VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

Robert VanNatta, Editor

VOLUME 20

==Reports of Workmen's Compensation Cases==

January 1977 - April 1977

Published by Fred VanNatta

VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

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

PRICE FORTY DOLLARS

DONNA VELASQUEZ, CLAIMANT
Ernest Kissling, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the State Accident Insurance Fund's denial of March 18, 1976 for the payment of hospital and medical bills.

Claimant sustained a compensable low back injury on August 18, 1970. Subsequently claimant underwent four and one half years of treatment, including twelve hospitalizations. Claimant appealed the award made by the Determination Order and a hearing resulted in a Referee's order on June 18, 1975.

On May 26, 1976 the Multnomah County Circuit Court granted claimant an award of permanent total disability, however, between the time of the Referee's order and the order of the circuit court, claimant had two more hospitalizations. The responsibility for those medical bills was denied by the Fund.

The first hospitalization was on January 17, 1976; at that time, Dr. Machlin Jr., indicated claimant had recurrent episode of low back injury problems with no stress involved. Eight hours prior to admission claimant had had a large pain shot and some muscle relaxers and went to bed. Upon awakening her pain was worse and she was hospitalized.

Claimant had initiated divorce proceedings against her husband and during November and December, 1975 there were several altercations between claimant and her husband.

The second hospitalization was on February 17, 1976 at which time Dr. Machlin Jr. stated claimant was admitted for low back pain having tripped over a shoe at a friend's house, falling against a davenport. Her husband attacked her and she fell over the davenport. Claimant was hospitalized by Dr. Machlin Jr.

The Referee found Dr. Machlin Jr. has been treating claimant since 1967. He attributed claimant's hospitalizations and medical bills to the original accident. He says that claimant's resistance of her husband's attacks and the ensuing fall were not of sufficient force to require hospitalization.

The Referee found this opinion of Dr. Machlin's to be speculation on the doctor's part. He found the denial issued by the Fund to be justified and proper.

The Board, on de novo review, finds that the first hospitalization on January 17, 1976 and the treatment at that time was for increased back pain with no stess bringing on symptoms and was related to claimant's original injury. The Board concludes this hospitalization and the medical bills relating thereto are the responsibility of the Fund.

The Board concurs with the Referee's affirmance only as it relates to the February 17, 1976 hospitalization; there is no evidence that it was required because of claimant's original injury.

ORDER

The order of the Referee, dated July 30, 1976, is modified.

Claimant's claim for the hospitalization of January 17, 1976 and the resulting medical bills is remanded to the Fund for acceptance and payment as provided by law.

The denial of claimant's claim for payment of her costs for her hospitalization on February 17, 1976 is affirmed.

Claimant's counsel is entitled to a reasonable attorney fee for provailing with regard to the Fund's denial of payment for the January 17, 1976 hospitalization. He is awarded a fee of $550 for his services before the Referee, and a fee of $200 for his services at this Board review, both sums to be paid by the Fund.

WCB CASE NO. 74-1755 JANUARY 17, 1977

CLAIR ADAMS, CLAIMANT
Ronald Thom, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant an award of 48 degrees for 15% unscheduled disability. Claimant contends he is permanently and totally disabled.

Claimant sustained a compensable back injury on January 30, 1074 and came under the care of Dr. Meyer and, on February 12, under the care of Dr. Donkle. Dr. Donkle diagnosed an acute traumatic strain of the dorsal spine and osteoarthritis.

On July 31, 1974 Dr. Donkle indicated claimant had disability resulting from his injury, however, claimant has a pre-existing significant arthritis in his back which is totally unrelated to the industrial injury. He added that claimant has two other problems which contribute to claimant's disability, i.e., severe pulmonary emphysema and acute anxiety problems. Because of the injury and these other problems claimant is precluded from returning to his former occupation of truck driving. Dr. Donkle estimated claimant's disability relating to the industrial injury was 10% of the whole man.

A psychological evaluation conducted on November 18, 1975 revealed a moderately severe relationship between claimant's injury and his current psychopathology through aggravation of a pre-existing condition; this condition will deteriorate unless claimant becomes involved in work activities of some kind.

Dr. Hickman recommended claimant be seen by Dr. Cook, an orthopedic specialist, who felt claimant most likely would not be able to return to full time gainful employment.

Russ Carter, assistant vocational rehabilitation coordinator, agreed with Dr. Hickman that claimant was not a proper subject for vocational rehabilitation but Carter felt this was because claimant had no vocational handicap; that he could return to some types of work.

The Referee found, based on all of the medical reports, that it was not possible to state that claimant's relatively minor injury caused or resulted in the devastating disability claimant now suffers, nor was there evidence that the injury triggered the underlying problems claimant has had for many years.

The Referee concluded that due to the industrial injury claimant was entitled to an award of 48 degrees for 15% permanent partial disability to adequately compensate him for his loss of wage earning capacity.

The Board, on de novo review, finds that the Referee has failed to give sufficient weight to the report from Dr. Hickman that claimant has a moderately severe rating of psychopathology directly related to the industrial injury. Dr. Hickman further rates claimant in a psychological Class IV and says his chances for successful rehabilitation is relatively poor.

The Board concludes that claimant's psychological problems being directly related to his industrial injury must be considered in determining his loss of wage earning capacity and that he is entitled to an award of 96 degrees for 30% unscheduled disability.

ORDER

The order of the Referee, dated June 30, 1976, is modified.

Claimant is hereby granted an award of 96 degrees of a maximum 320 degrees for unscheduled disability. This award is in lieu of the awarded granted by the Referee's order which, in all other respects, is affirmed.

WCB CASE NO. 76-514 JANUARY 17, 1977

LISA FORD, CLAIMANT
Eldon Rosenthal, Claimant's Atty.
Roger Luedtke, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order affirming the Determination Order of January 20, 1976 which granted claimant an award of 16 degrees for 5% unscheduled shoulder disability.

Claimant, a licensed practical nurse, sustained a compensable shoulder muscle injury on January 8, 1975. Dr. Utterback, on January 14, 1975, diagnosed abduction of the left shoulder and tenderness in the area of the supraspinatous tendon. He found no permanent impairment.

Claimant was found medically stationary and released to work on January 20, 1975, but she did not return to work. Dr. Utterback changed claimant's release to a limited one on March 12, 1975 but claimant's employer would not let her return without a full release.

On April 8, 1975 claimant was examined by Dr. Waldrum who diagnosed mild bursitis and recommended retraining in a sedentary type of job. He did not anticipate any permanent disability associated with this condition. Dr. Utterback concurred with these findings.

On August 25, 1975 claimant was seen at the Disability Prevention Division where the doctor's diagnosed strain left shoulder, bursitis, recovered; and strain, chronic bursitis right shoulder and no significant emotional overlay.

On January 14, 1976 Dr. Utterback indicated claimant was not disabled except for activities that involve the use of her right shoulder elevated or a pulling activity with that arm. She had no symptoms in the left shoulder. On March 1, 1976 Dr. Utterback found 5% awarded by the Determination to be adequate.

The Division of Vocational Rehabilitation offered its services to claimant in February, 1975, claimant testified she was not interested.

The Referee found claimant had not made a serious attempt to return to work for her employer. A representative of the employer testified there are jobs available to claimant but claimant did not take any action with regard to such jobs.

Claimant contends she is well-motivated with 40 productive working years ahead of her, but is now foreclosed from all heavy labor. The employer contends claimant has no symptoms whatsoever as long as she doesn't elevate her arms.

The Referee concluded claimant is well-educated, competent and only motivated to do what she wants to do. Claimant is not precluded from a broad field of the labor market, considering her age, intelligence, education and training. The Referee concluded the award by the Determination Order was more than adequate compensation for claimant's loss of wage earning capacity. He affirmed the Determination Order.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 12, 1976, is affirmed.

WCB CASE NO. 75-3953 JANUARY 17, 1977

BILL SWETLAND, CLAIMANT
A.C. Roll, Claimant's Atty.
Charles Paulson, Defense Atty.
Order

On January 12, 1977 the Board received from claimant's attorney a Motion for Correction and Clarification of the Board's Order on Review entered in the above entitled matter on December 10, 1976 and further requests the Board to order the employer to pay compensation for temporary total disability to claimant on and after April 9, 1975 and until the Board shall determine that claimant is no longer entitled to such compensation.

The Board, after full consideration of the matter, finds no need for correction or clarification of its Order on Review dated December 10, 1976 nor any justification for directing the employer to pay claimant compensation for temporary total disability on and after April 9, 1975.

If claimant was not satisfied with the Order on Review, under the provisions of ORS 656.298 he had the right to request judicial review of the order with the Circuit Court for

the county in which he resided at the time of his injury or the county wherein the injury occurred. Claimant's counsel is well aware of this.

ORDER

The Motion for Correction and Clarification of the Board's Order on Review in the above entitled matter on December 10, 1976 is denied.

WCB CASE NO. 75-2768 JANUARY 17, 1977

ROY J. FENTON, CLAIMANT
Willard Fox, Claimant's Atty.
James Delapoer, Defense Atty.
Order

On December 15, 1976 claimant's attorney, without submitting claimant to the jurisdiction of the Board and specifically appearing, filed a motion requesting the Board to dismiss the request for review of the above entitled matter made by Normarc, Inc., on September 28, 1976. The motion was supported by an affidavit made by claimant's attorney which stated, in part, that the employer, Normarc, was not a "party" at the hearing and, therefore, did not have a right to appeal the decision of the Referee.

The employer was represented at the hearing through the State Accident Insurance Fund by Assistant Attorney General Quintin B. Estell.

On December 30, 1976 a private attorney retained by the employer filed a Memorandum in Opposition to claimant's Motion to Dismiss, relying, primarily, on the definition of party as set forth in ORS 656.005(20), and which states:

> "'Party' means a claimant for compensation, the employer for the injured workman at the time of the injury and the insurer, if any, of such employer."

The Board, having given full consideration to the motion and supporting affidavit, and to the memorandum in opposition, concludes that the employer is a party as defined by statute and has sufficient standing to request review by the Board of the Referee's order.

The Board further concludes that although a request for review was not made by the Fund within 30 days after the entry of the Referee's order in the above entitled matter, the employer's request for review was received within the statutory period and, therefore, claimant's Motion to Dismiss must be denied.

It is so ordered.

JAMES DUFFY, CLAIMANT
Dennis Henninger, Claimant's Atty.
Charles Holloway III, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of July 5, 1974.

Claimant sustained a compensable industrial injury on November 6, 1972 causing left pubic ramus and ischium fractures and a fracture dislocation through the center of his left foot. Claimant was hospitalized for one month; he came under the care of Dr. Langston in June, 1973. In January, 1974 Dr. Langston released claimant to return to work. Vocational Rehabilitation programs have been offered to claimant a number of times; claimant has indicated no interest in either returning to work or being retrained.

A Determination Order of July 7, 1974 granted claimant an award of 80 degrees for 25% unscheduled low back and pelvis disability and an award of 75 degrees for 50% loss of his left leg.

In his report of February 27, 1976 Dr. Langston states claimant never had complaints of back pain while under his care and he found 100% loss of claimant's left foot. However, during the time claimant was under Dr. Langston's care he was examined by both Dr. Pasquesi and Dr. Cherry who were aware of claimant's low back symptoms. Dr. Cherry found a fractured left pelvis.

The Referee found claimant had both scheduled and unscheduled disability.

Claimant is 26 years old and has three years of undergraduate study and an excellent intellectual capacity; therefore, his loss of wage earning capacity, after taking into account claimant's lack of motivation, has been adequately compensated by the Determination Order for his unscheduled disability.

The Referee found claimant's left foot problems require the use of specially constructed orthopedic shoes, however, the award for 50% adequately compensated him for the loss of function of his left foot.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated March 16, 1976, is affirmed.

JAMES SHEPHERD, CLAIMANT
David Vandenberg, Claimant's Atty.
Michael Hoffman, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests review of the Referee's order dated June 30, 1976, the Referee's supplemental and clarifying order dated July 2, 1976 and the Referee's second supplemental and clarifying order dated August 13, 1976.

The original order directed the employer to pay claimant, in addition to the temporary total disability benefits ordered paid by the Determination Order of March 4, 1976, compensation for temporary total disability from October 24, 1974 through January 7, 1975, directed the employer to pay claimant an additional compensation in the amount equal to 25% of the compensation payable under the first directive of his order as a penalty for unreasonable delay in payment of compensation, directed the employer to pay claimant's attorney a fee of $650 and remanded the matter to the Disability Prevention Division of the Board with his recommendation that a program of vocational rehabilitation be authorized, pursuant to OAR 436-61-050(4), as amended April 1, 1976, and directed payment to claimant's counsel as an additional attorney fee the sum equal to 25% of any permanent partial disability award in excess of 48 degrees made payable to claimant by the Evaluation Division of the Board following completion or termination of claimant's vocational rehabilitation program, said fee to be paid out of such additional permanent partial disability award and not to exceed $1350.

The supplemental and clarifying order merely stated that the first order was final and subject to appeal with respect to the issues therein ruled upon but that the Referee retained jurisdiction of the matter with respect to the issue of extent of permanent partial disability pending acceptance or rejection of claimant as a candidate for an authorized program of vocational rehabilitation, and urged claimant to promptly apply to the Disability Prevention Division of the Board for consideration of referral for vocational rehabilitation stating that if within a reasonable time claimant was referred as a candidate for vocational rehabilitation the hearing would be closed; if not, a supplemental order with respect to the extent of disability would be entered by the Referee.

The second supplemental and clarifying order indicates that the Referee had been advised that pursuant to his recommendations in the original order claimant had been referred by the Board to Klamath Falls office of Vocational Rehabilitation Division on July 15, 1976 and it ordered claimant to be paid temporary total disability compensation from and after July 15, 1976 and until termination was authorized by the agency pursuant to the Board's rules.

Claimant fell 25 feet to a concrete floor on October 10, 1974. He was taken to the hospital emergency room, examined and released. Dr. Paden, who examined claimant at the hospital emergency room, indicated by a report dated November 7, 1974 that claimant was medically stationary when he saw him at the emergency room on October 10, 1974. He was released to regular work on October 24, 1974 by Dr. Paden who said claimant would suffer no permanent impairment from this injury.

