that he must live with the disability. The motives to this point have been clouded by the disputes centered upon magnifying the award."

WCB #68-1927 March 6, 1969

Richard Pacheco, Claimant.

"The above entitled matter involves an issue of whether a claimant should be permitted to concurrently maintain proceedings before the Workmen's Compensation Board upon the theory that his injuries arose out of and in the course of employment, while also maintaining proceedings by way of a tort claim for damages against the same party on the theory that the relationship was one of prime and independent subcontractors.

"The hearing officer issued an order abating the workmen's compensation proceedings during the pendency of the damage action in Court. It is this order of abatement which the claimant seeks to have set aside.

"The only authority cited by the claimant involves election of remedies where the claimant as to both elections is admittedly a workman. In this instance the claimant is unwilling to commit himself to the theory that he is one or the other. He wants to be permitted to proceed concurrently asserting the inconsistent theories.

"The action taken by the hearing officer deprives the claimant of nothing. If the matter proceeded to hearing on the merits, the hearing officer would certainly be warranted in utilizing the allegations of the concurrent proceedings to deny the claim. The order of abatement is probably the most charitable treatment of the claimant's diverse and conflicting proceedings. The order only 'abates,' pending the outcome of the Court proceedings, which saves the right to be heard on the claim before the Workmen's Compensation Board."

WCB #68-1254 March 10, 1969

James E. Tolley, Claimant.
H. Fink, Hearing Officer.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves the following procedural issue: A claimant was injured December 4, 1964. His claim was first closed by the then State Industrial Accident Commission on January 6, 1965. The claim was voluntarily reopened by the now State Compensation Department on March 8, 1968. Does the claimant have a right to hearing and review before the Workmen's Compensation Board?"

"Probably a precipitating factor to these proceedings is the fact that the State Compensation Department appended notices to its last closing order of June 28, 1968, advising the claimant he could either obtain a rehearing and appeal from the State Compensation Department or he could obtain a hearing and review before the Workmen's Compensation Board prior to appeal.

"The Board concludes that if the notice by the State Compensation Department is erroneous, the effect of that error could not be to vest jurisdiction where none exists by law. If an erroneous notice by its very error misled the claimant into losing procedural rights, the answer might differ.

"As a pre-1966 injury the claimant's right to a claim for aggravation expired January 6, 1967, over a year prior to the order of the State Compensation Department now subjected to attempted hearing and review.

"Though ORS 656.278 vests own motion continuing jurisdiction of prior claims in the Workmen's Compensation Board, there is certainly no bar to the State Compensation Department voluntarily assuming further responsibility for prior claims. If the order at issue from the State Compensation Department had in fact been executed by the Workmen's Compensation Board as an own motion order, the claimant could not obtain hearing, review or appeal since the order increased rather than diminished the award of compensation.

"The claimant has already benefitted from the voluntary reopening of his claim by the State Compensation Department. His claim may at any time for the remainder of claimant's life be re-examined on the own motion of the Workmen's Compensation Board.

"The Board review is limited to the procedural issue noted. The hearing officer does conclude that no further award is due on the merits though that issue technically was moot. The Board concludes that no claim of aggravation was instituted and no order of the State Compensation Department issued within the time provided by law from which an election could be made to invoke the hearing and review process as a matter of right under the 1965 Act.

"The order of the hearing officer denying claimant a hearing or further relief is therefore affirmed."

WCB #68-944 March 10, 1969

Harold C. Anderson, Claimant.
Norman F. Kelley, Hearing Officer.
Robert A. Bennett, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Department.

Appeal from determination allowing no permanent partial disability. Claimant suffered burns to the face and particularly the eyes, when he was sprayed with a caustic solution of pulp liquor. After a period of treatment, medical examination revealed no measurable visual disability, as far as visual acuity was concerned. At the hearing claimant complained of the continuing eye irritation, indicating he experiences it to some degree every day. After long

periods of using the eyes, he indicates it feels as if he has sand in his eyes. Claimant also complains of double vision, which first began approximately 14 days after accident, while he was still in the hospital. At first he began seeing double images of small objects such as print on a page. Claimant notes that when driving at night, the distant lights of an oncoming automobile appear double, as well as small objects at approximately 12 to 14 feet. Hospital records indicate that by history the claimant had no diplopia prior to his admission to the hospital. The Hearing Officer allowed 5% loss of a workman for unscheduled disability. The Board reversed, holding:

"Unfortunately, the hearing officer cites no authority upon which he bases his conclusion in which he disagrees with prior Workmen's Compensation Board interpretation of the law, nor does he attempt to distinguish the case of Wilson v. SIAC, 189 Or 114, where an award of unscheduled associated disability in addition to visual loss was disallowed.

"The hearing officer is in effect attempting to find contrary to the doctors that the claimant has visual loss but in the absence of supporting medical, he would disguise the award by improperly shifting the award to an unscheduled basis.

"The Board's interpretation is that if there is a permanent condition affecting vision, an award should be made for visual loss. In the instant case there is not even a medical opinion to support a finding that the irritation is permanent. The medical opinion is speculative in that it recites the condition 'may be permanent.' There is also speculation by the doctor that if the condition persists it may develop into a visual loss. If and when such loss develops, the law provides that the award may be then made by way of a claim for aggravation within five years or Board own motion jurisdiction for the lifetime of the claimant."

WCB #68-375 March 10, 1969

Eugene Creamer, Claimant.
Richard H. Renn, Hearing Officer.
C. S. Emmons, Claimant's Atty.
Frederick T. Smith, Defense Atty.
Request for Review by Employer.

The Board stated: "The above entitled matter involves an issue of the extent of permanent disability, if any, suffered by a 39 year old logger on June 17, 1966, when he jumped down from a log.

"The claimant had an extensive history of low back difficulty including a myelogram and surgical nerve root decompression in August of 1963. In December of 1963, the low back was fused from vertebra L-4 through L-5 and sacral 1 and 2. A plate used in this fusion was removed in the fall of 1964. In August of 1965, the claim was awarded, subject to the workmen's compensation law, a disability for the low back equal to the loss of function of 75% of an arm. The fusion process of the lower vertebrae was not successful and the award of 1965 for the prior injury was based substantially on the fact that there was a pseudoarthrosis."

"Pursuant to ORS 656.268, a determination issued finding the claimant to have recovered from the current accident without additional permanent partial disability. A fair summary of the medical opinions indicates that the claimant's current disability is in fact less than the awards heretofore made.

"Upon hearing, an award was made by the hearing officer that the claimant had a low back disability equal in degree to the loss by separation of 65% of an arm. Despite the uncontroverted fact that the claimant prior to this injury had a pseudoarthrosis from a previous accident for which he was still drawing compensation as permanently injured, the hearing officer found the claimant to be without prior disability and made the further erroneous conclusions of law that prior injury and award to the same part of the body is 'immaterial.' This latter conclusion is in obvious conflict with ORS 656.222 requiring awards to be made with regard to the combined effect of his injuries and past receipt of money.

"The Board finds there is no substantial evidence to support the findings of fact of the hearing officer and that the conclusions of law exclusing consideration of prior awards is an error of law.

"The Board further finds that the combined effect of the two compensable injuries does not exceed the award heretofore made of a disability equal to the loss of use of 75% of an arm and that upon this basis, no additional award is payable for the current claim.

"The order of the hearing officer is therefore reversed and set aside. The employer, having been required to pay compensation pursuant to ORS 656.313, shall advise the Board of the compensation paid pursuant to order of the hearing officer in order that the records of the Board may be complete for purposes of application of ORS 656.222."

WCB #68-1098 March 10, 1969

Kenneth Surratt, Claimant.
Mercedes F. Deiz, Hearing Officer.
James J. Kennedy, Claimant's Atty.
Robert E. Joseph, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 40% loss arm for unscheduled disability. Claimant suffered a low back injury while lifting steel plates. He was treated for acute lumbosacral strain. His present complaints consist of aches and pains. The hearing officer affirmed. The Board affirmed, commenting:

"Part of the issue raised by the claimant on review involves possible future medical care. The Board finds no basis for dispute with the proposition that the employer must provide medical services for conditions resulting from the injury and required following closure of the claim. That is clear by ORS 656.245. The Board does not ascribe any legislative intent to overrule Tooley v. SIAC. The words 'palliative treatment' entered compensation law with the Supreme Court decision in Tooley and if the Legislature intended to overrule that decision, it could have done so by the simple insertion of the words 'including palliative care' in ORS 656.245. The use of the word 'required'

seems to affirm rather than overrule the Tooley decision. No order by the hearing officer or the Board is necessary to preserve the claimant's future right to required medical services.

"The hearing officer affirmed the determination of disability but the Board deems it necessary to correct the discourse by the hearing officer indicating that 'education, economic and social environment' are factors in measuring permanent physical disability. Workmen in the area of partial disability are compensated on the basis of physical loss of function. The college professor and the manual laborer are evaluated similarly. Only in the consideration of permanent total disability, where factors such as 'suitable' employment are inserted in the law, may the other factors mentioned enter the final picture. Even here there is a reasonable duty imposed upon the workman to adjust himself to his disabilities and become reemployed within those limits."

WCB #68-763 March 10, 1969

James L. Smith, Claimant.
John F. Baker, Hearing Officer.
David R. Vandenberg, Jr., Claimant's Atty.
Patrick Ford, Defense Atty.
Request for Review by Employer.

Appeal from a determination allowing 100% loss by separation of the right little finger. Claimant suffered a hand and finger injury. At the time of the injury, the distal segment of the right finger was traumatically amputated. Subsequently, a transmetacarpal surgical amputation was carried out. The site of this amputation is in what is commonly considered to be the hand itself and has resulted in some narrowing and deformity of the hand. At the hearing the claimant demonstrated that on flexion of the fingers as in an attempt to make a fist, the right finger deviates towards the remaining fingers and overrides the middle finger. There is a failure of flexion at the distal joint of the right finger, some limitation of flexion at the middle joint. Claimant complains of pain and fatigue in the hand, fingers and forearm. The Hearing Officer allowed an additional award of 30% loss use of the right ring finger; 15% loss use of the right middle finger and 30% loss use of the thumb due to loss of effective opposition. The Board affirmed and assessed $250 attorney fees against the employer.

WCB #68-1089 March 10, 1969

John R. Darby, Claimant.
Mercedes F. Deiz, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 35% loss arm for unscheduled disability. Claimant, age 54, twisted his back and eventually a fusion was required from L-4 to S-1. Claimant stated, he knew he was unable to do welding, mechanics, or drill press work as suggested by the vocational rehabilitation counselor. He has not looked for work, but putters around in a small tomato patch, does a little painting, and has built a corner cupboard. He continues to suffer from

substantial pain in the low back and lower extremities. The Hearing Officer allowed an additional medical bill and increased the permanent partial disability award to 65% loss arm for unscheduled disability. The Board affirmed, commenting:

"As part of the administration of this claim, the claimant was processed through the Physical Rehabilitation Center maintained by the Workmen's Compensation Board. In this connection it is recognized by one and all that the claimant should avoid heavy strenuous type work which is beyond the limitations of function of his back. However, the claimant refused to follow up on work opportunities within his physical capacities because the starting salary was only $300 per month. No yardstick is obtainable with respect to effect of a prospective wage level of a certain job. A monthly salary of $300 is substantially more than the claimant would receive if awarded a pension as permanently and totally disabled.

"The claimant's condition might be improved by further medical care. Apparently such further treatment is not being sought nor does the Board believe the claimant should be required to submit to further surgery. However the disability is measured with respect to the existing disability, the claimant's acceptance of his present physical recovery and claimant's refusal to pursue employment opportunities within his capabilities.

"The Board finds and concludes that the rather liberal increase in award made by the hearing officer amply evaluates the residual disability and that the disability does not exceed in degree the loss by separation of 65% of an arm."

WCB #67-1528 March 13, 1969

Owen W. Gaffney, Claimant.
Randolph Slocum, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of permanent disability resulting from low back injury of July 19, 1963. As a pre-1966 injury, the last award of compensation was determined by a Jury on July 11, 1966. The current proceedings are in the nature of a claim for aggravation.

"By the ruling of the Supreme Court in Larson v. SCD, 87 Adv 197, it is questionable whether the claimant complied with the procedural requirements to obtain the right to a hearing on a claim of aggravation before the Board. It is the obligation of the claimant to provide a medical report containing sufficient facts to justify the claim.

"A substantial part of the hearing and the brief before the Board appears to be an attempt to impeach the jury verdict of July, 1966. The claimant asserts that his functional problems, which are a substantial part of the picture in his avoidance of return to work, make the claimant permanently and totally disabled. The medical reports on which he largely relies reflected that this problem pre-existed the jury verdict. There is no medical evidence that this problem has in any way 'aggravated' since the claim closure."

"The medical reports on which the hearing officer relied indicate that the disability is a little greater than that awarded and that the back condition may be a little worse. To some extent those medical reports impeached the former award. They do not reflect that the increased disability is substantially by way of aggravation. The award was increased by 75% in the increase from 20% to 35% loss of use of an arm. This is in fact a substantial increase.

"Despite the doubts over the procedural aspect, the Board, pursuant to ORS 656.278, has broad powers under its own motion jurisdiction to alter prior awards. It is basically upon this authority that the Board concludes from the evidence that the claimant's permanent partial disability resulting from the injury is equal in degree to the loss of use of 35% of an arm."

WCB #68-929 March 14, 1969

Joe D. Dodge, Claimant.
H. L. Pattie, Hearing Officer.
Don Londer, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. The claimant alleges that he brushed against a hot object which purportedly burned through two pairs of pants plus a pair of coveralls, causing him to jump back and injure his back. The existence of any hot objects is sharply disputed, and there is no corroborative testimony supporting the mechanic's of this alleged injury, although there were other employees present. The denial was affirmed. WCB affirmed.

WCB #68-610 March 14, 1969

LeRoy Schanaman, Claimant.
Forrest T. James, Hearing Officer.
M. D. Van Valkenburg, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Employer.

Claimant slipped, fell and suffered a concussion from which he has since recovered. Since the accident, aside from routine treatment of the concussion, the claimant has experienced recurring headaches, vomiting and episodes of fainting. These symptoms are post-traumatic and psychological in character. It is the responsibility for these symptoms that is the issue. The claimant had a preexisting condition which, for the sake of convenience, shall be called extreme nervousness. This was stirred up by the claimant's accident to the extent that all the old symptoms reappeared and necessitated extensive medical treatment. The employer is responsible for the consequences, when a compensable injury "lights up" a preexisting condition. Accordingly the Hearing Officer ordered additional time loss payments and medical payments. The Board affirmed and assessed $250 attorney fees. It was also noted that the request for review was received on the 31st day.