When claimant returned to work he was assigned to answering phone calls for a week

and then given a forklift job by the employer. Claimant said this caused back pain and the employer gave claimant the job of insulating pipes but he could not handle this job either and he quit.

Claimant testified he had been unable to return to work because of back pain. Claimant received no temporary total disability compensation after quitting work; he testified he was in need of medical care but lacked the funds to see a doctor. The carrier wrote to claimant and told him to contact his doctor if he required further medical treatment.

A Determination Order of March 4, 1976 granted temporary total disability compensation from October 10, 1974 through October 23, 1974 and from July 8, 1975 through November 18, 1975 and an award of 48 degrees for 15% unscheduled disability.

The Referee found claimant to be a forthright witness and accepted as true his testimony concerning the attempts to work. He found that the carrier had the information, or could have obtained it, known by the employer that claimant had been unable to perform his assigned work and, therefore, the carrier's failure to commence temporary total disability compensation was, in effect, unreasonable delay in payment of said benefits. Furthermore, claimant was entitled to time loss from October 23, 1974 to July 8, 1975.

Claimant's counsel referred him to Dr. Lilly who reported on July 8, 1975 that claimant had small compression fractures of L1-2 and T12 with 15% anterior wedging. Dr. Lilly opined claimant had low back pain, the condition was permanent and claimant should find sedentary work.

Claimant testified he wants vocational rehabilitation training for work within his physical capabilities.

The Referee reached the conclusions set forth in the opening paragraph of this order.

The Board, on de novo review, finds that claimant has never been other than medically stationary since October 24, 1974 and is not entitled to compensation for temporary total disability from October 24, 1974 through July 8, 1975 and, therefore, is not entitled to penalties and attorney fees for failure to pay the aforesaid compensation.

If claimant's condition has changed, based on Dr. Lilly's report of July 8, 1975, the proper procedure would be for claimant to request that his claim be reopened. There is no evidence that claimant has done this. The Referee has no authority to remand the matter to the Disability Prevention Division with his recommendation that a program of vocational rehabilitation be authorized.

The Board finds claimant has not been found eligible for entry into an authorized program of vocational rehabilitation under the rules promulgated by the Board pursuant to the authority granted it by ORS 656.728, notwithstanding the contrary finding contained in the Referee's second supplemental clarifying order. There is nothing in the record to support this finding by the Referee.

The Board finds that neither of the examining doctors indicated that vocational rehabilitation was necessary or desirable; apparently the Referee reached his decision to remand the matter to the Disability Prevention Division solely because claimant had said he would be interested in vocational rehabilitation. The Board does not find this

sufficient to support a referral to the Disability Prevention Division for vocational rehabilitation. The specific standards which must be met for claimant to qualify for vocational rehabilitation were not met by claimant in this case. The fact that claimant is not able to return to his former regular work does not, by itself, entitle claimant to vocational rehabilitation; claimant must be found to be without skills which would readily enable him to return to full time employment in order to be found to have a vocational handicap.

For the foregoing reasons the Board concludes that the Referee's original order, his supplemental clarifying order and his second supplemental clarifying order must be reversed, and the Determination Order of March 4, 1976 affirmed.

ORDER

The order of the Referee dated June 30, 1976, the supplemental order, dated July 2, 1976, and the second supplemental order, dated August 13, 1976, are reversed.

The Determination Order of March 4, 1976, is affirmed.

WCB CASE NO. 75-3259 JANUARY 17, 1977
WCB CASE NO. 75-3260

WILLIE ROLLINS, CLAIMANT
Allan Coons, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

On January 3, 1977 claimant, through his attorney, tendered certain exhibits and moved for their admission into evidence as part of the record for review in the above entitled matter or, in the alternative, if the State Accident Insurance Fund objected to this, moved for a remand of the matter to the Referee.

On January 11, 1977 the Fund responded in opposition to claimant's motion, contending such evidence dealt with changes in claimant's condition following the hearing and, therefore, was inadmissable.

The Board, having fully considered the motion and the Fund's brief in opposition thereto, concludes that the Motion to Supplement the Record and the Motion to Remand should be denied.

It is so ordered.

CLAIM # 87-CM111N JANUARY 19, 1977

RICHARD WHITE, CLAIMANT
Ann Morgenstern, Claimant's Atty.
Noreen Saltveit, Defense Atty.
Own Motion Order

On November 24, 1976 the Board received from claimant a request that it reopen his claim for an industrial injury suffered on December 28, 1967, exercising its own motion jurisdiction pursuant to ORS 656.278. Claimant alleges that he is in need of further medical care and treatment and is entitled to compensation for temporary total disability

and, if found appropriate after further medical care and treatment, compensation for additional permanent partial disability.

On November 9, 1976 the carrier, American Motors Insurance Company, was furnished a copy of the request and advised that it had 20 days thereafter to advise the Board of its position with respect to said request.

On December 30, 1976 the carrier responded, stating it opposed the reopening of the claim, however, it would appreciate an extension of time in which to make a further review of the file.

The only medical report submitted in support of claimant's request was signed by Dr. Donald D. Smith on August 13, 1976; it indicated he had first examined claimant on July 30, 1976 and the most recent examination had been made on August 11, 1976. Between July 26 and August 11 claimant had been hospitalized. He indicated on the form report that the disability was a result of an accident occurring in 1967.

On December 28, 1976 the Board was furnished a medical report from Dr. Knowles dated December 3, 1976 and was also informed that claimant was presently under the care of Dr. Bergman, a physician practicing in Walla Walla, Washington. Subsequently, reports were received from Dr. Bergman.

On January 4, 1977 the carrier furnished the Board with three medical reports from Dr. Howard E. Johnson and two reports from Dr. Donald D. Smith, also a claim filed on December 29, 1976 and the Determination Order mailed on April 1, 1968.

The Board, after reviewing fully the medical reports from Drs. Smith, Knowles and Bergman submitted on behalf of claimant and the reports from Dr. Johnson and Dr. Smith submitted by the carrier, concludes that such medical evidence does not justify a finding that claimant's present condition is related to his industrial injury of December 28, 1967 and, therefore, claimant's request to reopen his claim must be denied.

It is so ordered.

WCB CASE NO. 72-388 JANUARY 19, 1977

RICHARD UHING, CLAIMANT
Joseph Penna, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On December 15, 1976 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and modify the award entered in WCB Case No. 72-388. In support of this request claimant submitted medical reports from Dr. Grewe.

Claimant sustained an injury to his back on September 13, 1968 for which he filed a claim that was closed on February 19, 1969 with an award of 5% unscheduled disability. Claimant requested a hearing and, pursuant to stipulation dated July 2, 1970, claimant was granted an additional 10% for his unscheduled disability. The record indicates that, in addition to the first Determination Order and the stipulation, claimant's claim was closed by three other Determination Orders each of which awarded claimant an additional

compensation for temporary total disability only. The fourth and last Determination Order was mailed November 5, 1971 and claimant requested a hearing on the adequacy of said award (WCB Case No. 72-388). Prior to a hearing a stipulation was approved on April 4, 1972 which granted claimant an additional 24 degrees for unscheduled disability.

The Fund was advised of claimant's present request and, on January 5, 1977, responded, stating that claimant had received the awards enumerated above and also in May, 1973 claimant had requested additional benefits to which the Board, by its order dated May 16, 1973, indicated claimant was not entitled. Furthermore, during this period claimant was receiving benefits under vocational rehabilitation; that a plan was developed for college work with a major in juvenile corrections. According to the information in the file claimant received $6,000 in vocational rehabilitation benefits but later dropped out of school. The medical reports from Dr. Grewe indicate that a myelogram performed on December 2, 1976 was essentially negative and Dr. Grewe had no further recommendations other than out-patient pain management which, in the opinion of the Fund, indicated that all of claimant's problems might not be related to his industrial injury. The Fund agreed to pay for the myelogram.

The Board, having given full consideration to Dr. Grewe's reports, and the evidence contained in the response of the Fund, concludes that there is no justification at this time to reopen claimant's claim.

ORDER

The request made by claimant to reopen his September 13, 1968 claim is hereby denied.

WCB CASE NO. 75-5549 JANUARY 19, 1977

MICHAEL RICE, CLAIMANT
Marvin Nepom, Claimant's Atty.
Jack Mattison, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant an award for 96 degrees for 30% unscheduled right shoulder disability. Claimant contends he is odd-lot permanently and totally disabled, or in the alternative, entitled to a greater award for his unscheduled disability and also an award for scheduled disability.

Most of claimant's adult working life has been as a cook or chef; however, claimant was working as a gardner on December 13, 1974 when he suffered a compensable right shoulder injury which produced a spur. Dr. Boyden recommended surgical removal; Dr. Hopkins disagreed stating this surgery, if performed, would create a fixation that claimant would never overcome. Claimant is afraid of the surgery. Claimant has a low pain threshold and is very sensitive. Claimant has never returned to work. Dr. Hopkins recommended vocational rehabilitation; claimant doesn't appear to be interested. A service coordinator found claimant has sufficient skills to find gainful employment.

A Determination Order dated November 10, 1975 granted claimant 64 degrees for 20% unscheduled disability.

The Referee found that claimant's subjective complaints were not supported by the objective medical findings; also claimant lacked motivation to return to work. The Referee urged claimant to contact his coordinator and take advantage of the services of the Disability Prevention Division.

The Referee concluded claimant's loss of wage earning capacity was greater than that for which he had received an award but he certainly was not permanently and totally disabled. He increased the award to 96 degrees for 30% unscheduled disability.

The Board, on de novo review, adopts the Referee's order. There is no medical evidence to justify a finding of any permanent injury to a scheduled area of the body.

ORDER

The order of the Referee, dated November 10, 1975, is affirmed.

SAIF CLAIM NO. YC 13911 JANUARY 19, 1977

LEMUEL PERRIGAN, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

On April 22, 1966 claimant suffered a compensable injury resulting in fracture of the shafts of the right tibia and fibula. The claim was closed on July 25, 1967 with an award of 15% loss of use of the right leg.

On May 25, 1976 Dr. Goldsmith advised the Fund that claimant had developed phlebitis in the right leg, ankle and foot which appeared to be the result of his 1966 injury; he requested a reopening of claimant's claim. Dr. Goldsmith had, on March 26, 1976, performed a vein stripping to relieve claimant's problem.

Claimant still has pain and swelling in the right leg and is taking an anticoagulant, coumadin, and will continue to do so on a long term basis according to a report made to the Fund by Dr. Goldsmith on November 8, 1976. In this report Dr. Goldsmith stated he felt claimant would continue to have exacerbation with phlebitis and that an active program of vocational rehabilitation and job retraining should be done since there was no doubt that he would be unable to continue to work as a timber faller. He stated that claimant's situation, therefore, might be said to be stationary in one respect, namely, he would continue to have trouble in varying degrees with this leg for the rest of his life.

On December 29, 1976 the Fund requested a closing evaluation by the Evaluation Division of the Board. Evaluation recommended that further observation and treatment, as suggested by Dr. Goldsmith, could be provided under ORS 656.245 and that claimant should be considered medically stationary. They further recommended an additional award of 15% loss use of right leg and additional compensation for temporary total disability from March 25, 1976 through November 8, 1976, less time worked.

The Board concurs in the recommendations made by its Evaluation Division.

ORDER

Claimant is awarded compensation for temporary total disability from March 25, 1976 through November 8, 1976, less time worked, and 16.5 degrees of a maximum of

110 degrees for loss use of the right leg. This is in addition to and not in lieu of any previous awards received by claimant for his April 22, 1966 industrial injury.

WCB CASE NO. 76-294 JANUARY 19, 1977

RICHARD M. OLSON, CLAIMANT
Hugh Cole, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On July 20, 1976 the Board remanded claimant's request for the Board to reopen his January 25, 1955 claim, pursuant to its own motion jurisdiction, to the Hearings Division with instructions for a Referee to hold a hearing and take evidence on the merits of the request.

On January 16, 1976 claimant had requested a hearing relating to his claim, specifically, on the issue of the propriety of the Fund's claim closure without additional award of permanent partial disability. The Fund had voluntarily reopened the claim and, thereafter, had unilaterally closed it without submitting it to Evaluation Division for a determination pursuant to ORS 656.278. The Board's order also directed the Referee to take evidence on the propriety of the unilateral claim closure. Upon conclusion of the hearing, the Referee directed to cause a transcript of the proceedings to be prepared and be submitted to the Board together with his recommendation on both issues.

On September 23, 1976 a hearing was convened before Referee Raymond S. Danner, pursuant to the above instructions. On December 30, 1976 Referee Danner submitted his advisory opinion together with a transcript of the proceedings to the Board.

The Board, after de novo review of the transcript of proceedings and giving full consideration to the Referee's advisory opinion, adopts as its own the findings and conclusions of the opinion, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

Claimant's claim for an industrial injury suffered on January 25, 1955 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing January 17, 1975 and until his claim is closed pursuant to ORS 656.278. The Fund shall be allowed to deduct from the compensation for temporary total disability directed to be paid claimant by this order amounts of compensation which it has voluntarily paid.

Claimant's attorney is granted as a reasonable attorney fee a sum equal to 25% of the temporary total disability directed to be paid claimant by this order, payable out of such compensation, as paid, not to exceed $500.

VIVIAN MACDOUGALL, CLAIMANT
John Ryan, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order affirming the Determination Order of December 17, 1975 which granted an award of 20.25 degrees for 15% loss of the right foot.

Claimant, a cocktail waitress, sustained a laceration of her right foot on April 26, 1974. The laceration was repaired subsequently, she was seen by Dr. Aizawa who performed surgeries on July and October, 1974 for a traumatic neuroma and a fibroma with an adventitious bursa.

On July 18, 1975 Dr. Case examined claimant and found her principal problem was anxiety-tension coupled with an unsuitable occupation. Claimant received training under the Vocational Rehabilitation Division as a dog groomer but terminated and returned to her job as a banquet waitress.

Claimant testified she has pain in her foot if she stands too long and also it is caused by cold or damp weather. When the area around the surgical scar is touched she has an "electrical type" sensation. Claimant demonstrated at the hearing that when she takes off her shoe and stands flat-footed her toes don't touch the floor. Claimant wears a 9AAA shoe on her left foot and a $7\frac{1}{2}$ EE on the left.

The Referee found claimant had some residual right foot impairment; the pain in her foot resulting from prolonged standing is relieved by changing positions or by taking a foot bath.

The Referee concluded, considering all of the evidence, that claimant's total loss of function of her left foot has been adequately compensated for by the award granted to her by the Determination Order.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 21, 1976, is affirmed.

IRENE LAMBERTS, CLAIMANT
Wesley Franklin, Claimant's Atty.
Marshall Cheney, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer requests review by the Board of the Referee's order which granted claimant an award for permanent total disability.

Claimant, a nurse's aide since 1957, sustained a compensable back injury on July 9, 1970. Claimant's treating physician is Dr. Eckhardt; he diagnosed moderate muscular sprain of the low back.

Claimant has received awards totaling 64 degrees for 20% unscheduled low back disability and an award of 15 degrees for 10% loss of left leg.

Over the course of the years claimant has been examined by numerous neurologists and orthopedists and three psychiatrists.

On February 24, 1975 Dr. Schuler felt the awards granted claimant adequately compensated her for her disability. On May 1, 1975 Dr. Eckhardt agreed with Dr. Schuler but felt that claimant would never work again due to her physical and psychological problems.

On December 29, 1975 Dr. Quan, a psychiatrist who examined claimant, diagnosed possible hysterical personality disorder. Later, he indicated he did not find claimant's psychological problems sufficient enough to preclude her from gainful employment.

The Referee found a diversity of medical opinion expressed by the doctors who treated and/or examined claimant but he gave the greatest weight to the opinions of Drs. Eckhardt, Grewe, and Smith.

The Referee concluded that due to the combination of claimant's physical and psychological problems she now is precluded from engaging in any gainful employment and is permanently and totally disabled.

The Board, taking into consideration all of the medical evidence relating to claimant's physical and psychological problems finds that claimant could return to sedentary occupations and that she is not permanently and totally disabled either physically nor psychologically.

Dr. Quan found that not all of claimant's psychological problems were necessarily related to her industrial injury and that her psychiatric problems still do not preclude her from returning to gainful employment. Claimant, from a physical standpoint, has a moderate low back impairment; all of her complaints could not be objectively substantiated by the medical findings. In fact, most of the doctors recommended claimant return to some kind of light work.

The Board, on de novo review, concludes that claimant has lost a substantial loss of wage earning capacity due to both the physical and psychological problems and that she

is entitled to an award of 256 degrees for 80% unscheduled disability to compensate her for this loss.

ORDER

The order of the Referee, dated August 18, 1976, is modified.

Claimant is hereby granted an award of 256 degrees of a maximum 320 degrees for 80% unscheduled disability. This award is in lieu of that granted by the Referee's order which, in all other respects, is affirmed.

Any payments which the employer has made for the permanent total disability pursuant to the Referee's order shall be credited against the payments due claimant for the award made by this order.

WCB CASE NO. 76-313 JANUARY 19, 1977

OLLIE FITZGIBBONS, CLAIMANT
Keith Mobley, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant an award of 96 degrees for 30% unscheduled disability. Claimant contends she is permanently and totally disabled.

Claimant sustained a compensable injury to her back causing an onset of symptoms on May 4, 1972, diagnosed as chronic lumbar strain. On May 2, 1974 a Determination Order granted claimant 16 degrees for 5% unscheduled disability; she appealed and, after a hearing, was granted an award of 128 degrees for 40% unscheduled disability on February 20, 1975. On August 1, 1975 the Board's Order on Review set aside the Referee's order and reopened claimant's claim for further medical care and treatment. On May 8, 1975 a Determination Order granted claimant an award of 32 degrees for 10% unscheduled disability.

Claimant was examined by Dr. Van Osdel at the Disability Prevention Division on November 3, 1975. He found chronic lumbar strain of the lumbar and dorsal muscles and ligaments superimposed on minimal scoliosis and mild to moderate anxiety reaction with depression.

Claimant had a psychological evaluation on November 7, 1975 which indicated claimant felt she could not hold down any type of full time work. Dr. Munsey found the prognosis for claimant returning to work was poor. Claimant doesn't wish to make any changes in her life which would be inconsistant with her husband's wishes even if "this means she must sit around the house the rest of her life with nothing to do."

On November 14, 1975 claimant was examined by the Back Evaluation Clinic, the doctor diagnosed chronic lumbar strain and gastric ulcer. They felt claimant was capable of doing some form of light work on a continuous basis if she were so motivated. Total loss of function of her back due to this injury was mild.

The Referee found the medical findings were moderate as compared to claimant's complaints, however, the prospects for claimant's return to the labor market are dim considering the small town she lives in, her age, education and lack of special training.

The Referee concluded a substantial segment of the labor market was now unavailable to claimant and her loss of wage earning capacity was greater than that for which she had been awarded by the Determination Order. He granted claimant an additional 20% for a total of 30% of the maximum for unscheduled disability.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 17, 1976, is affirmed.

WCB CASE NO. 76-785 JANUARY 19, 1977

ROBERT ATWOOD, CLAIMANT
Lawrence Paulson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the denial of the Fund for claimant's claim for aggravation.

Claimant suffered a compensable automobile accident on September 12, 1971 for which he received medical care and psychiatric counseling. On September 12, 1972 a Determination Order granted claimant an award for time loss only. Claimant appealed, after a hearing, an order of September 18, 1973 granted claimant an award for 48 degrees for 15% unscheduled disability.

On June 13, 1976 Dr. William Thompson, claimant's psychiatrist, reported claimant had shown a multiplicity of functional complaints subsequent to his injury, all which might be interpreted as withdrawal from various toxic sedative substances, or alcohol. Claimant also has suffered considerable deterioration of his judgmental capacity and Dr. Thompson opined claimant is permanently and totally unemployable. Claimant insists all of this is due to his accident. Dr. Thompson admitted that when he had said "this accident may very well have been a precipitating episode for claimant's continuing symptoms" he meant it was possibly related to the injury.

At the hearing in 1973 Dr. Thompson had testified claimant was permanently and totally disabled and he felt claimant was even more so today because of his worsened psychiatric condition which makes claimant incapable of coping with his every day environment. Dr. Thompson found claimant's basic problems was chronic brain syndrome of unknown etiology. Dr. Thompson does not know if this problem pre-existed the 1971 accident but it is progressive with aging and will continue to worsen despite medical help.

The Referee found Dr. Thompson to be convincing on the issue that claimant's psychiatric condition is worse now than in 1973, however, he concluded that claimant had failed to show by any medical evidence that this worsening condition resulted from his compensable injury. He affirmed the Fund's denial.

The Board, after de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 24, 1976, is affirmed.

CLAIM NO. 133CB1890652 JANUARY 21, 1977

ADA WARR, CLAIMANT
Own Motion Determination

Claimant sustained a compensable low back injury on December 24, 1967. She was hospitalized for conservative treatment and returned to work on February 6, 1968. The claim was closed with an award of 16 degrees for 5% unscheduled low back disability.

On January 7, 1970, while arising from a chair, claimant had a recurrence of low back symptoms and was again hospitalized for conservative treatment. She returned to work on January 25, 1970. A second closure on July 3, 1970 granted claimant an additional award of 32 degrees for 10% unscheduled disability.

On May 19, 1975 claimant requested her claim be reopened for aggravation. The carrier denied the claim because claimant's aggravation rights had expired on October 8, 1973. An Own Motion Order of September 17, 1975 reopened the claim for further medical care and treatment. On April 25, 1975 claimant was hospitalized and, on January 7, 1976, underwent a laminectomy and lumbosacral fusion.

On December 13, 1976 Dr. Bert, claimant's treating physician, indicated claimant has hip discomfort diagnosed as bursitis and that claimant's stomach gives her more problems now than her back. Claimant was found medically stationary and limited to lifting under 20 pounds and with minimal stooping and bending.

On December 15, 1976 the employer requested a determination. The Evaluation Division of the Board recommends compensation for temporary total disability from April 25, 1975 through December 13, 1976 and an additional award of 32 degrees for 10%, giving claimant a total of 80 degrees for 25% unscheduled disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from April 25, 1975 through December 13, 1976 and 32 degrees for 10% unscheduled disability. This award is in addition to the awards previously granted to claimant.

WCB CASE NO. 75-2708 JANUARY 21, 1977

ALLAN KYTOLA, CLAIMANT
Allan Coons, Claimant's Atty.
James Huegli, Defense Atty.
Order to Show Cause

On March 23, 1976 the claimant requested Board review of the Referee's Opinion and Order entered in the above entitled matter on March 4, 1976.

Nearly one year has expired since the request for review, however, no further action has been taken by either party.

Claimant is hereby given 30 days from the date of this order within which to show good cause why his request for review should not be dismissed.

WCB CASE NO. 74-3022 JANUARY 21, 1977

WILLIAM E. PATTERSON, CLAIMANT
Gary Galton, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order of Dismissal

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

It is therefore ordered that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 75-2675 JANUARY 21, 1977

LEONARD WONSYLD, CLAIMANT
Donald Hull, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order of Dismissal

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

It is therefore ordered that the request for review and cross-request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

CHRISTINA DAVIS, CLAIMANT
Roy Kilpatrick, Claimant's Atty.
James Huegli, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the carrier's denial of claimant's claim for a compensable injury.

Claimant alleges she suffered a compensable injury on April 18-19, 1975 when she tried to lift a 100-pound sack of starch and felt a burning sensation in her right leg. Claimant was a forklift operator and at the time in question she received her instructions for the shift but felt the clutch on her forklift needed repair and did not follow her instructions.

The next few days claimant had trouble climbing onto the forklift. On April 27, 1975 claimant mentioned this difficulty to her foreman; however, he was unaware her complaints were work related.

Claimant saw Dr. Adkisson on April 29, 1975, he found a numb sciatic nerve with no causal relationship to her work.

On June 17, 1975 claimant saw Dr. Platner and told him about the incident at work; he hospitalized claimant for traction for one month. In December, 1975 Dr. Platner said claimant's injury was work related.

The defendant contends claimant was union steward and was aware all accidents had to be reported immediately. The defendant further contended claimant's testimony is discredited because she failed to inform Dr. Platner of a leg injury in March, 1975 or of the burning sensation in claimant's leg which she tolerated at work the remainder of the shift. The defendant further questions claimant's credibility because she called in at work sick several times when, in fact, she wasn't sick.

The Referee found the evidence indicated an experienced employee in a responsible position had failed to report an accident, as required, with no believable excuse. He further found that the histories given by claimant to Dr. Adkisson, Dr. Platner and to him were contradictory.

The Referee concluded claimant had not met her burden of proving she sustained a compensable industrial injury. He affirmed the denial of her claim.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 7, 1976, is affirmed.

WCB CASE NO. 75-4766-E JANUARY 21, 1977

WELDON F. MCFARLAND, CLAIMANT
Keith Tichenor, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

On January 7, 1977 the Board received claimant's Motion to Dismiss the Fund's request for Board review of the Referee's order entered in the above entitled matter on July 13, 1976. An affidavit of claimant's counsel, Donald R. Wilson, was submitted in support of the motion.

The basis for the motion apparently is that the Fund was advised by its counsel, James P. Cronan, Jr., Assistant Attorney General, to refuse to pay the benefits ordered by Referee Fink in his Opinion and Order and on which the Fund has requested Board review.

The Board finds that this is not a proper ground for dismissal of the Fund's request for review. Claimant has the right to request a hearing on the issue of the alleged failure of the Fund to comply with any portion of the Referee's order.

ORDER

Claimant's motion to Dismiss the State Accident Insurance Fund's request for Board review of the Referee's order entered on July 13, 1976 in the above entitled matter is hereby denied.

CLAIM NO. 635-3551-6 JANUARY 21, 1977

MYRTLE YORK, CLAIMANT
Own Motion Order

On October 14, 1976 the Board received a request from claimant to reopen her claim for an industrial injury suffered on October 2, 1968. Claimant's aggravation rights expired on September 4, 1975, therefore, claimant requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278.

On October 19, 1976 the Board advised claimant by letter that it had received her claim and upon receipt of medical reports from either Dr. Luce or Dr. Dunn, claimant's treating physicians, it would give consideration to the request as well as to any response made thereto by the carrier, Industrial Indemnity. A copy of this letter, as well as claimant's letter, was furnished to the carrier.

On December 10, 1976 Dr. Dunn advised the Board that he had examined claimant on August 24, 1976 as she was complaining of pain in her neck, right side more than left, and tenderness into the right side of her head, also a weakness in the right arm with prolonged use, dizziness at night which she described as a sensation of the bed spinning and constant slight occipital headaches and, occasionally, more severe headaches. In his letter Dr. Dunn stated that Dr. Luce, in January, 1976, and he in February, 1976 had discussed with claimant the question of an anterior cervical fusion. His opinion was that claimant's continuing difficulty was related to her industrial injury suffered on October 2, 1968.

A copy of this letter was forwarded to the carrier on December 14, 1976. To date no response has been received from Industrial Indemnity.

The Board, after giving due consideration to this matter, concludes, based upon Dr. Dunn's report of December 10, 1976, that claimant's claim should be reopened as of the date claimant is hospitalized for the recommended surgery.

ORDER

Claimant's claim for her October 2, 1968 industrial injury is remanded to the employer, Parkview Nursing Home, and its carrier, Industrial Indemnity, to be accepted and for the payment of compensation, as provided by law, commencing on the date claimant is hospitalized for the surgery recommended by Dr. Dunn and until claimant's claim is again closed pursuant to ORS 656.278.

WCB CASE NO. 75-5540 JANUARY 24, 1977

ROBERT STONEKING, CLAIMANT
John DeWenter, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks review of the Referee's order which affirmed the Determination Order of December 4, 1975 whereby claimant was awarded 192 degrees for 60% unscheduled heart disability.