WCB #68-1008 March 14, 1969

Roy Perryman, Claimant.
H. Fink, Hearing Officer.
E. B. Sahlstrom, Claimant's Atty.
Robert E. Joseph, Defense Atty.
Request for Review by the Employer.

"The above entitled matter involves an issue over the application of penalties and attorney fees with respect to compensation payable to the claimant following April 16, 1968, the date the employer's insurer discontinued payment of temporary total disability.

"The insurer stands by a medical report obtained from a Dr. McShatko in April who indicated further consultation and diagnosis was in order, but that he saw no reason why the patient could not return to work in the meantime. A careful consideration of Dr. McShatko's report falls far short of supporting any conclusion that the claimant had been restored as near as possible to a condition of selfsupport. Further medical diagnosis and possible care were prognosticated.

"So far as this record before the Board is concerned, the matter was never submitted by the employer for determination pursuant to ORS 656.268. Dr. McShatko was not the claimant's treating doctor and the record became one where the claimant had not returned to work, had not been authorized to return to work by the treating doctor and no determination was made pursuant to ORS 656.268.

"If the insurer had simply mistaken its position on the Dr. McShatko report, that position was not well taken once the treating doctor suggested the claim be left open on May 13, 1968, and on June 11, 1968, advised the insurer of further temporary total disability. The refusal of the insurer through July to budge from its adamant mistaken position certainly constituted an unreasonable resistance to payment of compensation which had been erroneously terminated.

"The Board concludes that with this record, the hearing officer had no alternative but to impose the increased compensation and attorney fees granted a claimant by ORS 656.262 (8)."

WCB #67-1584 March 19, 1969

Jesse Arehart, Claimant.
John F. Baker, Hearing Officer.
William R. Thomas, Claimant's Atty.
O. E. McAdams, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 15% loss arm for back disability. Claimant, a logger, suffered an injury in a fall to his neck, upper back, and left arm. Myelogram findings were not typical, but indicated there could be a small herniation at C6-7 on the left. Further surgery was not

recommended by claimant's doctor. The claimant is permanently disabled from returning to logging or other heavy work. The award was increased to 35% loss arm for unscheduled disability. The Board affirmed, commenting:

"The claimant's condition is one which probably would be improved by surgery. The claimant apparently sought complete assurance of success of the proposed surgery. No doctor can honestly extend such prognostications to any major surgery. Compensation may be suspended for unreasonable refusal to undergo surgery. The Board is reluctant to declare refusal to undergo major surgery unreasonable but it does deem the refusal a factor to be taken into consideration in evaluating disability. One of the problems is evaluating permanent disability and awarding compensation therefore only to have the claimant later insist upon surgery which then reduces the disability. One is compelled to conclude that if the disability was as great as alleged the claimant would be more willing to accept surgical proceedings which offer a substantial chance of reducing the disability."

WCB #68-1006 March 19, 1969

Densil A. Wilson, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Allen T. Murphy, Jr., Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant, a trailer-hauler, alleges injury to his back while in Washington.

"The claim was denied by the State Compensation Department and this denial was affirmed by the hearing officer. Though the accident allegedly occurred on November 3, 1967, the first notice to the employer was given orally by telephone in late March or early April, 1968. The treating doctor was not advised of the possible job-relationship until April 22, 1968, and the first written notice to the employer was April 30, 1968.

"If the claim was subject to the Oregon law, ORS 656.265 bars a claim for failure to provide written notice within 30 days. There are exceptions but the burden is upon the claimant to justify the delay, and show the employer not to have been prejudiced by the delay. This claimant has a history of prior back injury. One of claimant's exhibits contains a statement from a treating doctor that 'at this point I feel that he is malingering.'

"The Board concludes and finds that the failure to promptly notify the employer did in fact prejudice the employer and that the claim is therefore barred.

"The Board also concludes that the claimant was not a workman subject to the Oregon law. He was not hired in Oregon or by an Oregon employer. He was hired in Idaho and worked in and out from Idaho. Neither the contract of employment nor the accident arose in Oregon. Though claimant had been in Oregon and was to return to Oregon, his entire venture on leaving Boise was pursuant to directions from his place of employment in Boise to go to Portland, thence to Randall for a return to Boise. He was not an Oregon workman temporarily leaving Oregon. He was an Idaho workman who had temporarily entered Oregon, left Oregon and was to return temporarily to Oregon."

"On a matter of jurisdiction, the Workmen's Compensation Board, with the record before it, will not confine itself to other issues if it appears the parties are not properly subject to the Oregon law.

"The claim is also denied for the further reason that neither the claimant nor his employer are subject to the Oregon law with respect to the accidental injury suffered by this Idaho workman in Washington."

WCB #68-1278 March 19, 1969

Roy A. Black, Claimant.
J. David Kryger, Hearing Officer.
William Deatherage, Claimant's Atty.
Lyle C. Velure, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 25% loss arm for unscheduled disability for aggravation. Claimant has a low back injury. Presently he complains of pain in his lower back and both lower extremities upon walking and while lifting relatively heavy objects. Claimant gets a sharp pain in his low back while attempting to negotiate stairs. He has difficulty in sleeping due to the pain, and generally any physical activity exacerbates his condition. Claimant's right leg becomes numb, when it is inactive and feels as if it is asleep. Claimant states that he is unable to return to service station work as a mechanic, for which he was trained in the service, as he is unable to reach over fenders which results in stretching his back. Claimant states, he has a limited amount of ability to bend over and is unable to return to his prior occupation as a truck driver, as it involves lifting and involves extensive use of the lower extremities. There is no light work which the claimant is presently able to perform without retraining.

"The hearing officer increased this award to 60% of an arm and gave further awards for loss of function of 10% of each leg.

"The record reflects a claimant with a pre-existing degenrative osteo-arthritis. The issue is the extent ot which the accident precipitated a permanent exacerbation of disability upon the underlying degeneration.

"Apparently this claimant returned to work in June of 1967, and suffered a further injury on August 25, 1967. The record makes no attempt to distinguish or segregate the employer's liability and for the purpose of this review, it would appear that the finding of disability would properly encompass the residuals of both incidents. It is not quite as clear what part is played in the total picture by a non-industrial incident of lifting sacks of grain at home prior to May 29, 1967, as reported to Dr. McIntosh and recited in the report of Dr. McIntosh of July 1, 1967. To the extent this was a separate intervening non-industrial incident, the permanent results, if any, would not properly be chargeable to the employer.

"The claimant is described as obese which of course is a factor which places a self-imposed continuing strain upon the underlying degenerated physical structure. To this is added some functional problems which makes somewhat difficult the segregation of the true physical impairment and disability attributable to the industrial injury."

"The Board, from its review of the evidence, concludes that the weight of the evidence does not justify the increase in unscheduled disability from 25 to 60% of an arm. The Board, considering the matters not of record at the time of the original determination, concludes and finds that the unscheduled disability does not exceed in degree the loss by separation of 35% of an arm. Though the evidence is not strong reflecting an actual spreading disability from the back to the legs, the awards for loss of function of 10% of each leg will not be modified.

"The order of the hearing officer is therefore modified to reduce the award of unscheduled disability from 60% to 35% loss of an arm by separation. The order of the hearing officer is otherwise affirmed."

WCB #68-1752 March 19, 1969

Troy M. Audas, Claimant.
Mercedes F. Deiz, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 30% loss use of the left arm and 5% loss arm for unscheduled disability. Claimant, a roofer, suffered a dislocated shoulder in a fall. Claimant suffered a tear within the rotator cuff tendon. Surgery was performed. Medical examination subsequently found shoulder abduction and flexion to be one-half of normal, power to be 35% of normal, considerable atrophy of the scapulo-humeral muscles, and an occasional clicking in the shoulder movement. Dr. Kimberley reported that the claimant has a normal range of lumbar spinal motion, but was slightly tender at the lumbosacral juncture. Claimant is unable to return to any type of hard or moderately heavy manual work, cannot do overhead work, and cannot engage in excessive lifting. The Hearing Officer increased the awards to 50% loss function of an arm plus 25% loss arm by separation for unscheduled disability. WCB affirmed.

WCB #68-1181 March 19, 1969

C. W. Graves, Claimant.
H. Fink, Hearing Officer.
William Frye, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

Appeal from determination allowing 25% loss use of right forearm. Claimant fell and suffered a wrist fracture. The claimant appears medically to have suffered at most an 18% loss of impairment of the forearm and this has been extended to a finding of 25% disability. The Hearing Officer and the Board affirmed.

WCB #67-541 March 19, 1969

Roy B. Turvey, Claimant.

Previous proceedings appear at I VanNatta's Comp. Rptr., Page 55. Pursuant to a remand of March 27, 1968, by the Circuit Court for further evidence. The further evidence was heard and in a brief opinion the Hearing Officer and the Board respectively reaffirmed the previous award.

WCB #68-663 March 19, 1969
WCB #68-400
WCB #68-863
WCB #68-801

Paul F. Brauer, Claimant.
Fred Max Linton, Claimant.
Baden L. Windust, Claimant.
Lester H. Hubbard, Claimant.

"The above entitled matters involve four claims, all of which involve the same employer, the same insurer, similar issues of disability and common counsel for the parties. The issue before the Board is for imposition of penalties pursuant to ORS 656.262 (8).

"The issues on the merits arise from whether the various claimants suffer or suffered compensable disability as the result of inhalation of noxious fumes in the course of their employment.

"Orders were issued in each case on November 29, 1968, finding the claims to be compensable. The employer rejected the hearing officer orders as permitted by ORS 656.808 and decision on the merits now pending before a Medical Board of Review.

"The matter before the Board is the failure of the employer to institute compensation as required by ORS 656.313 during pendency of review and appeal procedures.

"It appears from the record that the employer made no payments of compensation for nearly two months following the orders of the hearing officer, that payments were then made only after repeated urging by claimants' counsel and institution by counsel of further proceedings to expedite compensation.

"By law, compensation in the first instance is made payable no later than 14 days after the employer has knowledge of the claim. Despite the continuing dispute over compensability of these claims, despite the possibility they may subsequently be found to be non-compensable and despite the fact that under such circumstances the employer would be unable to recoup payments, the law requires payment of compensation to be made once ordered paid and institution of review proceedings, in the words of the statute, 'shall not stay payment of compensation to the claimant.' At this point, it should be noted that compensation is now defined to include medical services. While medical care is not payable on a time schedule, it should be paid within a reasonable time following a billing. Claimants' counsel was awarded fees payable by the

employer. These, however, are not compensation to the claimant and are not payable pending review or appeal of the claims.

"With respect to the compensation, including medical care, the Board finds the employer's delay to constitute an unreasonable resistance to the payment of compensation as ordered by the hearing officer."

WCB #68-820 March 20, 1969

Robert V. Puckett, Claimant.
H. Fink, Hearing Officer.
Burt McCoy, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 60% loss use of the left little finger and 25% loss use of the left ring finger. Claimant alleges severe disability of the hand, but defendant's movies show substantial use of the hand. The Hearing Officer affirmed. The Board affirmed.

--- ------- March 20, 1969

William V. Koch, Claimant.
Own Motion Order.

"The above entitled matter involves the claim of a carpenter who was 43 years of age in September of 1951, when injured by the collapse of a wall. The immediate injuries consisted of a comminuted intertrochanteric fracture of the left femur and a badly comminuted fracture of the left heel bone.

"After considerable treatment the claimant managed to return to work for 16 years as a carpenter. In November of 1954 a court settlement resulted in a final award of disability of 75% loss of use of the leg affected by the multiple fractures plus 25% of an arm for unscheduled disabilities in the low back.

"The workman worked with some difficulty which was to be anticipated in light of the awards. With an increase in symptoms a further surgery on the foot was performed in July of 1967. Following this surgery the State Compensation Department awarded a further 20% of a foot.

"The matter is before the Workmen's Compensation Board on its own motion for consideration of whether the workman's condition is such that he can now no longer regularly perform work at a gainful and suitable occupation.

"One unexpected result of the 1967 surgery was a crutch palsy which developed in the right arm from the use of crutches following the foot surgery. It appears that this condition is permanent. Thus to the major disability of the leg and disability in the low back has been added a further major permanent disability in the right arm, all related to the injury.

"The Board finds and concludes from this record that the claimant by the combination of scheduled and unscheduled injuries is permanently incapacitated

from regularly performing suitable work. The claimant is found to be entitled to compensation as a permanently and totally disabled workman.

"The State Compensation Department is therefore ordered to pay compensation to the claimant accordingly.

"Counsel for claimant having been of some assistance to the claimant in the inception of own motion proceedings is allowed a fee in the amount of $150 payable from the increased compensation."

WCB #68-1464 March 21, 1969

Beulah Inez Sodaro, Claimant.
Forrest T. James, Hearing Officer.
Ralf H. Erlandson, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.

This is an aggravation claim for a low back difficulty. The claim was allowed by the Hearing Officer. On review a stipulation was entered which provided that a fusion would be performed on the claimant.

WCB #68-1403 March 24, 1969

Gerald L. Gregory, Claimant.
Richard H. Renn, Hearing Officer.
Richard Kropp, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by the Department.

Appeal from a determination awarding 10% of a workman for unscheduled disability. Claimant, a logger, was partially crushed between a Caterpillar tractor and a log. The injury suffered by the claimant was a crushing injury to his right upper quadrant abdomen with severe laceration of his skin in several places, fracture of ribs, rupture of his liver and diaphram and tearing of the muscles of the chest wall, causing immobilization of the right side. As a result of the injury, claimant is prevented from normal movement of his trunk and cannot lift, strain, jump or perform any strenuous activities involving the use of his arms, chest or right upper quadrant abdominal muscles. The Hearing Officer allowed 65% of a workman for unscheduled disability. On review the Board reduced the award to 50% of a workman or 160 degrees.

WCB #68-1281 March 24, 1969

Fred C. Low, Deceased.
George W. Rode, Hearing Officer.
George A. Rhoten, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Beneficiaries.

This is a heart attack claim, which was denied by the Hearing Officer. The Board stated:

"The above entitled matter involves the issue of whether a deceased workman's death from the obstruction of a coronary artery in his heart constituted an accidental injury arising out of an in course of employment.

"The deceased workman was the shop foreman for a company which sold and serviced heavy duty construction and logging equipment. Basically his duties were managerial and supervisory. His death occurred at his desk in the mid-afternoon of February 22, 1968. Though no particular exertion was involved in his work on the date of his death, he had performed some welding work the previous afternoon and experienced some symptoms which he described as his lungs hurting and which he ascribed to welding fumes.

"From this background the issues arose as to whether there is evidence of medical and legal causation to constitute a compensable accidental injury.

"There are conflicting medical opinions. Dr. Brady is a coroner whose medical specialty is that of pathology and whose specialty would be of primary value if proof were sought on an issue of whether death was produced by the coronary infarction. Dr. Brady did relate the death to some of claimant's employment activities the day before his death. On the other hand, Dr. Cohen is a medical internist specializing in chest diseases and instructing at the University of Oregon Medical School. His field includes cardiology. With due respect to Dr. Brady, the Board must make a choice and in this instance the Board concludes that Dr. Cohen's background, training and expertise in the particular area of medicine at issue entitled his conclusions to the greater weight.

"The Board concludes and finds that the death of the workman in this instance did not arise out of the employment and did not constitute a compensable accidental injury.

"The order of the hearing officer denying the claim of the beneficiaries of the workman is therefore affirmed."

WCB #68-661 March 24, 1969

Leo F. Effle, Claimant.
H. L. Pattie, Hearing Officer.
Benhardt E. Schmidt, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 10% loss function of the left leg for a twisted knee. Claimant suffered a torn medial meniscus which required surgery. The Hearing Officer affirmed the determination. On review the majority of the Board allowed increased compensation, commenting:

"The claimant had a degree of osteoarthritic degeneration of both knees prior to the injury and for a time post surgically there was an expectation that the knee was actually better functionally than it had been before the accident.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have a permanent partial disability of 10% loss of use of the left leg. This order of February 17, 1967, was the suject of a request for hearing filed April 15, 1968. Hearing should not have been granted on the basis of review of the initial determination and medical opinion supporting a claim of aggravation should have been obtained prior to scheduling a hearing.

"The latter procedural problem was not raised and the Board review is upon the issue of an increased disability by way of aggravation. The majority of the Board, noting the reference by Dr. Cottrell to the early optimism over the permanent effects compared to recent events, concludes that a compensable aggravation has occurred. The claimant has some irritating bodies referred to euphemistically as 'joint mice.'

"The hearing officer concluded that the disability in the knee was greater than the 10% awarded but that the amount attributable to the accident does not exceed the 10% awarded.

"The majority of the Board finds and concludes that the disability to the knee constitutes a loss of function of 25% of the leg and compensation is ordered paid accordingly. Claimant's counsel is to receive 25% of the increased compensation as paid.

"To the extent that injections are required from time to time in the injured knee due to the accident, the employer is required to pay the costs pursuant to ORS 656.245. If injections are required in both knees it would appear the accident would not be the precipitating factor unless medical evidence is produced distinguishing the nature of the injections and reflecting the relationship of treatment to the injury.

"Mr. Redman, dissenting, concludes that the disability attributable to the accident does not exceed the 10% previously awarded, that before any increase in award is made, the claimant should undergo recommended treatment, that award should not now be made only to have further proceedings by way of aggravation for failure to now follow the proper course and that there is not more than a 10% differential in the comparable disabilities of the injured and non-injured legs."

WCB #68-1401 March 26, 1969

William H. Johnson, Claimant.
Page Pferdner, Hearing Officer.
Garry Kahn, Claimant's Atty.
Kenneth Kleinsmith, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing no permanent partial disability. Claimant suffered a low back strain. The Hearing Officer allowed 10% of a workman or 32 degrees disability. On review the Board affirmed, commenting:

"If one were to base award solely upon the claimant's present recitation of subjective complaints, the claimant would be badly disabled. However, most of the complaints are subjective and little or no objective basis can be found by medical examiners to sustain the allegations of disability or to associate the symptoms to the accident. As the hearing officer noted, the claim of disability has spread on successive examinations until it now encompasses almost the entire physical structure. Most of the complaints appear to be functional and there is no evidence that any functional problem was caused by the relatively minor strain to the low back."

WCB #68-1130 March 26, 1969

Doran Jackman, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Charles H. Seagraves, Jr., Claimant's Atty.
Allan H. Coons, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 40% loss arm by separation for unscheduled disability for a back injury. Claimant, age 65, fell from a scaffolding and suffered compression fractures in the areas of D-12 and L-3. The Hearing Officer allowed 65% loss arm for unscheduled disability. The Board increased the award to permanent total disability, commenting:

"The Board has carefully reviewed the record. It reflects a workman now beyond the mandatory retirement age of his employment when injured. However, the fact that he might have experienced difficulty in continuing to be employed does not preclude an award of permanent total disability if the injury to the back is a substantial factor in barring the workman from suitable and regular employment. Many workmen are working past the age of 65 years. The Board concludes that the claimant could probably find some part time work at some sedentary job but that the degree of disability caused by his painful back would interfere with regular work in this connection."

WCB #68-2012 March 26, 1969

Linard Culp, Claimant.
H. L. Seifert, Hearing Officer.
Request for Review by Claimant.

The Board affirmed the dismissal of the request for hearing, commenting:

"The employer's insurer denied the claim by letter of July 3, 1968. The request for hearing on the claim was not filed with the Workmen's Compensation Board until December 5, 1968. It is the contention of the claimant that the law requires the denial of a claim by a Direct Responsibility Employer be made by the employer and that a denial by the employer's insurer is a nullity. The Workmen's Compensation Board is aware that a Circuit Judge has so ruled, but that the ruling is now on appeal. The Board has many tens of thousands of claims of record in which acceptances, denials and payments of compensation have been made by insurers for their insured. The administrative morass which would accompany an interpretation wiping out the legal effect of all these actions would be beyond comprehension. The Board deems the actions of the insurers to be the acts of the employers.

"The hearing officer dismissed the request for hearing as untimely filed. The record reflects that no medical services have been provided and no disability payments have been made. Pursuant to ORS 656.319, no hearing could be granted under these circumstances in any event since more than one year elapsed from the date of the accident. Either there was a proper denial from which no timely request for hearing was filed, or there was no legal denial and no request for hearing was filed within the time permitted."

WCB #68-335 March 26, 1969

Joseph Y. Braley, Claimant.
John F. Baker, Hearing Officer.
James H. Nelson, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 20% loss arm for a back injury. This was affirmed on Hearing and the review was dismissed as claimant applied for and received an advance payment.

WCB #68-513 March 26, 1969

Jesse J. Francis, Claimant.
Page Pferdner, Hearing Officer.
Vincent G. Ierulli, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 5% loss of the right foot. Claimant suffered a "contusion of right 2nd, 34d, and 4th toes." The Hearing Officer affirmed the determination, as did the Board, which commented:

"The claimant's toes and foot were previously deformed and calloused due to a condition categorized as 'hammer toes.' His other foot had been the subject of previous injury and award of disability.

"From the medical reports it would appear that the claimant was a difficult patient. There is nothing in the medical reports to support any other than a minimal award of disability. The claimant asserted upon hearing that he is now forced to walk on the outside of his foot. The hearing officer, from observation of the foot and shoe, concluded that the alleged abnormal manner of walking was largely confined to the exhibition at the hearing. The wear of the shoe and callous of the foot indicated normal use of the foot."

WCB #68-995 March 26, 1969

Bert Junior Taylor, Claimant.
H. Fink, Hearing Officer.
William Frye, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. A logger alleges a compensable knee injury. The denial was affirmed by the hearing officer and the Board which commented:

"The knee had been injured previously and had been the subject of surgery. Though apparently susceptible to injury, the knee was trouble free for several months before the time of the alleged accidental injury.

"The claimant alleges that the knee was injured in the forenoon of the day in question. The incident was not witnessed. He worked the remainder of the day and rode back from work in a 'crummy' without reporting the accident to the employer or fellow workmen. It is the testimony of the claimant and his wife that the knee was swollen to the extent his levis were tight. Though he did notify the 'crummy' crew the next morning that he had trouble with the knee, there was no recitation of work association. A further factor in consideration of the claim is that he did not seek medical attention for 11 days despite the alleged severe swelling upon leaving work. A further factor was the failure to report the accident when calling for his check."

WCB #68-409 March 26, 1969

Chester M. Lucas, Claimant.
H. L. Pattie, Hearing Officer.
Don S. Willner, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by the Department.

Claimant suffered an accidental exposure to chlorine gas. Ten per cent loss arm by separation for unscheduled disability was allowed by the Hearing Officer and affirmed by the Board which commented:

"After a further minimal exposure in May of 1968, the claimant sought medical attention. The medical problem is complicated by a reduction in

breathing capacity attributed to 40 years of smoking. The complicating factor is a bronchitis which is now made symptomatic upon exposure to chlorine fumes.

"The State Compensation Department has cited authorities from other jurisdictions which might be of more value if the claim was one of occupational disease. There is no claim that the exposure or disease is one of occupational disease. As the Board views the record in this case it is a claim of trauma from isolated instance of accidental exposure to a strong irritating substance and the principles applied to accidental injury are to be applied. Though the hearing officer appears to have relied strongly upon the claimant's inability to return to a particular job, it is that very inability which indicates there is some permanent disability and some medical support which indicates that there is more than a predisposition to further injury. The test of disability is not necessarily one of wage loss which occupies substantial discussion in the record."

WCB #67-1546 March 27, 1969

Mervyn Stockel, Claimant.
Norman F. Kelley, Hearing Officer.
Robert A. Boyer, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for Review by Employer.

"The above entitled matter basically involves a dispute between the present and former insurers of the employer with respect to the current responsibility for low back injuries received in a series of admittedly compensable injuries.

"The former State Industrial Accident Commission was the insurer with respect to a low back injury of July 9, 1965, when the workman sustained a strain in lifting a braking machine to clean under. This claim was closed August 18, 1965, with no compensation paid or allowed other than for medical services. This incident could not now serve as the basis of a claim for aggravation due to expiration of the statutory period of two years from the order allowing the claim. It would be subject procedurally only to the own motion consideration by the Workmen's Compensation Board pursuant to ORS 656.278.

"The next incident of record was September 1, 1966, when the State Compensation Department as insuring successor of the State Industrial Accident Commission accepted an exacerbation of the back problem on a claim designating the cause as 'lifting plywood samples from floor to table.' Again it would appear that only medical services were involved without time loss or permanent injuries. The claimant could qualify his present difficulties as a compensable aggravation of the September 1, 1966, incident if he obtained a medical report pursuant to ORS 656.271 and Larson v. SCD, 87 Adv 197,200. Claimant's problem here is that his doctor has associated the present problems with a new incident.

"This new incident of April 27, 1967, was associated with lifting lab equipment. The treating doctor concluded that there was a distinct injury each time. The claimant was actually without the prerequisite evidence to even establish a claim for aggravation."

"At this point it should be noted that the 1965 and 1966 injuries involved only medical services without either temporary total or permanent partial disability. The law requiring the employer to take the workman as he finds him has a continuing effect. If the workman had a prior minor non-industrial back injury, the present insurer would have probably accepted its responsibility without question. Only the possible opportunity to shift the obligation to the previous insurer prompted the present dispute.

"It would appear that where liability is in effect admitted, the workman should be spared the necessity of participating in the conflict between insurers. Though the right of successive insurers to litigate such issues is not clear, the insurers and employer must absorb whatever costs and penalties may be associated with delays and denials of compensation.

"The Board concludes and finds that the incident of April 27, 1967, constituted a new compensable injury and the order of the hearing officer directing the employer and its insurer, St. Paul Insurance Co., to accept responsibility for the consequences of the April 27, 1967, incident as a new compensable injury is affirmed." Attorney fees were also ordered.

WCB #68-928 March 27, 1969

William H. Arnold, Claimant.
George W. Rode, Hearing Officer.
Burl Green, Claimant's Atty.
John Gordon Gearin, Defense Atty.
Request for Review by Employer.

"The claimant is a 54 year old interstate truck driver who was injured October 3, 1967, when the large truck and trailer rig he was driving hit a large piece of pipe in the road. The truck rolled over and the claimant had difficulty in extricating himself from the rig which was upside down with the motor running and afire above him.

"Though the claimant recovered from the various cuts, contusions and abrasions, he experienced difficulty in returning to his former long haul truck driving due to headaches, anxiety and nervous tension. The employer terminated the claimant's compensation for temporary total disability notifying claimant that he could request a hearing.

"The procedure for terminating temporary total disability is found in ORS 656.268 and the record of this claim to date contains no such determination. Generally speaking, temporary total disability is terminable when the workman returns to work, when the treating doctor releases the claimant to return to his regular work or as of a date set pursuant to ORS 656.268. The employer sought a determination as required, but was advised that the information submitted was not sufficient to enable a determination to be made. The employer then unilaterally suspended compensation. The employer did not comply with the written directions of the Board but asserts it had some oral advice to follow the procedure it took.

"The employer's approach to the problems involved borders on the bizarre. It seriously asserts that by paying compensation late but prior to a hearing, it may vitiate the provisions of ORS 656.262 (8). The Board construes the

statute to require payment of compensation when due and the application of penalties and attorney fees is determined by failure to pay 'when due' rather than 'then due' as asserted by the employer.

"The employer urges 14 citations of error by the hearing officer. Despite the enumerations the issues resolve into whether the claimant's condition became stationary, whether the anxiety-tension-neurosis syndrome is compensably related, whether the unilateral termination of compensation was proper and whether the hearing officer should have proceeded to resolve issues which are to be resolved in the first instance prior to formal hearing and pursuant to ORS 656.268.

"The Board concludes and finds that the employer improperly terminated payment of temporary total disability; that the interpretation placed on medical reports by the employer in this instance did not justify the termination of benefits; that the record does reflect a causal connection between the accident and the claimant's continued inability to return to regular employment and a need for continued treatment; that the belated payment of benefits does not avoid application of penalties and the hearing officer properly reserved other issues for determination by the Closing & Evaluation Division of the Workmen's Compensation Board which is the administrative force performing the duties required by ORS 656.268.

"The order of the hearing officer is therefore affirmed.

"Counsel for claimant, pursuant to ORS 656.382 (2) is awarded the further fee of $300 payable by the employer for services in connection with this review."

WCB #68-739 March 27, 1969

Alonzo A. Johnson, Claimant.
John F. Baker, Hearing Officer.
A. C. Roll, Claimant's Atty.
James B. Bedingfield, Defense Atty.
Request for Review by the Employer.

The claimant suffered a head injury when he was struck above the left eye by a vine maple, while he was working as a logger.

"The claimant was injured while employed out of Coos Bay. Shortly after the injury he moved to Gilchrist. The case history involves subsequent treatment from a doctor at Cedarville, California, and Medford, Oregon.