Claimant suffered pain in his upper back and shoulders on December 20, 1972 while pulling guidewires from a spar tree. Claimant saw Dr. Ulman the following day and was hospitalized with a final diagnosis of acute myocardial infarction. Upon release from the hospital claimant suffered both chest pain and pain in the lower cervical or upper thoracic region which radiated down the left shoulder and arm and resulted in some shortness of breath. Both types of pain were relieved by nitroglycerine. Claimant's condition was diagnosed as arteriosclerotic heart disease with remote inferior wall infarction. He was again hospitalized in February, 1973 and, March 7, 1973, a three vessel myocardial revascularization procedure was performed.

In August, 1974 Dr. Holcomb considered claimant's clinical situation stabilized. Although claimant still needed to use nitroglycerine, he was able to do almost anything that he wanted within a moderate degree. Dr. Holcomb classifies claimant as Class II-C New York heart classification. He felt claimant would be moderately disabled.

Claimant was last seen by Dr. Holcomb on January 2, 1975; claimant had been moderately active at that time although he still used nitro and developed some angina from lifting his arms and working overhead or from any excessive activity, especially during cold weather. Dr. Holcomb again stated claimant could engage in moderate exertion but with no particular pressure involved and would continue to have a permanent moderate disability. A Determination Order of December 4, 1975 awarded claimant 192 degrees for his heart disability.

Claimant has been a logger all of his life, he has not worked since 1972. He has a high school education but no special training. At the present time claimant is still being treated by Dr. Holcomb and he tires easily and has angina pains. He is unable to engage in strenuous activity.

The Referee found that at the present time claimant spends his time at home doing various activities around the house with no set program. In the area where claimant lives there are jobs available, however, an individual with a heart problem might have difficulty being hired if the potential employer knew of his condition.

Claimant contends that he is permanently and totally disabled. The Referee found that claimant had failed to prove prima facie that he was within the odd-lot category, based upon Dr. Holcomb's recommendation that claimant could engage in moderate exertion and do light work. He concluded claimant had been adequately compensated for his loss of wage earning capacity by the award for 60% of the maximum allowable by statute for such disability.

The Board, on de novo review, affirms and adopts the order of the Referee.

ORDER

The order of the Referee, dated May 25, 1976, is affirmed.

WCB CASE NO. 75-5201 JANUARY 24, 1977

FRANK KIRWAN, CLAIMANT
Rolf Olson, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks review by the Board of that portion of the Referee's order which remanded claimant's claim for aggravation to it for payment of compensation, as provided by law, directed to provide claimant with psychiatric treatment by a psychiatrist of his choice. The employer also contends the Referee was wrong in refusing to consider certain film taken of claimant subsequent to the hearing but before he wrote his decision.

Claimant suffered a compensable injury on March 12, 1972 to his neck while driving a vehicle which hit a deep hole, bouncing claimant against the roof. A Determination Order of January 11, 1974 awarded 96 degrees for 30% low back disability and, pursuant to a stipulation approved on May 10, 1974, claimant received an additional 64 degrees, giving him a total of 160 degrees for 50% unscheduled low back disability.

On August 7, 1975 Dr. Viets, a chiropractic physician, advised the carrier that claimant was still under his care and that his condition "became worse after May, 1974..."

Claimant filed a claim for aggravation.

Claimant testified that since May, 1974 his headaches were more severe and he had numbness and tingling in his arms which he did not recall having prior to May, 1974. Claimant was under the care of Dr. Klump and Dr. Campagna, both neurosurgeons, both before and after the Determination Order and the May, 1974 stipulation. Although claimant's testimony reflects a subjective sense that his condition was worsened, the character of his complaints made to these doctors does not seem to be markedly different from the complaints made prior to May 10, 1974. Dr. Campagna felt that claimant's condition was essentially unchanged since his examination of claimant in November, 1973.

The Referee concluded that the record was not adequate to show a worsening of claimant's physical condition based upon the medical evidence.

In August, 1973 claimant had been given a psychological evaluation by Norman W. Hickman, a clinical psychologist, who diagnosed a moderately severe anxiety tension reaction moderately attributable to the industrial injury. Dr. Hickman felt there was no reason to expect that the injury would produce any permanent psychological disability unless the patient was unable to return to gainful employment. In 1976 claimant was again examined by Dr. Hickman who felt then that there had been a significant increase in his psychological symptoms and that claimant clearly feels that he is disabled by them.

After the hearing, claimant was evaluated by Dr. Luther, a psychiatrist, who diagnosed a hysterical neurosis, conversion type with muscle tension and some stigmata with anxiety and depression. He believed that at that time claimant was unable to work because of his psychological condition and it appeared to him that claimant's condition was, in fact, worse than it was in 1974. He recommended that claimant be tried on major tranquilizers and/or anti-depressants to determine if this approach to his distress might help.

On April 21, 1976 Dr. Klump commented that he could not state that claimant had permanent impairment from a physical standpoint but would again like to emphasize that he agreed wholeheartedly with Dr. Luther's evaluation with respect to his psychological disability.

The Referee concluded that claimant had sustained a worsening of his psychological disability subsequent to the last arrangement of compensation on May 10, 1974. The failure of the employer to accept the claim for aggravation after receipt of the 1976 report from Dr. Hickman and the post-hearing reports of both Dr. Luther and Dr. Klump, constituted a de facto denial and, therefore, he remanded the claim to the employer.

The Board, on de novo review, affirms and adopts the Referee's order. It agrees with the Referee's refusal to consider the post-hearing film taken of claimant.

ORDER

The order of the Referee, dated August 19, 1976, is affirmed.

Claimant's attorney is granted as a reasonable attorney fee the sum of $400 for his services at Board review, payable by the employer.

WCB CASE NO. 76-415 JANUARY 24, 1977

MINNIE NORGARD, CLAIMANT
Alan Scott, Claimant's Atty.
Philip Mongrain, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order holding that the defendant's conduct in refusing to pay medical bills during the pendency of its appeal was proper.

If a carrier has denied compensability of a claim later found to be compensable, is the carrier, if it appeals, required to pay medical bills during the period of appeal?

In this case it was stipulated by the parties that the insurer during the pendency of its appeal did not pay medical bills amounting to $5,683. The only question of fact presented to the Referee was whether claimant was subjected to harrassment by the doctor or hospital as a result of the non-payment of the bills. The Referee found claimant was a little bit nervous and worried about these bills not being paid and fearful they might be turned over to a collection agency, however, none were, and claimant had no contact with the doctor or hospital other than receipt of monthly billings from each for approximately three months.

He concluded that such contacts did not amount to harrassment but, at the most, constituted an annoyance to which everyone is subjected to in a daily routine of life.

The Referee concluded that he was not bound by a ruling of a circuit court to the same extent as he would be by decisions of the Workmen's Compensation Board and the Court of Appeals. The former is a court of last resort but is controlling only within the circuit it represents.

The Board has ruled that: "...medical services are defined as compensation but the Board does not deem such services to be with the compensation as used in ORS 656.313..." In the Matter of the Compensation of William R. Wood, WCB Case No. 69-319 (July 30, 1971). No ruling on this issue has yet been the basis of an ultimate decision by the Court of Appeals.

The Referee concluded that it was not yet required that the insurer pay the medical bills.

The Board, on de novo review, affirms the order of the Referee.

ORDER

The order of the Referee, dated August 2, 1976, is affirmed.

WCB CASE NO. 76-1109 JANUARY 24, 1977
WCB CASE NO. 76-1415

EDNA BURNS, CLAIMANT
Warner Allen, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Dennis VavRosky, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer, through its carrier, Employee Benefits Insurance, seeks Board review of that protion of the Referee's order which held that the May 14, 1975 denial by EBI was a nullity. The Referee had held, in addition, that the denial of claimant's claim for aggravation by CNA made on January 8, 1976 was proper, that claimant's injury (whether cervical spine, thoracic spine or lumbar spine) was caused or aggravated by the industrial injury of September 17, 1973 and the responsibility of EBI and that as a result of said injury claimant was entitled to an award of 80 degrees for 25% unscheduled disability.

Claimant suffered a compensable injury on January 26, 1973 while working as a janitress. She received chiropractic treatment and returned to work on February 6, 1973.

Her claim was closed by a Determination Order of August 9, 1973 with an award of compensation for temporary total disability only.

Claimant continued to work as a janitress and had a lifting incident in August, 1973 which caused her no loss from work and required no medical treatment. On September 1, while working for the same employer, claimant suffered a compensable injury when she struck the edge of a desk with the back of her neck. Thereafter, claimant underwent a course of treatment for both cervical and low back conditions.

Prior to September 1, 1975 the employer's carrier was CNA, from that date forward its carrier was EBI.

EBI accepted responsibility for the injury of September 17; however, it felt that part of claimant's symptomatology was due to the incident in August, 1973 and the injury of January 26, 1973. They issued a partial denial, accepting the responsibility for the cervical spine condition but did deny the responsibility for the low back condition (in the actual denial letter the claims representative for EBI mistakeningly had the letter typed indicating an acceptance of the low back condition and a denial of the thoracic condition but, after realizing the mistake, made the proper corrections by handwritten interlineations).

On September 10, 1975 claimant's claim for the September 17, 1973 injury was closed by Determination Order awarding claimant compensation for time loss only.

After receiving EBI's denial claimant filed a claim for aggravation with CNA which was denied on January 8, 1976. Claimant appealed from the denial of CNA and also from the Determination Order of December 10, 1975. No appeal was taken from the denial made by EBI.

The Referee found that the denial by CNA should be affirmed and EBI should be charged with the responsibility of the entire claim subsequent to September 17, 1973, including whatever symptomatology may have resulted from the incident in August, 1973. He based his finding, first, on the theory of estoppel since the denial letter of EBI did not communicate to claimant that her low back symptomatology was denied and, second, on the theory of occupational disease under which theory liability would attach at the time the disability commenced in September, 1973.

The Referee further found that claimant had suffered a relatively minor injury in 1973, that she was able to return to work soon thereafter and continue with her same duties until she suffered a rather severe injury on September 17, 1973 which produced disability. After giving consideration to all of the medical evidence, the Referee concluded that claimant had suffered a loss of wage earning capacity which would entitle her to an award of 80 degrees for 25% unscheduled disability and that the responsibility therefor was that of EBI.

The Board, on de novo review, agrees with the Referee's finding that the denial by CNA was proper; there is no evidence that claimant's condition resulting from the January 26, 1973 injury had worsened since the claim was closed on August 9, 1973.

The Board finds that the denial by EBI, although it may have been incorrectly typed originally was corrected to indicate that EBI was denying responsibility for everything except the cervical spine condition. Claimant was aware that the denial covered her low back condition; her attorney's letter, dated September 15, 1975, and addressed to the claims representative at EBI stated:

"...When I last discussed Mrs. Burns' condition with you it was indicated by you that you would accept responsibility for the neck, but not the back, because there had been a change of carriers between the first and second injuries, and that EBI was not responsible for the back injury as you had earlier indicated.

I am filing a claim for aggravation with CNA as a result of the worsening condition of Mrs. Burns' back condition..."

The Board concludes that the denial of EBI dated May 14, 1975 was a proper denial; that EBI is responsible only for the cervical spine condition. EBI does not contest the Referee's award of 80 degrees for 25% unscheduled permanent partial disability.

ORDER

The order of the Referee, dated June 10, 1976, is modified.

The denial by EBI of May 14, 1975 for any responsibility for claimant's low back condition is affirmed.

Claimant's industrial injury of September 17, 1973 is the responsibility of EBI but only so far as it affects claimant's cervical spine.

The balance of the Referee's order of June 10, 1976 is affirmed.

WCB CASE NO. 76-408 JANUARY 24, 1977

RAYMOND GITCH, CLAIMANT
John D. Ryan, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation benefits for an occupational disease.

Claimant alleges an industrial injury on June 30, 1975. Claimant was pulling on the green chain and suddenly he could not continue. On July 1, 1975 claimant saw Dr. Lobb with neck, right shoulder and right arm pain.

Claimant first had seen Dr. Lobb in January, 1975 for neck and right shoulder pain, diagnosed as arthritis. Claimant evidently felt the symptoms he experienced in June, 1975 were a continuation of those diagnosed in January, 1975.

On October 8, 1975 claimant filed a claim for workmen's compensation benefits, which were denied on December 12, 1975.

Dr. Lobb, claimant's continuing treating physician, relates a history of complaints of neck symptoms, stiffness and pain in the right shoulder since January, 1975. Claimant was shifted to a job requiring heavier lifting and the symptoms became progressively worse, Dr. Lobb indicated, until finally claimant was no longer able to work.

The Referee found the employer's time records did not support claimant's testimony nor the history claimant gave Dr. Lobb and on which the doctor based his opinion. The time records show claimant worked on four different job classifications and was shifted from job to job as needed. The Referee concluded claimant did not sustain a compensable injury on June 30, 1975.

However, the Referee found that the medical evidence supported a finding that claimant's cervical degenerative disc disease was caused by heavy lifting over a twenty year duration. He concluded claimant has suffered an occupational disease. There was no contradictory medical evidence presented, therefore, he remanded claimant's claim to the employer for acceptance and payment of benefits.

The Board, on de novo review, adopts the Referee's order

ORDER

The order of the Referee, dated June 9, 1976, is affirmed.

Claimant's attorney is granted as a reasonable attorney fee for his services in connection with Board review the sum of $400, payable by the State Accident Insurance Fund.

WCB CASE NO. 75-5298 JANUARY 24, 1977

LEONARD WOFFORD, CLAIMANT
Stephen Moen, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation, as provided by law.

Claimant alleges he sustained a compensable low back injury on August 14, 1975; however, claimant indicated on his claim the date of injury was August 15, 1975. The job claimant performed on August 15 had little or no lifting. Claimant consistently stated in the histories given to the doctors that the date of his injury was August 15, 1975.

Claimant alleged, initially, he strained his back lifting 90 pound steel slabs; at the hearing he said they weighed 350 pounds.

After the alleged injury claimant had to report to his supervisor to discuss his job performance; at that time claimant made no mention of an injury. Claimant testified at first he placed little importance on the injury; the dates were confusing because claimant starts his shift on one day and finishes it the next.

The Referee found corroboration of claimant's claim was provided by two co-workers. One testified he drove claimant to work on August 13 and after work drove him home and at that time he noticed claimant appeared stiff and sat with his back rigid. Claimant complained to him of back pain and indicated he hurt his back lifting at work.

The other witness, who worked with claimant, testified that the work done on the shift ending on August 14 involved heavy lifting done by himself and claimant.

The Referee concluded that an accident did occur on August 14, 1975 which was compensable. He set aside the Fund's denial and remanded the claim to it.

The Board, on de novo review, concurs with the conclusions reached by the Referee.

ORDER

The order of the Referee, dated July 23, 1976, is affirmed.

Claimant's attorney is granted as a reasonable attorney fee for his services in connection with Board review, the sum of $400 payable by the Fund.

WCB CASE NO. 76-1472 JANUARY 24, 1977
WCB CASE NO. 76-1758
WCB CASE NO. 76-1908

STEPHEN FAY, CLAIMANT
Noreen Saltveit, Claimant's Atty.
Scott Kelley, Defense Atty.
Roger Luedtke, Defense Atty.
R. Kenney Roberts, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The Industrial Indemnity Company requests review by the Board of the Referee's order and amended order which remanded claimant's claim for aggravation to it for acceptance and payment of compensation, as provided by law, commencing January 13, 1976 and until closure is authorized, and affirmed the denial of claimant's claim for aggravation by Fireman's Fund Insurance Company.

Claimant cross-appeals contending aggravation of the 1972 injury with Fireman's Fund Insurance Company and contending an occupational disease on or after October 1, 1975.

Claimant sustained three compensable injuries while working for three different employers. Claimant was first injured on November 4, 1972 while employed by Mannan Building Supplies whose carrier was Fireman's Fund. The second injury occurred on August 19, 1974 while claimant was in the employ of United Grocers whose carrier was Industrial Indemnity. The third incident was an alleged occupational disease on February 15, 1976 while in the employ of Northwest Grocery whose carrier was Employees Benefit Insurance.

Claimant had no prior medical history or injury. The November 4, 1972 injury was to claimant's low back, pelvis and rib cage. Claimant was treated conservatively by Dr. Morris who found him medically stationary on December 13, 1972. From November 27, 1972 through May 18, 1976, except for one occasion, claimant made no complaint of low back pain to Dr. Morris.

On August 19, 1974 claimant sustained a low back strain, diagnosed as muscle spasm. The next day claimant returned to work, but he testified he had continued to have intermittent low back pain since the first injury.

On April 27, 1975 claimant was involved in an automobile accident and was hospitalized with a diagnosis of neck and back strain, cerebral concussion and mild hysteric reaction. Claimant testified that after this accident he continued having back and neck pain and was off work five months.

On January 22, 1976 claimant was examined by Dr. Janzen who found low back pain and progressive deterioration of claimant's back condition. He stated claimant could not return to his regular work and referred claimant to Dr. Church. Dr. Church confirmed the opinion of Dr. Janzen and recommended vocational rehabilitation; he also found functional overlay as had Dr. Morris. Dr. Church felt the automobile accident had little to do with claimant's present problems.

Dr. Pasquesi, in a report of March 4, 1976, indicated it was impossible for him to separate claimant's present problems and divide the responsibility between the industrial injury of November, 1972 the automobile accident of May, 1975 and the alleged occupational disease of October, 1975.

The Referee found that after the November, 1972 injury claimant's condition was quickly resolved with only occasional pain. After the second injury in 1974 claimant had no other residuals and quickly returned to work with little more trouble than after this first injury. Following the automobile accident in 1975 and claimant's eventual return to work in October, 1975 claimant began having more problems, more pain and leg symptoms, which influenced claimant to file his claim for an occupational disease on February 15, 1976.

The Referee found no evidence in the medical reports of any accidental injury or any incident of trauma to the back after claimant returned to work for the second employer in October, 1975, nor does claimant have any occupational disease.

The fact that the treating physician found claimant totally recovered from his first injury and the almost complete lack of medical findings of continuing symptoms over a period of three years precludes a finding of aggravation of the November, 1972 industrial injury.

The Referee found that the work activity of claimant after he returned to work in October, 1975 was more substantial contributing factor to claimant's present low back condition.

The Referee concluded that Industrial Indemnity which covered United Grocers, the second employer, was responsible for claimant's aggravation of symptoms. Claimant's work activity after returning to work in October, 1975 constituted an exacerbation of the second injury. He remanded claimant's claim to the Industrial Indemnity for acceptance and payment of compensation.

The Board, on de novo review, concurs with the findings and conclusions reached by the Referee.

ORDER

The order of the Referee, dated August 23, 1976 and the amended order dated August 25, 1976, are affirmed.

HARVESTA HARRIS, CLAIMANT
Dennis Odman, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of March 10, 1976.

Claimant's claim arose out of the stress and pressure at work; he is a welfare assistance worker. Claimant developed a nervous stomach and an ulcer was suspected. Claimant also had marital and financial problems, and when these problems were resolved claimant's doctor related claimant's condition to his job.

Claimant's claim was closed by Determination Order on March 10, 1976 with an award for temporary total disability only.

No ulcer was ever found by the doctors although claimant underwent considerable diagnostic tests and was hospitalized on two occasions. Some scarring of claimant's duodenal bulb with deformity was found by Dr. Schaub in his report of October 10, 1975.

Dr. Schaub last examination of claimant was on August 21, 1975; it was unimpressive, although claimant complained of peptic symptoms which he claimed precluded him from working. The doctor felt claimant was possibly malingering. Claimant was to see Dr. Zerzan, a gastroenterologist, but failed to keep his appointments and Dr. Zerzan told Dr. Schaub to send claimant to someone else.

The Referee found the medical opinion failed to indicate any permanent partial disability. Claimant failed to keep medical appointments set up to assist in treating him; also claimant failed to meet his responsibility to follow through and seek out medical advice and treatment. Claimant made no attempt to secure the services of vocational rehabilitation and has not sought any employment for two or three months.

The Referee concluded claimant's motivation is questionable, and the medical reports did not justify a finding of permanent partial disability. He affirmed the Determination Order.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated May 13, 1976, is affirmed.

SAIF CLAIM NO. C 229909 JANUARY 26, 1977

HARVEY BURT, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

On November 5, 1969 claimant sustained a compensable left shoulder and left hip injury. Claimant came under the care of Dr. Ho who diagnosed calcific bursitis, left shoulder. On July 15, 1970 claimant underwent surgery for excision of deposits from the capsule of the left shoulder.

On October 28, 1970 a Determination Order granted claimant compensation for temporary total disability and 19.2 degrees for 10% loss of the left arm.

On April 29, 1976 claimant's claim was reopened for aggravation with time loss commencing January 2, 1975. On July 21, 1976 Dr. Beggs indicated claimant had degenerative changes of the hip joint involving the head of the femur and the acetabulum. Dr. Zimmerman performed a left charnley total hip arthroplasty on January 10, 1975.

In his closing report of November 23, 1976 Dr. Zimmerman stated that claimant was medically stationary, was back to work and had a slight decrease in the range of motion of his left hip.

On December 17, 1976 the Fund requested a determination. The Evaluation Division of the Board recommends payment of temporary total disability compensation from January 2, 1975 through May 26, 1976 and an award of 45 degrees for 30% loss of the left leg.

The Board concurs with this recommendation. The Fund has already paid claimant compensation for temporary total disability from January 2, 1975 through May 26, 1976.

ORDER

Claimant is hereby granted an award of 45 degrees for 30% loss of the left leg.

WCB CASE NO. 75-3439 JANUARY 26, 1977

WANDA BEATY, CLAIMANT
Allen Murphy, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which awarded her an additional 64 degrees for 20% unscheduled neck and shoulder disability.

Claimant contends the unscheduled award granted is inadequate and that she is also entitled to an award for right arm disability.

On February 28, 1970 claimant sustained a compensable injury, eventually diagnosed as chronic strain in the right shoulder and chronic strain of the cervical spine.

A Determination Order of October 14, 1970 granted claimant 16 degrees for 5% unscheduled neck disability.

On January 13, 1971 Dr. Parsons examined claimant and diagnosed cervical strain with no evidence of nerve root compression; he found the award granted claimant to be adequate.

The next four years claimant came under the care of Dr. Rinehart. On May 4, 1971 claimant's claim was reopened for further treatment by Dr. Rinehart.

Dr. Rinehart referred claimant to Dr. Gill who examined her on February 4, 1972; he had no specific recommendation for treatment and could not explain claimant's persistent chronic cervical strain and headache problems.

A Second Determination Order of March 28, 1972 granted no additional award for permanent partial disability.

Claimant was hospitalized in October, 1972 for a thoracic outlet syndrome and, on October 20, 1972, underwent surgery by Dr. Inahara for a resection of the right first rib.

On August 28, 1973 Dr. Snodgrass examined claimant with a diagnosis of chronic cervical strain aggravated by functional overlay. On September 16, 1974 claimant had a psychological evaluation which indicated hysteroid features, anxiety and depression; her prognosis was considered to be guarded and psychological counseling was recommended. Dr. Seres felt it didn't appear claimant was particularly interested in improving her present situation and probably lacked motivation.

The Orthopaedic Consultants examined claimant on July 7, 1975 and it was their opinion claimant's "impairment of the whole man" due to her injury was 5%.

A Third Determination Order of July 31, 1975 granted claimant no additional permanent partial disability.

Dr. Smith, on February 12, 1976, indicated claimant was medically stationary and her disability was mild to mildly moderate.

The Referee found claimant has undergone five years of treatment, primarily by Dr. Rinehart, and that the carrier's refusal to pay for more treatment recommended by Dr. Rinehart was not unreasonable.

He further found claimant has chronic cervical strain and mild capsulitis of the right shoulder which is to be rated and claimant does have some psychological problems.

The Referee concluded that claimant has suffered a loss of wage earning capacity due to her physical and psychological problems compounded by the fact that she has been out of the labor market for so many years. She is entitled to an award greater than 16 degrees and he increased the prior award to 80 degrees for 25% unscheduled disability.

The Board, on de novo review, concurs with the findings and conclusions of the Referee. The Board finds no medical evidence which would sustain an award for any scheduled disability.

ORDER

The order of the Referee, dated June 22, 1976, is affirmed.

WCB CASE NO. 75-2921 JANUARY 26, 1977

DONNA BARBER, CLAIMANT
Nicholas Zafiratos, Claimant's Atty.
Lawrence Dean, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of May 23, 1975.

Claimant sustained a compensable injury to her left leg on May 8, 1973. Her claim was closed by a Determination Order of March 29, 1974 with no award for permanent partial disability. On December 12, 1974 her claim was reopened for further medical treatment and closed on May 28, 1975 again without any award for permanent partial disability. Claimant last worked in January, 1974.

On March 13, 1974 Dr. Wade examined claimant and it was his opinion that there was no surgical or medical treatment that would improve claimant's condition. He found no functional impairment and no permanent disability with regard to function but only the sensory change. He indicated claimant could return to full unrestricted activity.

On April 22, 1975 Dr. Lisac reported, after examining claimant, "I am at a loss to find any objective evidence of abnormality in this patient." He found claimant functionally normal, no impairment in the left extremity.

On November 3, 1975 Dr. Quan, a psychiatrist, examined claimant and diagnosed anxiety neurosis, chronic, mild to moderate, pre-existing her industrial injury. He rated the degree of impairment at 10% of the whole man.

The Referee found, based upon the medical evidence, that claimant had failed to prove she had sustained any permanent partial disability from her industrial injury.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 30, 1976, is affirmed.

WCB CASE NO. 76-1472 JANUARY 26, 1977
WCB CASE NO. 76-1758
WCB CASE NO. 76-1908

STEPHEN FAY, CLAIMANT
Noreen Saltveit, Claimant's Atty.
Scott Kelley, Defense Atty.
Roger Luedtke, Defense Atty.
R. Kenney Roberts, Defense Atty.
Supplemental Order Awarding Attorney Fees

The Board's Order on Review issued January 24, 1977 in the above entitled matter failed to include an award of a reasonable attorney fee.

ORDER

It is hereby ordered that claimant's counsel is granted as a reasonable attorney fee for her services at Board review, the sum of $350, payable by the Industrial Indemnity Insurance Company.

WCB CASE NO. 76-1715 JANUARY 26, 1977

DONALD GROOM, CLAIMANT
Donald Wilson, Claimant's Atty.
Michael Hoffman, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which denied claimant's claim for additional benefits. Claimant contends his condition has become aggravated and he is entitled to claim reopening for further medical treatment.

Claimant sustained a compensable injury on October 23, 1975 and saw the employer's doctor, Dr. Battalia, who treated him conservatively. On November 10 he referred claimant to a physiotherapist for six treatments. Claimant missed no time from work, but on December 19, 1975 claimant was terminated for tardiness and absenteeism.

Claimant, in January, 1976, began doing construction plumbing involving little lifting. Claimant saw Dr. Battalia on February 9, 1976, relating a history of back pain for the last three weeks. Dr. Battalia referred claimant back to the physiotherapist. Later, claimant and Dr. Battalia had a "falling out" and the physiotherapist referred claimant to Dr. Boyden.

Dr. Boyden related claimant's condition to his industrial injury of October, 1975. Dr. Battalia indicated he was unable to causally relate claimant's symptomatology to the industrial injury.

Claimant contends the reason Dr. Battalia would not make a finding of a causal relationship was because he was the employer's company doctor and after claimant was fired didn't think claimant was eligible for benefits.

The employer contends that it wasn't until claimant was turned down for unemployment benefits that he turned to workmen's compensation for a claim reopening.

The Referee found merit in the employer's argument that claimant was able to do heavy lifting work right up to the time of his termination; claimant was feeling so well that he failed to see his doctor or to keep his appointments with the physiotherapist.

The Referee concluded claimant sustained a soft tissue injury in October, 1975 and that, after a period of conservative treatment, claimant was able to return to his heavy lifting occupation without difficulty. He agreed with Dr. Battalia that there was no causal connection between claimant's 1976 symptomatology and his industrial injury. He denied claimant's claim.

The Board, on de novo review, affirms the conclusions reached by the Referee.

ORDER

The order of the Referee, dated June 29, 1976, is affirmed.