"No purpose would be served in attempting to recite the entire history of the claim. Certainly a workman who impedes the duty of the employer to pay compensation difficult or impossible by moving about or entirely absenting himself may justify a delay by the employer in making payment.

"The Hearing Officer found and the Board concurs that the posture of the delays in this claim makes the moving of residence by the claimant an excuse rather than a reason for delayed compensation. The person in the employer's

establishment of responsibility for such payments made it quite clear that he felt it was the workman's duty to provide a continuing medical justification before payments would be made. ORS 656.262 makes the processing of claims and providing compensation the responsiblity of the employer. If the employer really concludes it has exhausted its responsibility, the matter should be submitted to the Workmen's Compensation Board purusant to ORS 656.268."

"The Board finds that though the circumstances might have justified some delay, the evidence in its entirety is one that reflects unreasonable delays. It is the unreasonable delay that brings to bear the award of increased compensation.

"The Board adopts the findings, conclusion and order of the hearing officer with respect to all matters and issues therein contained including the reimbursement for certain medical services and travel expenses, and having independently arrived at the same conclusions, the order of the hearing officer is affirmed.

"Pursuant to ORS 656.382 (2), counsel for claimant is awarded the further sum of $300 payable by the employer for services in connection with this review."

WCB #68-1257 March 28, 1969

Harold F. Vicars, Claimant.
George W. Rode, Hearing Officer.
Rodney Kirkpatrick, Claimant's Atty.
Gerald Knapp, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 55% loss arm for unscheduled disability. Claimant fell from a trailer and injured his low back. The claimant was first treated conservatively and subsequently underwent a laminectomy and a fusion of vertebrae in his low back. Though the fusion was a success in terms of obtaining a solid union, the claimant has continued to have symptoms which he asserts preclude him from ever again performing regular gainful employment. Claimant alleges frequent headaches, inability to sleep and in addition feels that the vertebra above the fusion come out, and he has to lie down to let them go back in. Claimant has made no employment efforts at all. His daily activities consist of watching TV, reading, walking around the yard and lying on the floor. The claimant was discharged from the Physical Rehabilitation Center for being delinquent in attendance. The Hearing Officer increased the award to 85% loss arm for unscheduled disability. On review the Board noted the lack of cooperation relative to the Physical Rehabilitation Center and remanded the matter to the hearing officer with directions, that a further appointment be obtained for the claimant to be enrolled at the Physical Rehabilitation Center.

WCB #68-866 March 28, 1969

Russell A. Boutillier, Claimant.
Forrest T. James, Hearing Officer.
F. P. Stager, Claimant's Atty.
James P. Cronan, Jr., Defense Atty.
Request for Review by the Department.

"The claimant is a 54 year old surveyor whose claim of an allegedly compensable coronary attack was denied by the State Compensation Department as insurer of the employer. The hearing officer ordered the claim allowed and the matter was brought to review.

"The factual situation involves an incident of January 15, 1968, when the claimant suffered an onset of chest pain while working on brushy, sloping ground. He rested and then returned to his car some half mile distant and returned home. Due to inclement weather the claimant stayed home January 16th, limiting his activities to getting firewood for his stove. Again on January 17th the inclement weather kept the claimant at home where he again limited himself to filling the wood box and moving a washing machine. He had another sudden onset of chest pain at about 10 a.m. His condition worsened during the day and after medical consultation that evenin, he was hospitalized.

"In the review of the record, the Board is faced with conflicting medical opinions with respect to whether the work activity of January 15th produced a compensable injury. Dr. Kaye is a general practitioner with about five and a half years of general practice. Dr. Kaye has no expertise in the area of cardiology, but has encountered the usual number of cardiac patients consistent with his practice. Dr. Kaye is of the opinion the work effort of January 15th was a causative factor in the coronary occulusion. Dr. Dripps is certified by the American Board of Internal Medicine and a substantial portion of his practice is concerned with cardiology.

"The testimony of Dr. Dripps with respect to the chain of events is quite explicit. It is his opinion that at most the claimant suffered a symptom of the decreased circulation in his coronary arteries at work, but that no physical change took place. The coronary attack occurred at home some 48 hours after the symptoms on the job and the coronary occlusion was not related to any work effort two days before.

"The hearing officer placed greater weight upon the opinion of the general practitioner who was the treating doctor. We are here faced with a matter of causation rather than treatment. The internist with expertise in the particular field demonstrated a knowledge of causation and diagnostic procedures and tests beyond the more general background of the general practitioner. The Board places greater weight on the conclusions of Dr. Dripps and concludes and finds that the claimant did not suffer a compensable accidental injury as alleged.

"The order of the hearing officer is therefore reversed and the denial of the claim by the State Compensation Department is sustained."

WCB #68-732 March 28, 1969

Dennie John Purkerson, Claimant.
Forrest T. James, Hearing Officer.
Tyler Marshall, Claimant's Atty.
Allan H. Coones, Defense Atty.
Request for Review by Claimant.

Appeal from a Notice of Denial.

"The claimant is a 19 year old millworker who claims to have injured his right shoulder, arm and back in an unwitnessed accident on January 27, 1968. There is no history of a specific trauma with the troubles beginning after a day of hard work. There is a dispute between the claimant and his supervisor with respect to whether the claimant called on Sunday, the 28th to report the injury. The claimant's further testimony was that he visited a Dr. Chatburn on Monday, the 29th.

"No report was submitted at the original hearing from Dr. Chatburn. The claimant first visited a Dr. Nicholas on March 13, 1968. Dr. Nicholas diagnosed a right shoulder strain but of course has no knowledge on the cause of the strain. One point of interest is claimant's testimony that he was advised by Dr. Nicholas to take a temporary layoff and then return to lighter work. This is not borne out by the report of Dr. Nicholas. In these matters the best evidence is the doctor's report--not the patient's uncorroborated replay of what he says the doctor said.

"There were numerous conflicts in the testimony. The Workmen's Compensation Board upon its initial review deemed the absence of any report from Dr. Chatburn critical. The matter was remanded to the hearing officer and the record now includes a report from Dr. Chatburn who reports that he treated the claimant on a January 16 for a neck problem but nothing in his records indicate anything was said to cause his office to handle the case as an industrial injury. The claimant reported to the doctor that a cervical problem came on 'that morning' while driving a stacker. This adds to the already implausible conflict in the evidence.

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

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

WCB #68-1124 March 31, 1969

Charles A. Rundel, Claimant.
George W. Rode, Hearing Officer.
Charles Paulson, Claimant's Atty.
James Larson, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 70% loss of the workman for unscheduled disability. Claimant has suffered a compensable heart attack, and the issue

is the extent of the disability. The Hearing Officer affirmed the determination, but pending Board review the claimant was referred to the Physical Rehabilitation Center. On the basis of their report which is partially reprinted below, the Board awarded total and permanent disability. The report stated in part:

"HISTORY: Mr. Rundel is now over 18 months post myocardial infarction and it has been about 1 year since he had the last episode of chest pain requiring hospitalization and suggesting acute coronary insufficiency. He has continued to be markedly restricted in activity by chest pain which occurs 2 or 3 times daily on an average. This is usually relieved by rest and he requires only 4 or 5 nitroglycerin tablets per week but admits he doesn't like to take medicine and tries to avoid taking pills unless the pain persists. At the present time typical activity which causes chest pain has included lifting the hood of his car, walking outside in the wind or cold air for a short a distance as 30 feet, stooping in front of his fireplace to scoop ashes with a small shovel and climbing 1 flight of stairs at any more than a very slow rate. He consistently has chest pain if he overeats, during sexual intercourse, with any kind of emotional disturbance and during dreaming at night. During the past two months he has had onset of chest pain at night which is now occurring about 5 nights per week, lasts 1/2 to 1 hour for which he has again avoided taking nitroglycerin. The pain occurs early after retiring, is aggravated if he becomes agitated and gets out of bed and gradually wanes if he lies quietly in bed.

"The pain continues to be an aching, heavy pressure sensation in his retrosternal region which on occasion radiates to his left chest. He denies having orthopnea, paroxysmal nocturnal dyspnea or cardiac edema. He fractured his left fibula in January and has been less active since that time so would not have occasion to notice exertional dyspnea. He has also had swelling in that leg related to the fracture but has noted none in the right ankle. In addition to nitroglycerine he takes Cardilate-P 4 times daily. He has had no other significant interval illnesses and has remained (sic)"

WCB #68-612 March 31, 1969

Garland Tolbert, Claimant.
H. Fink, Hearing Officer.
Robert J. McCrea, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

Appeal from a Notice of Denial.

"The claim upon which these proceedings are based was signed by the claimant March 14, 1968, asserting that on February 26, 1968, the claimant had slipped on a board and sustained a slipped disc. The employer's position is that he first knew of the alleged injury March 11, 1968, and that claimant had terminated his employment on March 5, 1968. The claimant had reported in to pick up his check on March 8, 1968, and informed the employer that he was going to Arizona to work.

"The claim was denied by the State Compensation Department as insurer of the employer and this denial was affirmed by the hearing officer. The claimant

had a previous industrial injury to his back for which he received an award of unscheduled disability equal to the loss of 40% of an arm. It is interesting to note that the hearing officer recites that the claimant recovered from the 1962 incident without residuals. It would appear that the current problem was based to some degree upon asymptomatic residuals which became exacerbated for some reason. There is medical opinion that the current problem is consistent with a fall such as the claimant describes. The doctor, of course, has no way of knowing what, if any, trauma claimant had sustained.

"Though the accident date on the claim is set as February 26, the testimony on hearing utilized dates of February 20th, 26th and 28th. Other evidence reflects that still another incident of threading pipe some time in January of 1968, was the precipitating factor. There is corroborative evidence of a slipping incident and of the claimant leaving work early on that date. There is also the fact that the claimant returned and continued to work and left the job to go to Arizona to work rather than due to a low back injury. The purpose of the Arizona trip was to alleviate an unrelated problem of pleurisy.

"The mere fact that a workman may be mistaken or confused with respect to the date of an alleged accidental injury is not fatal to this claim. However, when there is a question about whether the occurrence took place, the various inconsistencies may become important. The corroborative witnesses testified that 'things like that happen all the time.' On this basis it would be safe to assume that workmen in such occupations suffer accidents nearly every day. Not all accidents result in personal injury. Combined with an obvious speculation by the claimant utilizing several dates and several incidents was the report to the employer of leaving for Arizona to work. The one factor denied the Board in search for the truth from this confusion is the demeanor of the witness available to the hearing officer who concluded an accidental injury did not occur as alleged.

"The Board also concludes and finds that the claimant did not suffer a compensable injury as alleged. The order of the hearing officer is therefore affirmed."

WCB #68-941 April 2, 1969

Malcolm C. Buck, Claimant.
Page Pferdner, Hearing Officer.
Rodney Kirkpatrick, Claimant's Atty.
Kenneth Kleinsmith, Defense Atty.
Request for Review by the Department.

Appeal from a determination awarding 5% of the foot. The Board affirmed the hearing officer, awarded a $250 attorney fee and commented:

"Upon hearing the award was increased from 5 to 20% of the foot and order made with respect to assuming liability for arch supports for the injured foot. At the time of hearing it developed that a Dr. Belknap had treated the claimant June 8 to 14th, 1967, for a diabetic condition. Dr. Belknap billed the State Compensation Department on July 18, 1967. The bill was not paid by the State Compensation Department and in July of 1968, the claimant paid the bill himself after demands from a collection agency. Though there may have been some initial

basis for questioning the responsibility for a diabetic treatment, Dr. Church, the surgeon who treated the foot, advised the State Compensation Department in November of 1967, of the necessity of controlling the diabetes in management of the foot injury. It was not until a year later at the time of hearing that counsel for the State Compensation Department agreed on behalf of the State Compensation Department to assume liability for the $52 in medical care rendered by Dr. Belknap.

"Ordinarily attorney fees in a proceeding for increased compensation would have been payable from the claimant's increased compensation and would have been 25% of the increase from 5 to 20% disability of the foot.

"No attorney fee was assessed against the claimant's increased award. Instead the hearing officer found that the laxity of the State Compensation Department in failing to assume its responsibility and subjecting the claimant to paying for some of his own medical care under pressure from a collection agency justified the imposition of a 25% increase in the compensation ($13) and attorney fees prescribed in ORS 656.262 (8).

"There was no claim by the claimant that the State Compensation Department incurred any continuing liability for diabetic care. The surgeon caring for the foot discovered the diabetes and deemed management of the diabetes essential to the recovery of the foot. The record reflects that the State Compensation Department failed to meet its responsibility."

WCB #68-1525 April 2, 1969

Sandra Elliott, Claimant.
H. L. Pattie, Hearing Officer.
Edwin A. York, Claimant's Atty.
Richard C. Bemis, Defense Atty.

For previous proceedings see I VanNatta's Wk. Comp. Rptr., p. 9. Appeal from a determination allowing 20% loss arm for unscheduled disability. Claimant suffered a back injury which required a fusion. Claimant is not allowed to lift more than 15 pounds by doctor's instructions. The Hearing Officer affirmed the determination and the Board affirmed, commenting:

"A medical report was submitted from a Dr. Rask reciting that claimant has lost '70% of the use of her back.' The evidence reflects that this is most unrealistic. The reports of Dr. Robinson and the claimant's own testimony reflect that the residual permanent disability certainly does not exceed the award made by the hearing officer. Reports such as submitted from Dr. Rask are of little value in determination of the extent of disability caused by the accidental injury at issue."

WCB #68-118 April 2, 1969

Ervin A. Essig, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Dan O'Leary, Claimant's Atty.
John E. Jaqua, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing 5% loss use of left leg, 15% loss use right leg, 10% loss arm for unscheduled disability and 4% loss hearing of the left ear. Claimant was injured by a falling boxcar door. The immediate injuries included lacerations of the scalp and elbow in addition to knee injuries requiring surgery. The determination was affirmed by the hearing officer. The Board affirmed, commenting:

"The claimant's position on review is basically that the hearing officer did not consider loss of wages in arriving at the award of disability. A quote is taken from a Board order in another case involving temporary partial disability. Temporary total and temporary partial disabilities do involve wage loss. Permanent disabilities in Oregon are based upon the loss of physical function. The Supreme Court case of Lindeman v. SIAC cited by the claimant did not involve the issue of whether wage loss is a factor and the words quoted are mere dictum not directed to the issue before the Court. In the jurisdictions involving a 'wage loss' yardstick for permanent awards, workmen with obvious physical disability but no wage loss receive no award. The principle of comparing the finger loss of the ditch digger and violinist was again applied in Jones v. SCD, 86 Adv 847, 848 in May of 1968. The hearing officer did not err in limiting the evaluation to considerations of loss of physical function."