SAIF CLAIM NO. C 88072 JANUARY 26, 1977

W.B. GROSSNICKLE, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on August 9, 1967. On March 26, 1968 Dr. Cooper reported claimant had had back problems since the 1950's and on April 15, 1953 had undergone a fusion L4-S1 due to an industrial injury for which he received 65% loss of an arm.

Claimant's claim for the 1967 injury was closed on May 2, 1968 with no award for permanent partial disability; reopened in June, 1970 and, on March 8, 1971, Dr. Kimberley performed a fusion L3 to the original fusion mass through S1. The claim was closed by a Second Determination Order of March 23, 1972 with an award for 48 degrees for 15% unscheduled disability. Claimant's aggravation rights have expired.

An Own Motion Order of July 15, 1976 affirmed the Determination Order. On April 29, 1976 claimant was examined by the Orthopaedic Consultants who felt claimant could return to light employment.

On August 18, 1976 claimant was examined by Dr. Kimberley. Upon claimant's request the Board exercised its own motion jurisdiction and on September 20, 1976 remanded claimant's claim to the State Accident Insurance Fund for further medical treatment at the Pain Clinic.

While at the Pain Clinic it was found that, in addition to low back pain, claimant was experiencing pain in his neck, headaches, weakness of his hands and possible heart disease.

On December 17, 1976 the Fund requested a determination. The Evaluation Division of the Board, based upon the medical reports, found claimant has significant disability but most of it is unrelated to his industrial injury. They concluded claimant was not permanently and totally disabled and his disability for his low back condition

has been adequately compensated by prior awards. They recommended compensation for temporary total disability from October 18, 1976 through December 5, 1976.

The Board concurs with the recommendation. The aforesaid compensation for temporary total disability has been paid.

WCB CASE NO. 76-2655 JANUARY 26, 1977

CHEYENNE GUARD, CLAIMANT
Allan Scott, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which awarded claimant 16 degrees for 5% unscheduled disability and assessed a penalty equal to 25% of the temporary total disability compensation due from October 4, 1975 through November 24, 1975. Claimant contends the award is inadequate.

Claimant sustained three low back injuries in quick succession while working for this employer: October 4, 1975, October 27, 1975 and December 30, 1975.

After the October 4, 1975 injury claimant continued to work until October 14, he was examined on October 15, 1975 and was off work from October 15 through October 24, 1975. Claimant saw Dr. Jones on October 27, 1975 who diagnosed low back strain. On October 28, 1975 claimant was examined by Dr. Kravitz who diagnosed mild bilateral lumbar spasm with no permanent impairment.

On December 2, 1975 Dr. Pasquesi found no objective findings and no permanent impairment. After the third injury on December 20, 1975, claimant was examined by Dr. Rullman who found claimant was not medically stationary. Claimant was then examined by Dr. Graham who released claimant to work on March 1, 1975 with no finding of permanent impairment; the doctor later found minimal impairment.

On May 14, 1976 a Determination Order granted claimant an award for temporary total disability from October 16, 1975 through April 2, 1976 and no award for permanent partial disability.

Claimant did not receive his first check for temporary total disability until November 25, 1975.

Claimant later saw Dr. Cherry whose impression was low grade back strain, still symptomatic with some permanent partial disability. Claimant is now back to work full time.

The Referee found that after the third injury there possibly could be some jobs claimant was precluded from performing and, therefore, claimant was entitled to be compensated therefor.

He further found that the employer should have been aware that claimant was off work substantially more time than was estimated initially. The employer should have begun payment for temporary total disability no later than October 29, 1975 but did not

commence payment until a month later. Therefore, claimant is entitled to penalties.

The Referee awarded claimant 16 degrees for 5% unscheduled disability.

The Board, on de novo review, concurs with the findings and conclusions reached by the Referee.

ORDER

The order of the Referee, dated August 5, 1976, is affirmed.

WCB CASE NO. 76-106 JANUARY 26, 1977

EUGENE HEIDLOFF, CLAIMANT
James Gardner, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order remanding claimant's aggravation claim to it for acceptance and payment of compensation benefits as provided by law. It contends claimant suffered a new injury in 1975.

Claimant sustained a compensable injury on March 17, 1972 twisting his shoulder. Dr. Hauge's diagnosis was calcific tendinitis, right shoulder. The claim was closed based on a report of Dr. Hauge dated August 3, 1972.

On February 5, 1975 claimant was examined by Dr. Coletti who found chronic bursitis and rated his disability at 5%. On November 17, 1975 Dr. Grewe indicated claimant's current problems were probably related to previous claims (claimant also had had a similar injury in 1964); on January 20, 1976 he said claimant's current condition was an aggravation of his prior condition.

On November 5, 1975 Dr. Grewe performed surgery for a thoracic outlet syndrome, right. On November 24, 1975 the Fund denied the claimant's claim for aggravation.

On April 23, 1976 Dr. Grewe reported it was medically probable claimant had a thoracic outlet syndrome as a result of his 1964 injury which was materially aggravated by his second injury on March 17, 1972 which, because of claimant's continuing to work, resulted in the 1975 "flareup" which led to the surgery by Dr. Grewe.

Dr. Grewe testified that claimant has had continuing flareups since 1964 aggravated by the work he was doing using his arms overhead, and he was of the opinion that the last episode brought claimant under his care.

The Referee concluded that the latest episode was a work related flareup and claimant's claim is remanded to the Fund for acceptance.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee dated August 9, 1976 is affirmed.

Claimant's attorney is granted as a reasonable attorney fee for his services in connection with Board review, the sum of $400, payable by the Fund.

WCB CASE NO. 75-798 JANUARY 26, 1977

DONALD KANE, CLAIMANT
Allan Coons, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an award of 81 degrees loss of the left foot.

Claimant, a ranch manager, sustained a compensable left foot and ankle injury on October 7, 1972 when he was thrown from a horse and suffered severe fractures.

On June 28, 1973 claimant was examined by Dr. Wattleworth who found a bone fragment was left in the foot. In May, 1974 claimant had this bone fragment surgically removed. On October 11, 1974 Dr. Schachner rated the disability of claimant's foot as mild to moderate.

On January 31, 1975 a Determination Order granted claimant 40.5 degrees for 30% loss of the left foot.

Claimant testified he gave up his job due to an old knee injury and this new injury because he could not perform his duties. Claimant stated he cannot ride his horse anymore and cannot run at all. He is now trying to sell real estate.

The Referee found claimant cannot now perform his regular occupation and must do work of a sedentary nature.

The Referee concluded claimant's overall disability of the foot is such that it is no use to him in any industrial work and, therefore, claimant is entitled to a greater award. He granted claimant an additional 40.5 degrees.

The Board, on de novo review, based on the medical evidence, concludes that claimant's loss of function of his left foot had been adequately compensated by the award granted by the Determination Order. Loss of function is the sole criteria for rating a scheduled disability and the weight of the evidence, both medical and lay, indicate claimant retains at least 70% function of his left foot.

ORDER

The order of the Referee, dated June 4, 1976, is reversed.

The Determination Order of January 31, 1975 is affirmed.

WCB CASE NO. 76-333 JANUARY 26, 1977

LINDA LANDRY, CLAIMANT
Larry Sokol, Claimant's Atty.
G. Howard Cliff, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order affirming the Determination Order of January 6, 1976 which granted claimant no award for permanent partial disability. Claimant also contends she is entitled to further compensation for temporary total disability.

Claimant, a nurse's aide, fell down some stairs and sustained contusions and strain to her low back on August 15, 1975. She was treated conservatively by Dr. Kai who released her to work on September 11, 1975. He indicated claimant had no permanent impairment.

Claimant didn't return to work until mid-October and then she went to work part-time as a shoe salesperson.

Dr. Cohen, on October 7, 1975, indicated claimant was not capable of lifting patients and prescribed physical therapy and a back support.

The Referee found no medical evidence in the record to justify an award for permanent partial disability. He found that claimant had failed to prove she has any permanent physical impairment from her industrial injury.

The Referee further found that the fact that claimant's job is part-time is due to work available and not to her inability to work full time.

The treatment claimant received from Dr. Cohen is provided for under the provisions of ORS 656.245 and it was received while claimant was seeking work after terminating her nurse's aide position. Therefore, claimant is not entitled to temporary total disability for this treatment.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 17, 1977, is affirmed.

WCB CASE NO. 75-4431 JANUARY 26, 1977

B.H. SWEENEY, CLAIMANT
Gary Kahn, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review of the Referee's order which granted claimant an additional

award of 48 degrees, thereby giving claimant a total of 192 degrees for 60% unscheduled disability. Claimant contends he is permanently and totally disabled.

Claimant sustained a compensable injury on January 3, 1972 when he fell 18 feet off a porch of a building on which he was working. He was rendered unconscious, however, upon revival he drove himself to the hospital. After extensive treatment his claim was closed by a Determination Order of January 7, 1974 with an award of 48 degrees for 15% unscheduled low back disability and vertigo. By stipulation, dated May 15, 1974, his claim was reopened and, after extensive treatment including surgery, again closed on September 30, 1975 with an additional award of 96 degrees.

Claimant is 65 years old and was a private contractor for 40 years.

Claimant was examined by the Orthopaedic Consultants on May 5, 1975, they felt psychiatric treatment was indicated but claimant refused it. They further recommended claimant be admitted to the Pain Clinic as a last resort, but claimant also declined this service. They recommended no further treatment

The Referee found no medical evidence indicating any need by claimant for further treatment.

Claimant contends he is now permanently and totally disabled. He stated he had never had any intention of retiring at age 65; his father had worked until he was 88 years old. Claimant asserts that his retirement was forced by the injury.

The Referee found claimant was definitely not permanently and totally disabled nor did he fall within the "odd-lot" category because he has many resources upon which to draw.

The Referee was confident that with claimant's personality and these resources claimant would have little difficulty in bidding on other building jobs based upon his past experience; however, he concluded that claimant had sustained a considerable loss of wage earning capacity due to his physical limitations resulting from his industrial injury. He awarded him an additional 48 degrees.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 30, 1976, is affirmed.

WCB CASE NO. 75-4102 JANUARY 26, 1977

STEPHEN TYLER, CLAIMANT
Rick McCormick, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer requests review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of benefits, as provided by law, ordered it to commence compensation for temporary total disability as of September 1,

1975 and until closure, and ordered it to pay a penalty equal to 25% of all compensation for temporary total disability owed claimant from October 6, 1975 through March 12, 1976.

On August 5, 1974 claimant alleges he suffered a compensable injury resulting in pulled muscles in his low back. The following day claimant was seen by the doctor at the hospital emergency room who diagnosed a lumbosacral strain and advised claimant to take a few days off work. However, despite the doctor's advice claimant returned to work the following day.

On June 16, 1974 claimant was fired by the employer because of conflicts between them. Claimant went to work for another employer, driving truck. Claimant continued to have flareups of his symptoms.

On September 3, 1975 claimant sought legal advice regarding his rights and on October 6, 1975, finally filed a claim. The carrier did nothing until March 12, 1976; it issued its denial four days prior to the hearing.

A co-worker of claimant's testified that he was present when claimant suffered his injury and knew claimant was having back problems but he didn't know if the employer was present or not; he thought he was. The employer testified he knew nothing of the injury until he received his copy of the request for hearing.

The Referee found this is an issue of credibility, i.e. claimant's testimony vs the employer's testimony. He felt that claimant's testimony, however, was sufficiently corroborated by the testimony of the co-worker and the emergency room report. Claimant's failure to file his claim or to inform his employer the Referee found understandable, considering the dominant figure of the employer and their relationship.

Dr. Ellison believed that claimant's truck driving might have caused or aggravated claimant's back condition. The Referee concluded claimant had sustained his burden of proving he suffered a compensable injury.

On the issue of the carrier's failure to accept or deny the claim until March, 1976 the Referee found it was the carrier's responsibility, regardless of claimant's delay, to properly process the claim; because of its failure, the Referee assessed the penalty.

The Board, on de novo review, finds that the claimant had delayed filing his claim for in excess of one year, therefore, a heavy burden rested upon his shoulders to prove that the employer had actual knowledge of work related injury. Claimant stated that the employer might have been present when the accident occurred; this is not sufficient to establish that the employer had knowledge of an accident. The corroborating witness testified that he thought the employer was there at the time of claimant's accident but he was not sure. Claimant testified that he told the employer the day following the alleged accident that he had seen a doctor, however, he did not tell the employer why he had seen a doctor.

The Board concludes that claimant has failed to establish the employer had any actual knowledge of an injury occurring and that the employer was prejudiced by not being notified of the alleged accident. Therefore, the claimant's claim is barred under the provisions of ORS 656.265.

ORDER

The order of the Referee, dated June 7, 1976, is reversed.

GARY VAN UITERT, CLAIMANT
Ann Morgenstern, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of May 13, 1976.

Claimant, a choker setter, was compensably injured on February 21, 1973 when struck on the left ankle by a log. The ankle was dislocated and there was a compound unstable bimalleolar fracture. On February 21, 1973 Dr. Wattleworth performed an open reduction of the fracture and claimant returned to modified work in August, 1973.

On December 5, 1973 Dr. Wattleworth reported claimant was going to have chronic difficulty with his left ankle in the form of degenerative arthritis, pain and stiffness. He further indicated claimant could not do work which involved heavy lifting or standing on his feet for a prolonged period. On May 15, 1974 Dr. Wattleworth found claimant medically stationary; and, on July 11, 1974, he recommended a lighter occupation for claimant.

On June 16, 1975 Dr. Cherry examined claimant and found him symptomatic and recommended an ankle fusion, Dr. Wattleworth agreed, however, claimant resisted the proposed surgery. On February 27, 1976 Dr. Wattleworth recommended claim closure and an award of permanent partial disability for traumatic arthritis; he indicated no surgery necessary at this time.

A Determination Order of May 13, 1976 granted claimant an award of 47.25 degrees for 35% loss of left foot.

The Referee found, based primarily on the medical reports of Dr. Wattleworth, that claimant's award granted by the Determination Order adequately compensated him for the loss of function of his left foot. Claimant is working full time and is able to cope with the new job given to him. Both Dr. Cherry and Dr. Wattleworth believe that ultimately claimant will need an ankle fusion, but claimant is postponing this as long as possible because of additional time loss and the unpleasant prospects of surgery. This is understandable, but at the present time claimant retains at least 65% use of his left foot.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 25, 1976, is affirmed.

CLAIM # E 42 CC 98720 RG JANUARY 28, 1977

ERNEST ALLEY, CLAIMANT
Own Motion Determination

Claimant sustained a compensable back and right hip injury on February 4, 1969; his claim was first closed by a Determination Order of October 21, 1969 granting compensation for time loss only. Claimant's claim was closed a second time on March 21, 1972 with an award of 48 degrees for 15% unscheduled low back disability. Claimant appealed. By an award, dated September 20, 1973, the claimant was awarded an additional 48 degrees, making a total award to claimant of 96 degrees for 30% unscheduled disability.

Claimant's claim was reopened by an Own Motion Order dated October 5, 1976 directing payment for temporary total disability compensation to commence on September 26, 1975, the date Dr. Anderson performed a laminectomy at L4-5 with a fusion from L4-S1. Claimant returned to work; he was medically stationary and had no symptoms relating to his back.

The carrier requested a determination on December 14, 1976. The Evaluation Division of the Board recommends compensation for temporary total disability from September 26, 1975 through November 11, 1975 and no further award for permanent partial disability.

The Board concurs with this recommendation. The compensation for temporary total disability referred to in the preceeding paragraph has already been paid to claimant.

WCB CASE NO. 76-2090 JANUARY 28, 1977

GLEN PETERSON, CLAIMANT
Douglas Green, Claimant's Atty.
Ray Heysell, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which modified the Determination Order of January 20, 1976 by deleting the award of 38.4 degrees for 20% loss of the left arm.

Claimant had had an injury in October, 1972 to his left arm and hand which caused him to only miss a few days from work. On December 12, 1973 claimant sustained another compensable injury to the same area; he continued working until the following February when he was referred to Dr. Klump who found ulnar palsy on the left side and probably at the site of the elbow.

On March 8, 1974 Dr. Klump performed a left anterior ulnar nerve transposition of the elbow. On November 5, 1974 Dr. Balme performed surgery for excision of loose body of the left elbow.

On October 9, 1975 Dr. Balme indicated he had advised claimant to return to work as his elbow condition was medically stationary. He recommended no heavy lifting.

A Determination Order dated January 20, 1976 granted claimant compensation for

temporary total disability and an award of 38.4 degrees tor 20% loss of the left arm.

On July 9, 1976 Dr. Klump opined that claimant's arm/elbow injury began with his first injury in 1972.

On July 14, 1976 Dr. Bomengen indicated he did not think that the injury in 1973 caused or aggravated claimant's ulnar nerve problem, that there was no severe injury involved which would be permanent and that most likely this condition was an older injury which had progressed.

Claimant has not performed gainful employment since the latter part of September, 1974. He has been referred to vocational rehabilitation but no program has been initiated for him.

The Referee found, based on the medical evidence and the testimony, that claimant's residual problems were related to his 1972 injury and claimant's left arm disability worsened six or seven months after the 1972 injury.

The Referee concluded claimant has suffered no permanent partial disability as a result of his 1973 injury and, therefore, he was not entitled to further medical care or treatment nor to any compensation for permanent partial disability. If he is found to be vocationally handicapped it would be in relation to the 1972 injury.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 13, 1976, is affirmed.

WCB CASE NO. 76-1294 JANUARY 28, 1977

ROBERT EDENS, CLAIMANT
David Hilgemann, Claimant's Atty.
Michael Hoffman, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation as provided by law.

The employer contends that the injury was not compensable, that claimant was an independent contractor not an employee, that claimant's alleged injury did not occur at the time of his employment with this employer, that the claim was untimely filed.

Claimant, who owned his truck and trailer, testified he entered into two agreements with the employer: (1) his employment as a driver and (2) a leasing arrangement whereby he leased his truck to the employer. Claimant was paid on a mileage basis; all taxes were withheld from his paycheck. His working activities were under the direction and control of the employer and he could be fired at any time. His termination of employment, however, would not necessarily release his truck from the employer's use.

The Referee concluded that claimant was an employee of the subject employment, not an independent contractor.

Claimant testified he first noticed shoulder difficulties in January, 1974 on a long-haul trip with pain in both shoulders. Claimant called and asked the operations manager to call claimant's wife and have her make an appointment for him with a doctor.

Claimant was subsequently examined by Drs. Crothers, Reilly, and Sanford. Their reports indicate a conflict in claimant's date of initial onset of symptoms. However, Dr. Crother's report gives some support to claimant's testimony as to the onset occurring in January, 1974. Also claimant had been seeing Dr. Crothers for two or three years prior to this incident and never complained of shoulder problems during that time.

The Referee concluded that the weight of the medical evidence indicated that January, 1974 was the time claimant first had the onset of shoulder problems.

On the issue of timeliness, the Referee found that claimant filed an 801 on February 11, 1976, 25 months after the alleged onset of symptoms in January, 1974. Claimant contends he didn't file a claim earlier because it wasn't until January, 1976 when he was seen at the Scott and White Temple in Texas that his doctor informed him of a causal relationship between his condition and his employment. The provisions of ORS 656.265(4) provide, in part, that claimant's claim is not barred if the employer had knowledge of an injury. The operations manager and the general manager for the employer both testified they knew of claimant's shoulder problems during his trip in January, 1974.

The Referee concluded that the employer did have knowledge of claimant's injury and his claim, therefore, was not barred.

The Referee concluded that the medical evidence supported a finding of causal relationship between claimant's shoulder problems and his employment and, therefore, his claim was compensable.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 12, 1976, is affirmed.

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

WCB CASE NO. 76-36 JANUARY 28, 1977

ARTHUR HOWTON, CLAIMANT
J. David Kryger, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review of the Referee's order which granted claimant an award of 192 degrees for 60% unscheduled low back disability and affirmed the prior award of

22.5 degrees loss of the left leg. Claimant contends he is permanently and totally disabled or, in the alternative, entitled to a greater award for both the scheduled and unscheduled disabilities.

Claimant has been employed as a laborer all of his life. On March 31, 1971 he suffered a broken left leg and a cast was applied. His doctor reported claimant had a pre-existing rheumatoid arthritis that was interfering with the healing process. On claim closure, Dr. Anderson found osteoarthritis of the lumbosacral spine which pre-existed this injury. On March 21, 1972 a Determination Order granted claimant 32 degrees for 10% unscheduled low back disability and 15 degrees for 10% loss of the left leg.

Claimant continued with pain symptoms and saw Dr. Berg who found advanced degenerative arthritic changes which were not caused, but only temporarily aggravated, by the industrial injury.

A Referee's order of January 31, 1973 granted claimant an additional 16 degrees for his unscheduled disability and an additional 7.5 degrees for his left leg.

In July, 1974 claimant had exacerbated back pain and was hospitalized for a week of conservative treatment, later the back pain recurred and claimant was rehospitalized. In August, 1974 bilateral laminectomies and discectomies at L3-4 and a left L4 laminectomy and discectomy were performed. Dr. Tsai related the disc herniation to claimant's industrial injury. Claimant continued to have back pain and, in February, 1975, was hospitalized for traction.

In September, 1975 claimant was examined by the Orthopaedic Consultants who diagnosed chronic lumbosacral strain, degenerative arthritis L4-5 and L5-S1 without radiculopathy. Moderate interference with functional disturbance during the examination was noted. They rated claimant's loss of function as moderately severe, but mild with respect to the industrial injury. They recommended claimant not return to his regular occupation.

Claimant was then referred to the Disability Prevention Division where he was found to demonstrate few aptitudes for employment and the prognosis was guarded. Dr. Van Osdel found moderate severe functional components present and he recommended a job change with no repetitive lifting overhead or no repetitive bending, stooping and twisting.

In April, 1976 claimant's vocational rehabilitation counselor found claimant too impaired to benefit from their services. In March, 1976 Dr. Steele agreed that job retraining for claimant was not feasible.

Claimant worked some two and one half years between his industrial injury and his surgery in August, 1974. In January, 1976 claimant started drawing social security benefits.

The Referee found, based on the medical reports and observation of claimant at the hearing, that claimant exaggerates his pain and physical impairment and the reports also indicate a functional component to claimant's complaints. The medical evidence indicates claimant has physical impairment which is not totally the responsibility of the employer. The Orthopaedic Consultants found moderate severe physical impairment but due only to a mild degree to this industrial injury. Dr. Berg remarked that claimant's degenerative arthritis condition was only temporarily aggravated by this industrial injury.

The Referee concluded that claimant is not permanently and totally disabled as a

result of this injury and can find gainful and suitable sedentary employment, but claimant is entitled to a greater award for his loss of wage earning capacity. He granted him a total of 192 degrees for 60% unscheduled disability. (After the increase made on January 31, 1973, claimant was awarded another increase of 25% unscheduled disability). He found the scheduled award of 15% loss of left leg to be proper.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 23, 1976, is affirmed.

WCB CASE NO. 76-608 JANUARY 28, 1977

WILLIAM NIMTZ, CLAIMANT
Hayes Lavis, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review of the Referee's order which awarded claimant compensation for permanent total disability as of August 2, 1976.

Claimant, a 39 year old logger, without any prior medical history or injury, sustained a compensable injury on November 30, 1971. His claim was closed on December 2, 1975 with an award of 160 degrees for 50% unscheduled low back disability. Dr. Cherry diagnosed spondylolisthesis L4-5 and transitional 5th vertebra and chronic severe back strain superimposed on pre-existing anomalous back.

On January 30, 1973 claimant underwent surgery for a right lumbar laminectomy and exploration of the 4th lumbar and lumbosacral interspaces. On February 9, 1973 Dr. Kloos indicated he decompressed the nerve roots at the time of the exploration and found the cause of nerve root compression was the spondylolisthesis.

Claimant began to improve and was almost completely relieved of symptoms until August or September when the pain reoccurred in the low back and right leg. Dr. Kloos examined him and found considerable limitation of motion and he opined claimant had developed intraspinal scar tissue which accounted for some of the symptoms and possible pseudoarthrosis in the fusion.

On December 11, 1973 Dr. Pasquesi reported the possibility of a re-exploration of the fusion as claimant suffers radicular pain. The surgery gave evidence of pseudoarthrosis at L4-5 and a re-fusion was performed in April, 1974. In May, 1974 claimant had a near fall and severely twisted his back and his back and leg pain worsened.

Claimant was seen at the Pain Clinic in November, 1974 and the psychological evaluation indicated intractable low back pain with residual radiculopathy, also low average intellectual functioning and questionable motivation for rehabilitation. Dr. Newman found claimant genuinely motivated to continue his schooling (attending welding and machinist school full time) but found it questionable as to what claimant will do following this training. He questioned claimant's motivation to return to work.

On March 17, 1973 claimant was examined by the Orthopaedic Consultants who recommended repair of the pseudoarthrosis but said claimant should finish school first; however, claimant said his pain was too bad to postpone this surgery.

On April 10, 1975 Dr. Fagan performed the surgery and found no evidence of pseudoarthrosis whatsoever, but a bone fusion mass was removed; also, the removal of ledge formation at L3-4 and a bursa removal was done.

On July 18, 1975 Dr. Fagan again performed surgery due to nerve root irritation. On August 20, 1975 Dr. Fagan indicated he was doing "poorly" with this patient. He referred claimant to the Orthopaedic Consultants who examined claimant on October 14, 1975 and found claimant medically stationary and recommended no further surgery. Total loss of function is moderate due to this injury. They recommended claimant be weaned away from narcotics and encouraged to increase his activity.

On April 18, 1976 claimant again saw Dr. Fagan for continuing pain and the doctor said claimant was depressed and taking too much pain medication; he recommended bed rest and psychological evaluation.

The Referee found, based on all of the medical reports and lay testimony, that there is no indication that claimant is able to return to his former occupation, or to any type of sedentary employment, or that he can continue his vocational rehabilitation training which Dr. Fagan had hoped claimant would be able to finish.

The Referee found claimant to be well motivated and he concluded claimant had done everything possible to retrain himself for lighter employment.

Claimant is only 39 years old but the evidence that he cannot be gainfully employed was not refuted by the Fund. The Fund failed to show any suitable employment that would be regularly and continuously available to claimant. The Referee awarded claimant permanent and total disability.

The Board, on de novo review, adopts the Referee's order. This a classic case of claimant making a prima facie case that he falls within the "odd-lot" category and the Fund, thereafter, failing to show available work for claimant.

ORDER

The order of the Referee, dated August 2, 1976, is affirmed.

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

WCB CASE NO. 75-4493 JANUARY 28, 1977

VICTOR H. NAPIER, CLAIMANT
Rolf Olson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks review by the Board of the Referee's order which affirmed the

State Accident Insurance Fund's denial to pay compensation for claimant's myocardial infarction.

Claimant is 56 years old and has been employed as a counselor by the Oregon State Employment Division working in cooperation with the Vocational Rehabilitation Division to rehabilitate inmates of the prison facilities.

On July 2, 1975 between 3:30 and 4:00 p.m. claimant walked with one of the inmates he was counseling to the Oregon Bank to assist the inmate in cashing a check. The Oregon Bank is located at the corner of Center Street and Church Street in Salem. After the inmate had cashed his check claimant proceeded alone down Church Street to the intersection at Marion where he noticed an automobile bearing a State of Oregon emblem on its door was stalled in the intersection. Claimant knew neither of the two persons in the car but he, together with one of the passengers, pushed the automobile across the intersection, a distance of almost three complete traffic lanes. The street was fairly level. After pushing the automobile claimant started to walk away and almost immediately noted a sharp pain underneath his collar bone. He returned to his office and attempted to work but was unable to concentrate. He states he remembers perspiring and also having weakness in his arms while at the office; the pain lasted between 20 and 30 minutes.

Claimant left work a little early on that day and that evening he drove to the beach, approximately 75 miles from Salem. The following day he went fishing in a 20 foot dory. It was necessary to row a short distance until the boat motor started. Claimant and his friends fished between four and five hours and then returned and claimant remained at the beach until Sunday. He spent most of that time lying around in his trailer, stating he did not feel like doing very much.