WCB #68-1119 April 4, 1969

Clark Mumpower, Claimant.
John F. Baker, Hearing Officer.
Robert L. Ackerman, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

"The above entitled matter basically involves the issue of whether the 1965 Act with reference to a claim arising prior to January 1, 1966, permits the application of ORS 656.262 (8) for assessment of additional compensation and attorney fees. The claimant had heretofore elected to have his claim administered pursuant to the procedures applicable to claims arising on and after January 1, 1966. The claimant was being compensated on a claim for aggravation. There was some delay by the State Compensation Department in payments accruing in May of 1968.

"Did the Legislature intend or could the Legislature properly grant additional benefits in the form of increased compensation and attorney fees for delays in the payment of compensation? The hearing officer noted that this case differed somewhat from Larson v. SCD, 87 Adv 197. A decision by Circuit Judge Burke is of record but it preceded the Supreme Court decision. The Board is advised that further matters are now pending in the Supreme Court on the very issue at hand."

"The Board cannot indefinitely postpone decisions even though the resolution to a problem may be forthcoming in another case.

"The Board concludes from the Supreme Court decision in Larson v. SCD that all of the procedures and incidental benefits are associated with an election to proceed under the new remedies. The previous case of Colvin V. SIAC, 197 Or 401 is of interest but is not necessarily controlling here. The basic election given claimants with pre-1966 injuries was the choice between a two year period for filing claims for aggravation with a jury trial on court review, or a five year period for filing such claims with a review on the record by the Workmen's Compensation Board and Circuit Court without jury. Upon close analysis, the imposition of increased compensation and attorney fees is contingent upon a future unreasonable act of the State Compensation Department. This is not a substantive increase in compensation for a prior injury. It is a procedural remedy for a wrong committed by the State Compensation Department following enactment of the new law.

"The Board concludes that increased compensation and attorney fees could be assessed in a proper case where the State Compensation Department unreasonably delays payment of compensation with respect to a pre-1966 injury.

"The Board finds no evidence in this record to support a decision holding any delay to be unreasonable.

"The Board is faced with a substantial administrative problem which it would like to see resolved in this area. Does every delay in payment create a right in the claimant to immediately cause the matter to be submitted to hearing, review and appeal? Matters involving one day's dely in compensation and non-payment of a minimal medical bill have become the subject of extensive and expensive hearings. The Board is aware of the unlimited aspects of ORS 656.283 (1) granting to any party at any time a hearing on any question. Whether this was intended to permit unlimited proliferation of piecemeal minor issues would appear at this point to be more important. If this matter is subjected to appeal, the Board would like some expression concerning the discretion of the Board in such matters and a judicial expression with respect to whether a delay in payment gives absolute right to hearing or whether even setting a hearing is a matter of discretion of the Board as one of the means to enforce a compliance with the law.

"Primarily because the evidence of record does not justify the imposition of increased compensation and attorney fees in this instance, the order of the hearing officer is affirmed."

WCB #67-1049 April 7, 1969

H. A. Kleeman, Claimant.
J. David Kryger, Hearing Officer.
William Babcock, Claimant's Atty.
John E. Jaqua, Defense Atty.
Request for Review by Employer.

"The above entitled matter involves issues of claims procedure and the responsibility of the employer with respect to an accidental injury of February 25, 1966. As of the date of the hearing, more than two years later, the

claimant had at most undergone minimal medical consultation and lost no time from work.

"Upon hearing, the employer was ordered to 'provide further medical care' and that the 'claim was improperly closed.'

"The Board will first address itself to the procedure. The hearing officer devoted an inordinate amount of an eight page order to attempt to prove the claim was 'improperly closed' and that the claimant 'was not then (April 13, 1966) and never had been medically stationary.' This assertion is made upon a record where the claimant's only visits to a doctor in 1966 were on February 25th and March 3rd, he never lost a day's time from work and did not seek further medical attention until January of 1967.

"The Board receives notifications of over 100,000 accidental injuries a year. The great majority of these injuries involve only nominal medical care. The Board from its inception on January 1, 1966, was faced with an administrative policy decision. Was every bump and bruise to be reported? The Board policy here by Administrative Order 5-1966, rule 2.03 a, dispensed with notice by the employer in first aid claims where no medical services, are provided. The next category is where some medical services, but no other form of compensation, are involved. The application of the full procedure of ORS 656.268 for determination of disability would probably entail a cost to the Board, employers and insurers approximating a million dollars a year. The Board policy has been that it would be a useless act to 'determine disability' where there was obviously no disability involved. There are now over 200,000 reported injuries involving only minimal medical services on which no determination has been issued purusant to ORS 656.268. They are not 'closed' in the sense of a determination having been issued and are therefore not 'improperly closed.'

"Concomitant with this policy is the Board policy that no workman would be deprived of the right to be heard with respect to any such claim deriving from the lack of a formal determination. The Board could apply its continuing jurisdiction without regard to whether the claimant could insist upon a hearing as a matter of statutory right.

"The hearing officer's lengthy opinion completely ignored ORS 656.319, which would deprive the claimant in this instance of the right to hearing as a matter of law under the legalistic theory of the hearing officer. The injury in this instance occurred February 25, 1966. No request for hearing was filed until August of 1967. No medical services were provided, no disability payments were made, no determination issued, no denial was made and by operation of this provision of the statute the right to a hearing was lost in the absence of the board policy preserving hearing rights if any issue arises from admitted accidental injuries without a formal determination pursuant to ORS 656.268. The Board could, of course, require a supporting medical report in such cases in keeping with the requirements of ORS 656.271.

"So much for the procedure.

"The Board, in adopting the simplified approach, never intended that it would adversely affect a claimant or redound to the benefit of an employer who failed to assume its responsibility of processing claims. In this instance it appears that the claimant was forcibly struck and received bruises and

contusions. While he returned to work without loss of any time from work even the relatively nominal medical costs were not paid by the employer.

"The Board concludes and finds that the employer failed to meet its responsibility under ORS 656.262 (1) and (8). There appears to be no reasonable basis for the complete failure to pay for the medical consultations and x-rays.

"The Board further finds that the condition complained of by the claimant at the hearing was compensably related to the injury of February 25, 1966. The employer is ordered to assume responsibility for all required medical services including those heretofore obtained and any disability compensation which might be therewith associated.

"Claimant was required to obtain counsel to preserve his rights. The fee allowed by the hearing officer would be minimal and paid by the claimant, possibly from his own pocket on the basis of a percentage of the medical benefits.

"The Board, for the reasons stated, concludes that the employer's failure to properly pay medical bills and to properly process the subsequent aspects in large measure contributed to the necessity of an involved hearing. The Board concludes that the employer unreasonably delayed payment and thereby unreasonably resisted payment of compensation. Claimant's attorney fees should be assessed against the employer pursuant to ORS 656.382 (1) for the hearing and ORS 656.382 (2) for review. A reasonable fee for such services to date is the sum of $600 which is hereby ordered paid by the employer to claimant's counsel."

WCB #68-1199 April 7, 1969

James M. Robertson, Claimant.
Richard H. Renn, Hearing Officer.
Harry A. Slack, Sr., Claimant's Atty.
Hugh Cole, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 45% loss use right leg. Claimant suffered a comminuted interarticular fracture of the proximal tibia and tibial plateau with a disruption of his popliteal artery (Broken knee). Claimant cannot walk on rough ground so cannot hold the job of a bridge construction foreman, as he had, but is able to work as a mobile crane operator. The knee condition is such that the claimant must use care in the use of the leg. Determination affirmed. WCB affirmed.

WCB #68-1355 April 9, 1969

Clorene M. Brothers, Claimant.
H. L. Pattie, Hearing Officer.
Claud A. Ingram, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing no permanent partial disability for a back strain. Claimant, a nurse's aide, strained her back while attempting to lift a patient. The Hearing Officer allowed 10% arm for unscheduled disability. On review the Board affirmed, commenting:

"In addition to the usual symptoms concerning low back difficulties, the claimant complains of a number of instances of instability from which she has suffered falls. A further factor is the circumstance that the claimant has added substantial weight following her injury. One medical report recites that 'on questioning it appears to be due to the increased intake of malt beverages.' The extent to which a person subjects strained soft tissues to a continuing abuse by imposing the burden of carrying additional pounds of flesh should not become an obligation of the employer. Her condition will improve when and if she follows the medical advice to reduce her weight and thereby reduce the strain."

WCB #68-603 April 9, 1969

Charles Henry Heckard, Deceased.
Richard H. Renn, Hearing Officer.
Nicholas D. Zafiratos, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Department.

"The deceased workman was a 54 year old logger. He was suffering from arteriosclerosis, a condition common to coronary attacks. He had a history of a non-disabling coronary occlusion nine years prior to this fatal episode of January 24, 1968. The record also involves some issue over the causal relationship of an automobile accident two weeks prior to death.

"The claim was denied by the State Compensation Department, but ordered allowed by the hearing officer.

"Many states resolve compensability of such claims on the usual-unusual activity test. That is not the test in Oregon though the medical experts do tend to base some individual opinions on the particular degree of effort. The hearing officer found as a fact that the work in which the claimant was involved in helping retrieve a cable was 'more difficult than that which he ordinarily performed.' This is contrary to the evidence, Tr. pg. 41-46. The hearing officer further recited as a fact that 'there is no evidence that this (auto) accident directly caused his decease.' Dr. Rawls at Tr. pg. 87-88 testified that the auto accident (non-industrial) was a material contributing factor. The hearing officer also erroneously recites as a conclusion of law that defendant's physician's testimony supported a conclusion of medical causation between the work effort and the infarction."

"Decisions in these matters are not easy at best. The findings and conclusions upon which decision is made should not distort, or deviate from, the record.

"In large measure, just as the Supreme Court has had occasion to do in these matters, the decision must be made upon the background, training and expertise of the doctors whose differing opinions are at issue. In this instance, one doctor is a competent general practitioner. The other doctor is an internist and, to the extent the further specialization is productive of greater expertise in such matters, the Board places a greater weight upon the conclusions of Dr. Rawls.

"The Board concludes that the decedant workman's coronary occlusion was not legally nor medically a compensable accidental injury. The order of the hearing officer allowing the claim is therefore reversed."

WCB #68-1361 April 9, 1969

Donald Lee Viles, Claimant.
George W. Rode, Hearing Officer.
Ben T. Gray, Claimant's Atty.
Allen T. Owen, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing no permanent partial disability. Claimant slipped off a running board of a truck at 11 a.m. and his ankle began to bother him that evening. Dr. Franck stated, "I believe it is medically reasonable to assume that the minor injury may have brought to surface his arthritic symptoms, but that there was continued disability as a result of arthritic complaints, and the injuries probably would have played a minor role as opposed to the primary disease itself." His present complaints are minimal and reflect no loss of working ability. The determination was affirmed by the hearing officer and the Board.

WCB #68-1038 April 9, 1969

Juanita Long, Claimant.
Forrest T. James, Hearing Officer.
James B. Griswold, Claimant's Atty.
Allan Owen, Defense Atty.
Request for Review by Department.

Appeal from a determination allowing 15% loss arm for unscheduled disability. Claimant, a cherry picker, was knocked from her ladder by a runaway jeep and suffered severe contusions to her back, hip, shoulders and neck. The Hearing Officer ordered the case remanded to the Department for further medical care and treatment. The Board set aside the hearing officer order and re-evaluated the disability at 40% loss arm for unscheduled disability, commenting:

"There are three complicating factors which have been of special concern to the Board in review of this claim. The first is the emotional overlay which has exaggerated and perpetuated physical complaints beyond reasonable expectations and beyond any objective findings. This factor rules out any possible

surgical approach. The second factor is the obesity of the claimant. The medical reports indicate that the claimant, admittedly obese to start with, has substantially added to her weight since the accident.

"The third factor is one of whether the proper resolution of the issues is further medical care as ordered by the hearing officer or a re-evaluation of the claim on the basis of the degree of permanent disability. It is obvious the hearing officer concluded that psychiatric treatment was intended though the evidence, at least, would indicate from looking backward that some psychiatric consultation might help.

"Complicating the third factor is the circumstance of the claimant having moved to Oklahoma immediately following the hearing officer order. ORS 656.245 (2) allows an injured workman a free choice of doctors within the State of Oregon. No Oregon doctor has recommended and offered any specific care. The Board, in this instance, cannot delegate such a problem to unknown practitioners outside the jurisdiction of Oregon.

"The Board concludes and finds that there is insufficient evidence to warrant further medical care from either a physical or psychiatric standpoint. The Board does conclude and find that the claimant's physical condition can be improved but that such improvement can be accomplished only by the claimant's voluntary effort in reducing her excess weight. This does not warrant a continuing order allowing temporary total disability."

WCB #67-1370 April 14, 1969

Robert Raymond Majors, Claimant.
George W. Rode, Hearing Officer.
Herbert W. Lombard, Jr., Claimant's Atty.
Earl Preston, Defense Atty.
Request for Review by Claimant.

Appeal from a notice of denial. Claimant, a jackhammer operator, suffered an episode of sudden partial loss of vision, headache and nausea. Aside from the assertion that the operation of the jackhammer may have precipitated the condition, at the time of hearing a further incident was related of a minor head trauma, when struck by the lid of a box. The denial was affirmed by the hearing officer. The Board affirmed, commenting:

"Even the cause of the interference with the field of vision is not clear. At the hearing level, a further examination was obtained from a leading neurosurgeon, Dr. Raaf, whose report of August 14, 1968, leaves the entire cause one of speculation and conjecture.

"There was certainly no duty, authority or obligation of the hearing officer to seek further medical examination at the cost of the Board to resolve the dispute and to thereby prove or disprove the claim.

"The testimony of Dr. Furrer is relied upon heavily by the claimant. As noted by the hearing officer, even Dr. Furrer's testimony, taken as a whole, is basically one of possibilities. Dr. Raymond Martin, medical consultant to the State Compensation Department, expressed an opinion of no relationship.

Dr. W. E. Harris, Cardiologist, likewise expressed an opinion of no relationship. Dr. Serbu at one point expressed an opinion of possibility of a relationship, but admitted the problem baffled him.

"All of the theories of possible causation by work are speculative whether by inhalation of fumes several hours before symptoms were manifested, a minor head trauma related for the first time at hearing or from general vibration. Not only is the condition undiagnosed, the possible work relation to the undiagnosed condition remains speculative and conjectural by the great weight of the expert medical testimony."

WCB #68-962 April 14, 1969

Janice L. Eng, Claimant.
George W. Rode, Hearing Officer.
Donald R. Wilson, Claimant's Atty.
Allen G. Owen, Defense Atty.
Request for Review by Department.

"The above entitled matter involves issues of whether the hearing officer properly awarded increased compensation and attorney fees pursuant to ORS 656.262 (8).

"The claimant sustained a compensable low back injury on May 14, 1967. Pursuant to ORS 656.268, a determination issued March 28, 1968, finding the claimant to have recovered without residual permanent partial disability. Her temporary total disability had covered a period of two and one half months. By law a claimant is given a period of one year from the date of such determinations within which to request a hearing.

"The problem that arose in this instance was precipitated by the claimant seeking further medical attention shortly following the determination. On May 20, 1968, a Dr. Kiest made a report of an examination made of the claimant on May 16, 1968. A copy of his report was forwarded to the State Compensation Department. The report indicated a need for further surgery which was related to the injury. The State Compensation Department responded by a letter indicating it would seek further information to determine its responsibility. On June 5, the Board received a request hearing on the matter of further medical care. On July 16, 1968, an operation was performed for removal of an intervertebral disc. The State Compensation Department apparently did nothing at this point, apparently on the assumption that a hearing was in the offing which would resolve the Department's responsibility. The hearing was duly held on September 11, 1968. The present review, as noted, is not precipitated by the fact the hearing officer ordered the State Compensation Department to assume responsibility. The review is precipitated by the application of ORS 656.262 (8) applying increased compensation and attorney fees.

"It should be further noted at this point that one 'defense' of the State Compensation Department to the request for further medical care and compensation was a compensable 1964 injury. It is true that the Workmen's Compensation Board was given continuing jurisdiction of pre-1966 injuries by ORS 656.278. The State Compensation Department is not deprived of the authority nor responsibility and certainly should not be heard to assert its own liability as a defense. It is also true that the claimant could not obtain a hearing as

a matter of right without approval of the Workmen's Compensation Board. However, it appears to the Board that something is lacking where the Department's defense becomes one of asserting alternatively that it is entitled to rely upon the order of determination without regard to subsequent developments or that the problem is related to a prior State Compensation Department claim.

"It would appear that when the matter became an adversary proceeding, the Department awaited a disputatious resolution in lieu of ascertaining its continuing responsibilities. Employers and insurers, including the Department, should not overlook the responsibilities imposed upon them by ORS 656.262 with respect to processing claims and providing compensation. That responsibility includes required medical services following determinations. (ORS 656.245)."

The assessment of penalties and fees was affirmed.

WCB #68-882 April 14, 1969

Eldon D. McManus, Claimant.
H. L. Pattie, Hearing Officer.
Nels Peterson, Claimant's Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant.

Appeal from a determination awarding 15% loss use left leg. Claimant tripped and bruised his knee. Surgery was required. The medical reports reflect no loss of motion, no loss of strength, no instability of the knee, no limp and no other impairment. The Hearing Officer affirmed the determination. The Board affirmed, commenting:

"The history of the claim reflects a surgical repair of the knee. It also reflects two subsequent incidents in which the claimant fell at home causing the recovery to be prolonged. A medical report recites that the claimant is an immoderate drinker, but no significance of this recitation is attached with respect to the disability of the leg."

WCB #68-974 April 17, 1969

Darrell I. Adams, Claimant.
John F. Baker, Hearing Officer.
Reese Wingard, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Claimant.

Appeal from a partial denial. The Hearing Officer affirmed the refusal to pay for the surgery. The Board affirmed, commenting:

"The claimant sustained a football injury to the left knee while in high school in 1961. In 1967 he had a compensable injury to the knee from an industrial injury in Idaho. The current claim arose in April of 1968.

"The State Compensation Department as insurer of the employer in the April, 1968, injury accepted and paid compensation for the temporary effects of the injury."

"The necessity of surgery in a given case must largely rest upon expert medical testimony. It appears clear from the evidence in this record that the surgery was not performed to correct any physical injury suffered in this accident. The claimant had a football knee from high school which had produced structural damage to the knee from this, essentially, was the damage repaired by the surgery now in issue. In large measure the claimant had a trick knee susceptible to recurring episodes of temporary disability. The surgery was basically preventative to cure the longstanding defect.

"The Board is well aware of the responsibility of the employer to take the workman as he finds him. The employer did assume the responsibility for the temporary disability which would probably have been non-existent but for the previously disabled knee. If the last injury produced an additional degree of damage to precipitate the present need for surgery the claimant's arguments would be well taken. The present surgery appears to have produced a better knee than at any time since the high school football episode. The medical reports from surgery bear out the causal relation to prior injury though counsel attempts to mitigate the effect of the medical opinion by questioning the use of the words, 'appeared to be old ruptures.' There is positive qualified uncontradicted medical opinion disassociating the need for surgery to the accident at issue."

WCB #68-792 April 17, 1969

Herman W. Newman, Claimant.
Forrest T. James, Hearing Officer.
Dan A. Ritter, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Employer.

Appeal from a determination allowing 40% loss arm for a back injury. This award was increased by the hearing officer to 60% loss arm. Claimant's back injury required a fusion from L-2 to L-4. The Board affirmed, commenting:

"The procedural issue arose from the fact the request for review was not timely filed by the employer. However, the order subjected to review was not served upon counsel for the employer and the employer's insurer. ORS 656.289 requires merely that a copy of the order be sent to all parties. Reading this alone one could say that the notice had properly been sent to the parties. However, once a party is represented by counsel, the compliance with a statutory requirement of notice to parties is accomplished by service upon counsel. ORS 16.800. If counsel recieved notice but no notice is mailed the parties, there would be a different result since service upon counsel is service upon the party. Actual notice to a party represented by counsel without notice to counsel should not be considered as a compliance with the statute. The motion to dismiss the review for procedural defects is therefore formally denied.

"The question of the increase in rating is not restricted to impeaching the determination made pursuant to ORS 656.268. Further evidence was adduced at the hearing, not available at the time of determination, including extensive testimony by the claimant and a further medical report by a Dr. Kimberley. The Board policy, as oft stated, is to discourage the doctor from making the ultimate medico-legal expression of disability. The mere expression by

Dr. Kimberley of a higher rating would be of little value. However, the other opinions expressed in the additional report and the testimony of the claimant in this instance is considered by the Board to justify the increase in disability found by the hearing officer.

"The claimant has a problem of a poor motivation with respect to return to work. The relation of this lack of motivation to the injury is speculative. The claimant at age 26 can ill afford to look to society for continued support. The award recognizes that he sustained a substantial injury but the law contemplates that the workman readjust himself wihtin the limits of his physical abilities. Part of the purpose of permanent partial disability award is to enable the workman to make that adjustment. No award can offset the loss to the claimant, the employer and society if the claimant fails to apply his physical resources and become a productive member of society."

WCB #68-1023 April 22, 1969

Julius H. Pool, Claimant.
Norma F. Kelley, Hearing Officer.
Robert A. Bennett, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Department.

"The above entitled matter involves an issue of whether the claimant sustained a compensable loss of vision as the result of being sprayed in the face by some caustic pulp liquor.

"Pursuant to ORS 656.268, a determination issued finding the claimant to have no residual permanent visual disability. The hearing officer, however, found there to be a permanent loss of 3% of the binocular vision. From this award the State Compensation Department requested review.

"One of the issues was the fact that the claimant wore glasses prior to the injury which indicated some pre-existing visual problems. The record contained no medical evidence on the nature of the problem requiring correction. The Board obtained agreement of the parties to obtain a report pending review. That report was obtained and reflects that the claimant's vision was corrected to 20/20 vision. The conjecture and speculation of the State Compensation Department that the claimant's minimal post injury loss of vision was pre-existing must be disregarded. There is no dispute about the existence of corneal scarring related to the injury. The only logical conclusion to be drawn from all of the evidence is that the claimant did sustain the loss of vision found and awarded by the hearing officer, and the Board so finds. The order of the hearing officer is therefore affirmed.

"Counsel for claimant, pursuant to ORS 656.382 (2) is awarded the sum of $250 payable by the State Compensation Department for services in connection with this review."

WCB #68-1017 April 22, 1969

Rose Lee Joy, Claimant.
John F. Baker, Hearing Officer.
David R. Vandenberg, Jr., Claimant's Atty.
Allan H. Coons, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves issues of disability arising out of a compensable injury to her left foot when it was struck by cups and saucers. Her physical recovery was delayed by the development of a thrombophlebitis.

"The determination of disability issues pursuant to ORS 656.268 found a permanent partial disability of 10% loss of use of the foot. The hearing officer awarded a short period of additional temporary total disability and increased the determination of disability to 25% of the foot.

"Though the claimant still seeks additional temporary total disability, the medical evidence is uncontradicted that her condition is medically stationary and that no further medical care is indicated. There is a possibility of a recurring problem with the thrombophlebitis, but that will only serve as the basis for reinstating compensation when and if it recurs and if such recurrence is related to the injury.

"The claimant has been advised by doctors to avoid obesity, to cease smoking, to wear supportive stockings or a special type shoe. The claimant has not followed medical instructions for a variety of excuses. A workman has the responsibility of following reasonable medical advice to minimize the disability. If the disability was as great as claimed, the only logical conclusion would be that the claimant would be anxious to follow medical advice for alleviating her problem.

"The Board concludes and finds that the condition is stationary and that the disability does not exceed the award for loss of use of 25% of the foot."

WCB #68-19 April 22, 1969

Richard P. Thomas, Claimant.
H. L. Seifert, Hearing Officer.
Jerry G. Kleen, Claimant's Atty.
Carlotta Sorensen, Defense Atty.
Request for Review by Claimant.

Appeal from a determination allowing no additional permanent partial disability. The Hearing Officer affirmed. The Board affirmed, commenting:

"The above entitled matter involves the issue of whether the claimant sustained any permanent disability as the result of a low back injury while lifting a tailgate on a truck on August 29, 1967. This incident occurred on the second day of work on the job.

"Though the claimant is 49 years of age, his entire work history reflects little stability and no record of any sustained employment. He was discharged

from the armed services after a year's service with a medical discharge. The claimant is vague about the reasons. He draws a veteran's pension but this is for non-service connected disability. He has a record of prior industrial injuries dating from 1956 for low back injury and has drawn compensation for permanent disability from that source for disability equal in degree to the loss of 90% of an arm. There is medical evidence of record that the disability now is not as great as that for which awards have been heretofore made.

"It is upon this record that the claimant seeks to be declared permanently and totally disabled as the result of the relatively minor tailgate incident of August 29, 1967. There is evidence of the claimant's emotional overlays and feelings of inadequacy. There is also evidence that the claimant at five foot five and approximately 200 pounds in weight has no motivation to remove the excess weight which is one of the obstacles in his reemployment path. There is no evidence that the emotional problems were produced or precipitated by the accident of August, 1967. There is every indication that both the physical and emotional problems have been a way of life with the claimant for many years.

"The Board concludes and finds that the claimant sustained no additional compensable permanent disability as the result of the August 29, 1967, incident with a truck tailgate."

WCB #68-1165 April 22, 1969

Leslie Yancey, Claimant.
H. L. Seifert, Hearing Officer.
Robert L. Engle, Claimant's Atty.
Lawrence J. Hall, Defense Atty.
Request for Review by Claimant.

This is an aggravation claim. A determination had allowed 10% loss arm for unscheduled disability. Claimant, a 43-year-old farm worker, fell from a ladder, striking the ground with his head, shoulders, and low back, and fracturing his ribs. The Hearing Officer affirmed the determination and the Board affirmed, commenting:

"The claimant is an itinerant laborer with minimal formal education. The claimant's travels to and from Texas with some medical consultations in Texas has complicated the problem of evaluating disability related to the injury. The limited education may have produced some degree of lack of communication with treating and examining doctors. The Board is convinced, however, that the medical reports correctly reflect the progression of symptoms and that symptoms in areas of the body not related in the earlier reports did not exist until they are shown in the subsequent reports.

"The tendency to relate all ailments which manifest themselves following a compensable injury to the injury is not limited to the uneducated. Even new symptoms in the same area of the body involved in the accident are not to be presumed to be associated to the accident. This is particularly true where the person affected has a natural progression of degenerative processes. The medical evidence certainly fails to reflect that many of the claimant's new symptoms are related to his injury in 1966. The medical evidence also reflects that the disability associated with the accident is not of a serious nature."

WCB #68-1523 April 23, 1969

Larry Berry, Claimant.
H. L. Pattie, Hearing Officer.
Leo Probst, Claimant's Atty.
Clayton Hess, Defense Atty.
Request for Review by Claimant.

"The claimant is a 25 year old longshoreman with congenital defects in his spine making the back susceptible to injury.

"Pursuant to ORS 656.268, a determination of disability found the permanent disability to be 10% 'of the workman.' The injury is subject to the 1967 amendment of ORS 656.214 (4) which makes awards for unscheduled disability payable on the basis of comparing the workman before the injury and without the disability. This comparison is then applied to a scale with a maximum of 320 degrees. The former comparison of unscheduled injuries to scheduled members, (usually the arm) is not utilized. Unscheduled disabilities are not limited to the spine and include generally the body, neck and head apart from members or parts for which specific compensation is allowed. When one speaks of limitations of the spine alone, a percentage of loss of the spine is not equivalent to a like percentage of the workman.

"The hearing officer increased the award to 64 degrees. The claimant asserts the award is too low and the State Compensation Department asserts the award is too high. If the long familiar standard of comparing the back to loss of use of an arm was utilized with the pre-1967 schedule, the 45% of an arm urged by the claimant would be only slightly more than the 64 degrees allowed.

"The claimant's working ability with respect to his spine was limited prior to the industrial injury. Any doctor observing the anomalies prior to injury would undoubtedly have given the same advice with respect to avoidance of heavy labor. The advisability of such avoidance was made clear by the succession of injuries but the necessity of such avoidance was pre-existing. This is one factor entering the measure of compensable disability.

"The pre-existing anomaly does not preclude award and is in fact the productive factor which made the disability symptomatic and greater than before the injury. There have been subsequent incidents of waxing floors at home and pushing an automobile which also temporarily exacerbated the underlying congenital weakness and not attributable to the accidental injury per se. There is also medical evidence that the condition attributable to the accidental injury is minimal which, if true, would make the award excessive.

"The Board finds and concludes that some additional permanent disability was imposed upon the back and that this disability on the basis of a comparisone to the workman before the injury and without such additional disability does not exceed the 64 degrees awarded."

WCB #68-1252 April 23, 1969

Richard L. Frank, Claimant.
J. Wallace Fitzgerald, Hearing Officer.
Dan O'Leary, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves several issues arising out of problems in evaluation of the extent of permanent residual disabilities where the disability is to an area of the body without specific schedules of degrees of disability. In this case it is the back.

"Counsel for the claimant cites four other back disability claims asserting the disabilities are the same and ergo the Board must accept his fiat that they are the same and grant the same award. Counsel labels as 'nonsense' the Board's position that even in achieving uniformity the Board must consider each case upon its own merits. The day of computerization of these matters is still for the future.

"If the Oregon law permitted the evaluation of disability on the formula of loss of wages urged by claimant's counsel, it might be an easier task to arrive at ratings. Claimants with substantial physical disability might receive little or no award and the comparison of physical disabilities sought in the claimant's alternate but inconsistent theory would of course be impossible.

"The law upon which these matters rest has a history fraught with difficulties. Prior to the 1965 Act, any unscheduled injury was required to be compared to an injury to a scheduled member with a maximum of '145' degrees. The disability could have been compared to a foot, leg or other member of the body, but the coincidence that 145 degrees for loss of an arm bore the maximum of 145 degrees led to the customary use of the arm for purposes of comparison. The fact that an unscheduled disability might exceed the loss of use of an arm did not permit a greater award. This circumstance led to the Supreme Court decision in Green v. SIAC that in a combination of injuries from more than one compensable accident there could be an award in excess of the maximum for a single accident. The comment of the Supreme Court in Nesselrodt v. SCD, 85 Adv 797, 800 indicates that the Green decision may be re-examined upon the proper occasion. The 1965 Act then deleted the reference to loss of use from ORS 656.214 (4) and raised the maximum degrees to 192 degrees. This led to the rather incongruous use of comparing unscheduled disabilities to a percentage of the loss of an arm by separation. When one starts separating an arm from the body, the separation of the first six inches from the proximal end renders the arm almost 80% useless by comparison to other schedules. The formula is one that logic compelled the application of a loss of use formula with a 192 degree maximum. The Legislature in 1967 essentially deleted the distinction in all cases between loss of use and loss by separation. The four claims claimant would use as determinative of this claim were evaluated under that formula.

"The 1967 Legislature abondoned the longstanding formula of comparison to other members of the body. The section now reads:

'In all other cases of injury resulting in permanent partial disability, the number of degrees of disability shall be a maximum of 320 degrees determined by the extent of the disability compared to the workman before such injury and without such disability.'

"The formula requiring a comparison to other members of the body is deleted. A new factor is added requiring a comparison of the workman before such injury and without such disability with a maximum of 320 degrees. Upon this formula the workman in this proceeding received 32 degrees, not too far below the awards in degrees claimant would use as a test pattern. If the Legislature did not intend to change the formula, it would have been easy to simply insert the new maximum degree level. If the concept of comparison to an arm had been retained, it would still leave any workman with an unscheduled disability in excess of the loss of an arm with compensation limited to one whose unscheduled disability equalled an arm. It would likewise give far more compensation for unscheduled disability limited in degree to loss of an arm than the compensation paid for actual loss of an arm.

"Coming back to the case at hand, there is medical evidence that the claimant has a 4% impairment of the spine. If one were to use this factor alone, it would be equivalent upon schedules developed by the American Medical Association to 2% of the workman. The order issued by Closing & Evaluation was expressed in terms of disability of the workman. Impairment is not synonymous with disability and the schedules of the American Medical Association are only one of the tools used in the determination process. Upon the basis of a maximum of 320 degrees, which was set to allow a full graduation of awards, the disability rating granted is substantially above the impairment schedule of the American Medical Association. This certainly does not reflect that any injustice has been done in this case.

"The Board concludes and finds that upon a comparison of the workman to the workman before the injury and without such disability, the disability does not exceed the 32 degrees as approved by the hearing officer."

WCB #68-1221 April 28, 1969

Paul B. Howard, Claimant.
John F. Baker, Hearing Officer.
Joseph Larkin, Claimant's Atty.
W. M. Holmes, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of whether the claimant is entitled to further compensation for a low back injury of September 14, 1966.

"Pursuant to ORS 656.268, a determination was made March 6, 1967, finding the condition to be medically stationary with the increased disability imposed upon a pre-existing disability evaluated as equal in degree to the loss by separation of 20% of an arm.

"The present proceedings are procedurally by way of an alleged compensable aggravation of the disability incurred. The claimant has a long history of incidents involving his low back dating back at least to 1935. This history includes incidents which have occurred subsequent to the one at issue of September 14, 1966."

"The term aggravation has a special meaning in compensation law with both medical and legal implications. Other words such as a worsening or an exacerbation also convey a meaning of increased disability but do not carry the medico-legal significance that the increased disability is compensably related to the accident at issue. Even the original determination issued in these proceedings made loose use of the word aggravation since the increased disability was the result of a new accident and the use of the word aggravation could be misleading in view of the special connotation otherwise given the word. Likewise when a claim for aggravation was filed which we now consider, the doctor used the word aggravation but without reference to whether the condition was made worse by new compensable incident or incidents compensable in their own right.

"Where a workman receives a succession of compensable accidents for the same employer, insured by the same insurer, the problem is not as serious. That employer and that insurer are responsible regardless of whether the increased disability arose out of a compensable aggravation or a new compensable accident.

"In this instance, the record reflects that a different employer, probably a different insurer and certainly a new compensable accident precipitated the increased disability. Upon this basis it cannot be said that because an 'aggravation' occurred, that it was a compensable aggravation. If the claimant has not preserved rights stemming from incidents of August, 1967 and May of 1968, it would appear that he may not be entirely precluded from yet proceeding within the year from the May of 1968 episode.

"The Board concludes and finds from its review of the record that the evidence would not support a finding that the claimant has sustained a compensable aggravation of his September, 1966 injury with respect to this claim.

"The order of the hearing officer denying the claim for aggravation is affirmed."

WCB #68-595E April 28, 1969

Esther M. Wheeler, Claimant.
J. David Kryger, Hearing Officer.
William H. Dashney, Claimant's Atty.
Howard Kaffun, Employer's Atty.
Robert E. Nelson, Department Atty.
Request for Review by Claimant.

"The above entitled matter involves the issue of whether the claimant sustained a compensable injury while employed by the defendant employer, Noble Dependehner, dba Noble's Tavern.

"The defendant employer was a noncomplying employer as defined by ORS 656.002 (15) for failure to assure compensation to subject workmen as required by ORS 656.016. If a subject workman of a noncomplying employer is injured, the claim is compensable as provided by ORS 656.054.

"Though compensation becomes payable from the State Compensation Department, the State Compensation Department is only a paying agency entitled to

reimbursement from the employer or the administrative fund of the Workmen's Compensation Board. The employer is thus the real party in interest with respect to adversary proceedings involving an issue of the compensability of a claim.

"There appears to be no question but that on an uncertain day in early May or late April of 1967, an accident happened to a keg of beer in the tavern. Despite the dispute over the date of the accident to the beer, the real dispute centers upon whether the claimant injured her low back in mopping up the beer.

"The hearing officer noted numerous contradictions from witnesses for both parties and, without noting any findings of creditability from observation of the witnesses, upheld the objection of the employer to the allowance of the claim.

"Upon request for review, the claimant urges that the burden of proof shifts to the employer when the employer denies a claim and that there is a presumption that in filing a claim the claimant speaks the truth. No such impossible combination of burdens is cast upon an employer. The claimant does have the burden of proving a claim and whether the claim is valid is weighed from the totality of the evidence.

"The Board is normally reluctant to reverse the hearing officer where there are numerous conflicts in the evidence. The observation of the witnesses may well be the factor upon which the facts are resolved. The record does not reflect any such resolution in this case.

"The Board feels that too much emphasis has been placed upon the uncertainty of the date of the spilled beer when all witnesses agree that such incidence occurred. That would have no more bearing on the merits than if all the witnesses were reassembled and gave an equally conflicting accumulation of dates when they appeared as witnesses in this proceeding.

"Admitting the spilled beer, do the remaining circumstances and evidence require a finding that an injury was sustained by the claimant? There is some speculation and evidence that the claimant may have injured herself in playing ball or in getting out of a bathtub. Even if these incidents occurred, if the tavern acts also occurred and contributed to the claimant's disability, she sustained a compensable injury.

"The Board concludes and finds from its review that the accidental injury was sustained by the claimant as alleged.

"The claim is ordered paid in the first instance by the State Compensation Department and the employer is ordered to repay the State Compensation Department all such compensation pursuant to ORS 656.054.

"Pursuant to ORS 656.386, a claimant whose claim is allowed on review following a denial of the claim is entitled to have his attorneys' fee paid by the employer. A reasonable fee for services in connection with review and hearing is found to be the sum of $800.

"It is therefore further ordered that the employer herein pay to claimant's counsel the sum of $800."

WCB #68-502 April 28, 1969

Gervis J. Thibodeaux, Claimant.
H. Fink, Hearing Officer.
Donald G. Krause, Claimant's Atty.
Roger R. Warren, Defense Atty.
Request for Review by Claimant.

"The above entitled matter involves an issue of the extent of disability sustained by the claimant as the result of a contact dermatitis.

"The claim, after first being denied, was allowed by the State Compensation Department as insurer of the employer. Pursuant to ORS 656.268, a determination was made finding the disability to have been temporary only and to be disabling from November 2 to 24, 1966.

"The order of the hearing officer was issued October 18, 1968. This order was 'rejected' as provided by ORS 656.808. This rejection serves as an appeal to a Medical Board of Review.

"The State Compensation Department, as insurer of the employer, selected its appointee to the Medical Board on January 30, 1969. No appointee has been selected by the claimant and the Board is advised that claimant's counsel is unable to locate the claimant. The presence of the claimant is normally required for purposes of a medical board of review and this is particularly true where the issue is simply one of the extent of disability.

"The claimant's claim has already been evaluated pursuant to ORS 656.268 and also evaluated by a hearing officer. The request for a Medical Board was filed November 27, 1968. The failure to select a doctor for a period of approximately five months is deemed an abandonment of the review process and a failure to exhaust administrative remedies sufficient to justify a dismissal of the proceedings.

"It is therefore ordered that the Request for Medical Board of Review be and the same hereby is dismissed."

WCB #68-1460 April 28, 1969

Imabel Appleby, Claimant.
Richard H. Renn, Hearing Officer.
Randolph Slocum, Claimant's Atty.
Eldon Caley, Defense Atty.

Appeal from a determination allowing no permanent partial disability. This determination was affirmed by the hearing officer but some additional compensation for a period of temporary total disability was allowed. Review was dismissed by stipulation.

WCB #67-1368 April 28, 1969

Opal G. Loudon, Claimant.
H. L. Seifert, Hearing Officer.
A. C. Roll, Claimant's Atty.
Scott M. Kelley, Defense Atty.

Appeal from a denial of an occupational disease claim for bronchial asthma and allergy rhinitis because of dust. The Hearing Officer affirmed the denial. Upon rejection, the Medical Board of Review reported:

"A Medical Board of Review, consisting of Dr. Leo C. Skelley (McMinnville), Dr. John O'Hollaren, (Portland) and the undersigned met to examine Mr. Louden and to review the medical records in his case, and the transcript of the WCB hearing of March 8, 1968. Our answers to the five questions required by the Occupational Disease Law are enclosed.

"The history of the patient's present illness is given in the reports of Drs. Skelley and O'Hollaren, and need not be reviewed in detail. The patient indicated that he had had some nasal drainage for about a month before seeing Dr. Skelley on February 1, 1966. He denied a past history of allergic rhinitis. He said that his cough had begun one to two weeks before seeing Dr. Skelley, and that he soon began to awaken about three times a night feeling 'choked up', short of breath, and unable to lie flat. These episodes were associated with cough productive of whitish sputum with relief of the episode. Shortness of breath on exertion began around this time, as on climbing one flight of steps. Continued difficulties with asthma led to his quitting work for the Willamina Lumber Company about September 9, 1967. He had worked there for about three years, operating a resaw. The logs were usually hemlock or douglas fir, and occasionally cedar. The patient attributes his difficulties to exposure to sawdust and to fumes from diesel engines. He had worked in lumber mills altogether for about 18 years, and says that he had had no previous difficulty with chronic cough or wheezing. Respiratory distress had at times been precipitated by exposure to automobile exhaust fumes, but not to housedust, kitchen odors, or to cold air. He had smoked about a package of cigarettes a day until May, 1967, and had smoked a total of 50 years altogether. He now smokes about 1/2 package of cigarettes a day. He has continued to have trouble with asthma and shortness of breath on exertion since quitting work, particularly when humidity is high. He has tired easily in the past year. He weighed about 148 lbs. in 1967. His weight has been about stationary at 138 lbs. in the last year. He has had no cardiac symptoms, and no acute respiratory infections or pleurisy. He was granted 'early disability' under Social Security Administration about six months after he quit working. He has continued to take a vaccine.

"Physical examination of the chest of this thin 64 year old man showed that there was poor rib motion, and some use of the accessory muscles of respiration. Breath sounds were fairly good, but expiration was prolonged and wheezing. There were scattered sibilant and sonorous rales, more prominent on expiration, associated with expiratory wheezing, loudest over the hila anteriorly. No cyanosis of the nailbeds was seen. There were multiple keratoses of the dorsum of the hands. The heart sounds were satisfactory, except for being somewhat distant at the base. There was mild depression of the lower sternum.

"The forced expiratory spirogram done at Dr. O'Hollaren's office showed a forced vital capacity of 2.8 liters, about 72% of predicted normal. The first

second volume remained low (2 liters). These tracings are compatible with a moderate degree of ventilatory impairment of the obstructive type, with definite improvement in the expiratory airway obstruction after an inhalation of Isuprel.

"The panel concluded that Mr. Loudon has bronchial asthma, and also chronic obstructive lung disease with chronic bronchitis to account for the impairment of lung function noted above. His history, the presence of eosinophilia in the blood, and the skin reactions to several kinds of antigens all suggest that he is an allergic individual. Exposure to sawdust, diesel fumes, and perhaps other respiratory irritants at his work in the sawmill may well have precipitated episodes of cough and bronchospasm, but would not be considered primary or essential causes of either his emphysema or chronic obstructive lung disease. The latter is more probably related to his long history of cigarette smoking than to the rather recent development of bronchial asthma. An important factor in weighing the possible relationship of work exposures to his asthma is the fact that his asthma does not seem to have improved since he quit work in September, 1967. For these reasons, the panel did not feel that Mr. Loudon has, or has had, an occupational disease or infection as defined by the Occupational Disease Law."

WCB #68-1048 April 28, 1969

Warren W. Jederberg, Claimant.
Richard H. Renn, Hearing Officer.
James Cronan, Defense Atty.

Appeal from a denial of an occupational disease claim. The Hearing Officer ordered the claim accepted, but the Medical Board of Review found no occupational disease. Dr. Lacer reports:

"Mr. Warren W. Jederberg was examined on 12 April, 1969.

"Mr. Jederberg states that in January of 1956 he first developed a skin disease of his hands which caused them to be dried and cracked, and that little blisters formed on his hands which secreted clear liquid and resulted in redness, swelling, and itching. At this time he was employed in an automotive repair shop. It was the original opinion of his local physician and consulting dermatologists that this dermatitis was due to solvents and soap used in his work, and that this represented a contact dermatitis of his hands. The patient states that since this time he has never been entirely free of the rash. He resumed work in June of 1956 as driver for Eddy's Bakery, and in February of 1957 as a substitute mail clerk for the post office in La Grande. During this time the patient states that his hands were never completely free of the rash, and occasionally developed exacerbations of the condition. He attributes this to exposure to soaps, dust and grease, even to touching a box of soap in the grocery store. Actually, the history of the condition is one of exacerbations and remissions, with little relation to occupational factors.

"At the present time Mr. Jederberg is employed at a bowling alley, and is exposed to a liquid plastic which he uses to repair and plug bowling balls, In addition, there is a degreasing agent which is used to clean the balls prior to applying the plastic. Both these substances are apparently quite irritating to the skin, and so labeled on their respective containers. Mr. Jederberg uses lined rubber gloves, and makes every attempt to keep the material from getting on his hands or skin, but states that he still has flareups of his dermatitis."

"Examination at this time shows a minimal redness and scaling, and moderate lichenification of both hands and face. No vesiculation or ulceration is noted, and Mr. Jederberg states that his hands are much better now than they have been at any time in the past several months. He uses Synalar Cream continuously, and states that if he should stop using the cream his hands would become much worse.

"In my opinion, this patient has chronic eczema of his hands at this time, which is not related to his work. I feel that he has had dyshidrosiform eruptions of his hands which represents a reaction pattern and not a single disease. Various causes include sweating, reactions to drugs, foods, emotional stimuli, and factors as yet unknown. It is extremely difficulty to separate this type of reaction from a true contact dermatitis, inasmuch as they may appear indistinguishable on general inspection. In view of the long interval between this man's original exposure and his continued course of exacerbations and remissions in spite of his occupation, I feel that his present condition is not related to his original occupational disease."

WCB #67-1185 April 28, 1969

William A. Barry, Claimant.
H. L. Seifert, Hearing Officer.
Richard T. Kropp, Claimant's Atty.
Carlotta Sorensen, Defense Atty.

Appeal from a notice of denial. Claimant, a 57-year-old janitorial custodian at the Oregon State Hospital was hospitalized in June of 1967, for a liver ailment, anxiety, nervousness and depression. The Hearing Officer affirmed the denial, as did the Medical Board of Review which reported:

"Mr. William A. Barry was interviewed for approximately 1½ hours on 3/29/69.

"The history was reviewed with Mr. Barry, however Mrs. Barry interjected some points that she felt were important that her husband may have omitted during our private interview.

"Mr. Barry described his early home life, scholastic achievements, social adjustments, work record, religious affiliations, marriage and rearing of children. He also reviewed his past medical-surgical history. He then, with much difficulty, explained his present illness and the difficult work adjustments he had at Oregon State Hospital as custodian.

"I had previously reviewed the transcript from his hearing and had a general knowledge of the above described events which were in general agreement with the history now given by Mr. Barry.

"Mr. Barry was an extremely tense, anxious man who was cooperative but mildly defensive and hostile. He stammered severely which retarded the communication considerably. He appeared rather depressed but with a full and stable affect which was appropriate. During the interview he was rather restless, smoked frequently and had a marked tremor. His thought processes were logical and organized and no evidence of psychosis. His memory, judgment and insight were intact. He employed several neurotic defense mechanisms."

"It was my impression that Mr. Barry has a compulsive-obsessive personality disorder and a depressive neurosis with hysterical-conversion features.

"In my opinion he does not suffer from an occupational disease or injury. The remaining questions therefore would not be applicable.

"The Medical Board of Review composed of myself, Dr. John A. Rennebohm, and Dr. Jerry L. Schroder met on 4/7/69 and agreed unanimously that Mr. Barry does not suffer from an occupational disease."

WCB #68-774 April 30, 1969

Donald Frankfother, Claimant.
Forrest T. James, Hearing Officer.
Tyler Marshall, Claimant's Atty.
Philip Mongrain, Defense Atty.
Request for Review by Claimant.

Pending review, this claim by the Board has been ordered reopened by stipulation of the parties for such further payment of temporary total disability and medical care and treatment as shall be indicated. The stipulation was approved by the Board.

WCB #68-1410 April 30, 1969

William Gill, Claimant.
Norman F. Kelley, Hearing Officer.
Richard Noble, Claimant's Atty.
Evohl Malagon, Defense Atty.
Request for Review by Department.

"The above entitled matter is quite involved both from the standpoint of various injuries sustained by the claimant but also from the procedural posture.

"The claimant sustained a back injury in October of 1966 involving being struck in the back by the head of a sledge. The claimant's history of low back difficulty stems at least from 1960 and involves a major head-on auto collision in 1965. The claim was denied by the State Compensation Department as insurer of the employer but ordered allowed in a previous proceeding. A determination of disability in August of 1967 led to further hearing whereupon the claim was ordered reopened. Subsequently the claimant had returned to work but his claim was not again closed by a determination as provided by ORS 656.268.

"The crux of the current dispute centers about an incident at a roadside rest area on July 29, 1968. The claimant was enroute to Portland to a Veterans Administration facility in connection with a cervical problem unassociated with his industrial claim. The mechanics of this roadside rest are not entirely clear. Claimant's leg apparently went numb and he had a constrictive type sensation below the knee which was unlike any previous symptoms. The record is replete with discussions by respective counsel on whether the incident was a compensable aggravation of the existing condition or a new and

intervening non-compensable exacerbation. Unfortunately the record is scant with respect to a medical analysis of what physical process took place to produce the symptoms. The hearing officer concluded that the ensuing disability was related to the back injury. The State Compensation Department seeks a review.

"The posture of the claim, as noted, is not technically one of aggravation as the term is used in compensation law. The claim was in open status. The State Compensation Department had no obligation to pay temporary total disability while the claimant was working. However, under ORS 656.268, the State Compensation Department had immediate obligations when faced with the treating doctor's report. Just as employers are faced with initiating compensation 14 days after injury, a further cessation of employment due to disability, supported by a medical report, poses an obligation to resume payment in the absence of a clear defense. The State Compensation Department failed to reinstate payment and the current hearing process was instituted.

"The Board concludes and finds with the hearing officer that the roadside rest incident as described does not constitute such an intervening subsequent accident that it could be said to break the chain of medical and legal causation from the course of the accidental injury.

"The order of the hearing officer is affirmed and reinstating compensation and awarding increased compensation and attorney fees for unreasonable delay and resistance to payment.

"It is further ordered pursuant to ORS 656.382 (2) that State Compensation Department pay to claimant's counsel for services in connection with this review the sum of $250."

WCB #68-1209 April 30, 1969

Don Sampson, Claimant.
Richard H. Renn, Hearing Officer.
William D. Cramer, Claimant's Atty.
Lyman C. Johnson, Defense Atty.
Request for Review by Employer.

"The above entitled matter basically involves the issue of whether delays by the employer and its insurer in payment of temporary total disability justify an award of increased compensation and award of attorney fees to claimant's attorney.

"The claimant is a ranch hand who injured his left knee on June 18, 1968, when his horse collided with a tree on a ranch near Drewsey, Oregon. The injury was of sufficient severity to require hospitalization for six days with a hospital discharge reflecting application of a knee brace and use of crutches.

"The employer was insured as a Direct Responsibility Employer through St. Paul Insurance Companies with offices in Portland, Oregon. The place of injury was thus remote from the agent selected by the employer to fulfill its responsibility to the injured workman."

"The entire controversy is centered upon a period of temporary total disability extending only from June 18 to August 19, 1968. The insurer forwarded the first payment of compensation approximately one month after the injury and the second payment a month later at the approximate termination of the period of temporary total disability.

"ORS 656.262 (4) provides:

> 'The first installment of compensation shall be paid no later than the 14th day after the subject employer has notice or knowledge of the claim. Thereafter, compensation shall be paid at least once each two weeks, except where the board determines that payment in instalments should be made at some other interval. The board may by regulation convert monthly benefit schedules to weekly or other periodic schedules.'

"ORS 656.262 (8) provides:

> 'If the department or direct responsibility employer unreasonably delays or unreasonably refuses to pay compensation, or unreasonably delays acceptance or denial of a claim, it shall be liable for an additional amount up to 25 per cent of the amounts then due plus any attorney fees which may be assessed under ORS 656.382.'

"It is clear that the employer who without doubt knew of the accident and hospitalization, failed to make the payments within the time provided by law. The law places the prime responsibility for processing claims and providing compensation upon the employer but permits employers to delegate responsibility to the State Compensation Department or to obtain the assistance of a private insurer in the discharge of responsiblity retained by the employer. If an employer insured by the State Compensation Department is responsible for delays in compensation, the State Compensation Department may assess any additional payments to the employer. ORS 656.262 (3). Where the responsibility, as here, is retained by the employer who obtains private insurance the record cannot be reviewed on the basis that the insurer had some reason for delay. It is the combined knowledge of the employer and insurer which must be examined to determine whether the delay in payment was reasonable.

"The Board cannot set a precedent that a first payment of one week's compensation a month after injury and hospitalization is a reasonable compliance with the law. A simple telephone call by the insurer to the hospital or doctor would have alerted the carrier to the responsibility it had assumed for the employer.

"The word penalty is used in ORS 656.262 (3) in referring to additional compensation payable under ORS 656.262 (8). The word penalties is also used in the codifiers preface to the section, but this is not a part of the law. The Board concludes in light of Nordling v. Johnson, 205 Or 315, 324 that the additional compensation provided is not a penalty and is subject to liberal rather than a strict construction. It is viewed as an additional measure of compensation to ease the financial burden imposed upon the claimant for the delay of the employer and its insurer. It is upon this basis that the Board concludes the hearing officer appropriately awarded the claimant an additional 25% of the compensation so delayed."

"The award of attorney fees is not as clearly substantiated. The claimant's counsel immediately precipitated a request for hearing before the Workmen's Compensation Board on what was basically a minimal matter. The fact that compensation might have been expedited without hearing does not of course justify the delay existing when the matter was first brought to counsel by the claimant.

"The fact that the matter became the subject of a full hearing and review must in turn rest upon the employer and its insurer who chose to contest the matter at these levels when there was a clear failure to promptly pay as required by law. One could not expect the claimant to proceed without counsel or to pay from his own pocket fees in excess of the compensation obtained only through the services of counsel. In light of all the circumstances, the Board finds and concludes that the employer through its carrier did unreasonably resist by maintaining an adversary position through hearing and this review.

"It is accordingly ordered that the order of the hearing officer be and the same hereby is affirmed in all respects and counsel for claimant is awarded the further fee of $250 payable by the employer for services in connection with this review."

WCB #68-980 April 30, 1969

Larry Laverne Thornton, Deceased.
John F. Baker, Hearing Officer.
A. J. Morris, Claimant's Atty.
Earl M. Preston, Defense Atty.
Request for Review by Beneficiaries.

Decedent was a 19-year-old logger whose death resulted from a compensable injury on February 4, 1968. The issue is whether the fraternal twins, purported to be the decedent's illegitimate children, may take as beneficiaries, when there is a surviving spouse and a legitimate child. The Board commented:

"The position of the State Compensation Department with reference to the two children is that the Workmen's Compensation Board is without authority to determine that Thornton was the father of the children and further that there is no provision in the benefit schedule for payment of illegitimate children if Thornton is the father since Thornton was survived by a spouse and legitimate child.

"The hearing officer upheld the denial of the claim on the latter basis though finding that the children were in fact children of the deceased workman.

"The State Compensation Department suggests that by statute a filiation proceeding is the only recourse for determination of questioned fatherhood and that the jurisdiction is solely in the Circuit Court. An examination of the filiation statutes reflects that they are quasi-criminal in nature founded upon complaint charging the putative father with possible determinations of guilt, jail and fines. How the deceased workman is to be charged in this instance is not revealed. Part of the filiation proceedings is the absolution gained by admitting parenthood and assuming responsibility. There is in evidence a document signed by Mr. Thornton prior to his death and prior to the birth of the beneficiaries admitting his responsibility."

"Beyond the question of paternity the Workmen's Compensation Law delegates the initial responsibility to the employers, insurers and Workmen's Compensation Board of deciding issues on the validity of marriages, divorces, dependency and status of children. The Circuit Court is in the chain of review but the legislative intent is clearly for the administrative process to make the initial decision in all such matters.

"The Board concludes and finds that Larry Thornton was the father of the children on whose behalf these proceedings were instituted.

"The issue next presented is whether an illegitimate child is entitled to benefits where the workman is survived by a spouse.

"ORS 656.204 does not refer to illegitimate children but in the absence of being survived by a spouse, the child would be paid under ORS 656.204 (4). Even children by a divorced wife are beneficiaries under ORS 656.204 (3).

"Since ORS 656.002 (4) defines child to include an illegitimate child, the presumption should be in favor of compensation.

"ORS 656.204 (2) provides for compensation being paid to the surviving spouse for each child of the deceased. It should be noted that this reference is to a child of the deceased without reference to whether it was a child of the surviving spouse. If this was the only applicable section it would be inequitable to pay the surviving spouse the benefits for a child under the care of someone else. ORS 656.228 permits payments directly to the guardian or person having custody of the beneficiary. The illegitimate child is definitely such a beneficiary.

"The order of the hearing officer is therefore reversed and the State Compensation Department is ordered to allow the claims of the children as beneficiaries of the deceased Larry Thornton. If issue should arise as to the amount payable under ORS 656.204 (2) (a), it is ordered that the payment for the children herein be made as for the second and third children of the deceased.

"The claims of these beneficiaries having been hereby allowed after a denial by the State Compensation Department, counsel for the State Compensation Department, counsel for the beneficiaries is entitled to payment of attorney fees by the State Compensation Department pursuant to ORS 656.386. Two lengthy hearings requiring 384 pages of transcript and numerous exhibits, plus these review proceedings, warrants a fee in the amount of $1,000 which is ordered paid in addition to the compensation."

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