On Sunday, July 6, claimant noticed chest pains and a dull ache; he drove home that day and the pain in his chest was still present the following day. He first called Dr. Morrison who examined him and then referred him to Dr. Dudley who had claimant take a blood test and gave him a pill. After leaving the doctor's office he returned to his office and worked the rest of that day, a Monday. That evening Dr. Dudley phoned and told claimant that claimant had suffered a heart attack and should go to the hospital.

Claimant was hospitalized on July 7. He reported no prior history of heart trouble but stated that he smoked three packs of cigarettes a day. Claimant was hospitalized for eleven days; the discharge diagnosis was myocardial infarction due to arteriosclerotic coronary thrombosis.

Claimant filed a claim which was denied; the grounds were twofold. (1) Was the infarct related to the work incident? (2) Was the car pushing incident within the course and scope of his employment?

On the first issue the Referee found a split of medical opinions. Dr. Sutherland and Dr. Wysham, both Portland cardiologists, shared the opinion that the car pushing event on July 2 was not the cause of claimant's heart attack. Dr. Sutherland felt that the infarct did not occur until July 6, based upon the time period between the two events. The cardiac enzymes were elevated on July 7 when claimant was hospitalized and Dr. Sutherland did not believe they would have remained elevated for the period between July 2 and July 7 and then gone down over the next three days. Dr. Wysham believed that claimant had suffered a myocardial infarction shortly before noon on July 6 rather than on July 2. He believed that the shortness of the period claimant experienced pain on July 2 (less than 30 minutes) indicated an attack of angina pectoris rather than a myocardial infarction.

He did not think that the angina pain was associated with any permanent cardiac injury. It was more of a warning that claimant's arteriosclerotic heart condition was worsening but the attack of angina did not contribute to the subsequent myocardial infarction.

Opposing these two medical opinions was the one expressed by Dr. Griswold who felt that the chest pains and other symptoms on July 2 were symptoms of coronary insufficiency and were precipitated by the activity of pushing the car. He thought that claimant could have had a small infarct on July 2 at the time he was assisting in pushing the car and a further extension of this infarction on July 6.

Dr. Griswold was impressed by the claimant's statement that he had sweated rather profusely on July 2 after noticing the pains; it was, in his opinion, a very important factor to be considered. People with angina alone, which does not jeopardize heart muscle, usually do not sweat.

The Referee was well aware of the eminent qualifications of all three doctors as heart specialists but chose to rely on the opinion expressed by Dr. Griswold as he was the only one of the three doctors who actually physically examined claimant. Both Dr. Sutherland and Dr. Wysham relied for their opinions on the medical evidence in the record. Dr. Griswold also heard claimant testify at the hearing; the other doctors did not.

On the legal issue of whether the car pushing incident was within the course and scope of claimant's employment, the Referee found adversely to claimant. Claimant contended that as an employee of the State of Oregon he had furthered the business of the employer, the State of Oregon, and benefited it when he assisted in pushing a vehicle owned by it. Claimant admitted that he did not know either of the persons in the vehicle nor did he know by which division of the state they were employed. The two persons could not be considered as "fellow workmen" with claimant in the same way as in the Brazeale case cited by claimant and reported in 190 Or 566.

The Referee concluded that in the instant case claimant was purely a volunteer. What he did was commendable but it was not in the furtherance of the business of his employer. The Referee affirmed the denial of claimant's claim on the basis that claimant was not acting within the course and scope of his employment at the time of his heart attack which he had previously found to be compensable and medically related to the car pushing incident.

The Board, on de novo review, reaches the same conclusion at which the Referee arrived but not for the same reasons. The Board is more convinced by the medical opinions expressed by Dr. Sutherland and Dr. Wysham that claimant's myocardial infarction did not occur on July 2, 1975 as a result of pushing the automobile. Both Board members who reviewed this case agreed that the medical evidence was most persuasive that the myocardial infarction suffered by claimant occurred on July 6 not July 2.

No infarction occurred on July 2 and the intervening period of time made any relationship between the pain noted by claimant on that date and the pain suffered on July 6 very doubtful except for the underlying progressive arteriosclerotic disease. Claimant admitted he felt fine on July 3 and was not even tired after spending the day fishing; he could not recall what he was doing on Sunday when he again suffered chest pains.

One of the reviewers, Mr. Wilson, also felt that claimant was not acting within the course and scope of his employment at the time of the car pushing incident; on this point he is entirely in agreement with the statements set forth by the Referee in his order.

The Board concludes that the denial by the Fund of claimant's claim was proper because claimant filed to show medical causation between the July 2, 1975 incident and his myocardial infarction for which he was hospitalized on July 7, 1975.

ORDER

The order of the Referee, dated July 29, 1976, is affirmed.

WCB CASE NO. 76-2660 JANUARY 28, 1977

TERRY KNAUS, CLAIMANT
Milo Pope, Claimant's Atty.
James Huegli, Defense Atty.
Order

On January 17, 1977 the Board received claimant's request for review of the Referee's order entered in the above entitled matter on December 13, 1976. The request was enclosed in a letter addressed to the Workmen's Compensation Board bearing a postmark of January 12, 1977.

On January 17, 1977 the Board received from the employer a motion to dismiss claimant's request for review on the grounds and for the reason that said request was not timely filed pursuant to ORS 656.295.

ORS 656.295(2) states that the request for review shall be mailed to the Board and copies of the request shall be mailed to all other parties to the proceedings before the Referee.

Although the attorney for claimant failed to include proof of service, his letter of January 11, 1977 addressed to the Board indicates carbon copies were sent to the claimant, Lamb-Weston, GAB and the legal firm representing the employer. The Board concludes that it is reasonable to assume that said copies were mailed on the same date as the original was mailed to the Board.

Therefore, the request for review was mailed on the 30th day after the date of the Referee's order entered in the above entitled matter and the employer's motion to dismiss must be denied.

It is so ordered.

WCB CASE NO. 75-5156 FEBRUARY 1, 1977

STEVEN POLLARD, CLAIMANT
Harold Adams, Claimant's Atty.
Ronald MacDonald, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Fund's denial of claimant's claim.

The alleged employer, Mr. Bremmer, has been a real estate salesman for the past 10 years. In January, 1975 he asked his nephew to help him move some hay for his heifers to his property, 23 acres of land on which he resides. The nephew brought claimant along to help because the nephew wanted to quit early. Mr. Bremmer agreed to hire claimant, but there was no discussion as to the compensation.

The three of them commenced moving the hay at 8 a.m. and this continued through the morning. Around 10 a.m. claimant informed the employer he had hurt himself and he was told to sit under a tree and rest. After resting 10 to 15 minutes claimant returned to work; they worked until noon. The nephew ceased working at 10:30 a.m. and only claimant and the alleged employer continued.

Mr. Bremmer testified that during noon claimant went swimming while he went to a restaurant and brought hamburgers for their lunch. He testified that after lunch he and claimant worked until 2 p.m. when it got hot and he suggested quitting and finishing the following morning. Claimant agreed. Mr. Bremmer paid claimant by check the amount of $15. Claimant tried to cash the check, couldn't, and went back and picked up Mr. Bremmer and took him to a local tavern where the check was cashed.

Claimant's version of the story is different; he testified he told the alleged employer he hurt himself in the afternoon. Further he stated he was pulling hay off the pickup and fell landing on his right knee. The alleged employer denied claimant was ever on the truck while unloading except perhaps to get the bottom bales off. He also denied any injury occurred in the afternoon.

Claimant testified his knee was sore and he could hardly get out of bed. He stayed in bed for five days and on Friday sought medical attention and ultimately had surgery. The nephew testified claimant came to see him three days after the alleged accident and he didn't notice anything wrong with claimant's knee at that time. He walked normally.

Claimant filed a Form 801. The Fund denied the claim on the grounds that claimant was not a subject worker, Mr. Bremmer was not a subject employer and claimant did not suffer a compensable injury.

A woman living with claimant testified that on Saturday evening claimant's knee was red and swollen and he was in pain; further stated claimant in bed and then went to the emergency room at the hospital and was referred to Dr. Burr.

Dr. Burr's initial report indicates claimant had gotten out of bed and twisted his knee.

The Referee found that Mr. Bremmer was not a subject employer. His farming was not a business, it was incidental to his residence; his business was selling real estate.

The Referee found that Mr. Bremmer had merely hired claimant as a casual worker to do a small job and, therefore, claimant was not a subject worker.

The Referee, having made these findings, the issue of compensability is moot.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated May 10, 1976, is affirmed.

CHARLES PERRIGO, CLAIMANT
Keith Skelton, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an award of permanent total disability as of August 1, 1976.

Claimant sustained a compensable back injury on March 14, 1972, diagnosed as acute low back pain syndrome. On August 22, 1972 Dr. Frank Smith examined claimant and diagnosed chronic lumbosacral strain associated with lower lumbar instability. On March 5, 1973 he performed a lumbar laminectomy with removal of herniated disc L4-5 on the left. On November 13, 1973 Dr. Smith found claimant medically stationary. A Determination Order of December 12, 1973 granted claimant 48 degrees for 15% unscheduled low back disability.

Claimant had returned to work on September 5, 1973 and continued to work until August 9, 1974 when he began to have recurrent back symptoms. On August 30, 1974 Dr. Smith said that claimant had lower lumbar nerve root irritation; he later indicated claimant was too handicapped to return to his former occupation and should be in a sedentary type of job.

On October 8, 1974 Dr. Kloos performed a left lumbar laminectomy and removal of herniated 4th disc and decompression of the nerve roots of the lumbar area. On December 11, 1974 Dr. Kloos indicated claimant could return to work in January but must avoid heavy lifting and excessive bending or twisting.

On January 8, 1976 Dr. Kloos reported claimant had stated he was much worse with severe back discomfort and that his "hips sometimes feel numb;" the doctor found considerable functional overlay.

Claimant was examined at the Disability Prevention Division on February 11, 1975 by Dr. Halferty, who diagnosed functional overlay moderate and recommended a job change. The psychological evaluation of February 19, 1975 found claimant experiencing moderate psychophysiological reaction with moderate anxiety related to somatic complaints which is largely attributable to the industrial injury.

On April 24, 1975 Dr. Donald Smith examined claimant and indicated that the odds of finding work for claimant were poor. Claimant stated the company had put him on 100% disability and Dr. Smith felt that was what claimant wanted; he found claimant not motivated for other employment.

On July 3, 1975 a Second Determination Order granted claimant an additional 176 degrees, giving claimant a total of 224 degrees for 70% unscheduled disability.

On December 16, 1975 Dr. Cherry, after examining claimant, said claimant "has severe residuals of herniated disc, post-operative, twice. He is unable to perform at his former job or do any job at which he has had experience or training." Dr. Cherry felt claimant was untrainable due to his medical condition and lack of education; it was his opinion that claimant was permanently and totally disabled.

The Referee found claimant had twice returned to work and was definitely not a quitter. He has little education and training. He concluded that claimant was permanently and totally disabled not only because he had made a prima facie case that he came within the odd-lot category but because the evidence was sufficient to support a finding of permanent total disability under the law applicable prior to the "odd-lot" doctrine.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 30, 1976, is affirmed.

Claimant's attorney is granted as a reasonable attorney fee for his services in connection with Board review, the sum of $350, payable by the Fund.

WCB CASE NO. 76-1422 FEBRUARY 1, 1977

RACHEL HART, CLAIMANT
Don Atchison, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review of the Referee's order which granted claimant an award for permanent total disability commencing July 28, 1976.

Claimant sustained a compensable injury on September 25, 1972 to her right elbow. The claim was subsequently closed as a "medical only" but thereafter was reopened. A Determination Order of January 2, 1973 granted claimant compensation for temporary total disability only.

Claimant filed a Form 801 on March 24, 1974. Dr. Cutler reported claimant was having recurrent problems with her right elbow and he recommended two or three months rest for the elbow. This claim was accepted as an aggravation.

In September, 1974 Dr. Shlim diagnosed disabling epicondylitis. Claimant came under the care of Dr. Bump who indicated claimant's "tennis elbow" problems were so severe that claimant had to quit work. Dr. Bump was reluctant to operate but in January, 1975 he performed surgery for release of the extensor muscle origin, and excision of the epicondyle.

On November 5, 1975 Dr. Dresher reported claimant had lateral epicondylitis and may have strained her dorsal spine. He said claimant could no longer do the rather strenuous job which she had at the time of her injury.

Claimant was examined by the Orthopaedic Consultants who diagnosed tendonitis, lateral epicondylar area bilateral, more on the right. They rated the total loss of function of the right arm as mild and of the left minimal. They indicated claimant could not return to her old job but could do some types of employment that didn't require lifting or pulling with the upper extremities. They recommended claimant be referred to the Division of Vocational Rehabilitation for job placement.

A Second Determination Order of March 10, 1976 granted claimant 38.4 degrees for 20% loss of the right arm.

On May 8, 1976 Dr. Walz indicated claimant was permanently disabled from work involving the use of her hands and arms.

The Referee relied upon the definition of permanent total disability found in ORS 656.206(1) and concluded claimant fell within the meaning of this statute, therefore, he awarded her compensation for permanent total disability.

The Board finds that the Orthopaedic Consultants, upon examining claimant, found total loss of function of the right arm as mild and the left as minimal; furthermore, that claimant could return to some other occupation not involving lifting or pulling activities with her upper extremities.

Therefore, the Board finds claimant has suffered no unscheduled disability and the disability she has must be rated strictly on impairment. The Board concludes that claimant has been adequately compensated for the loss of function of her right arm, but also is entitled to an award of 19.2 degrees for 10% loss of her left arm, based on the report of the Orthopaedic Consultants.

ORDER

The order of the Referee, dated July 20, 1976, as amended on July 28, 1976, is reversed.

Claimant is awarded 19.2 degrees of a maximum of 192 degrees for loss of her left arm. This is in addition to the award granted claimant by the Determination Order mailed March 10, 1976 which is affirmed.

Claimant's attorney is awarded as a reasonable attorney fee a sum equal to 25% of the additional compensation awarded claimant by this order, payable out of said compensation as paid, not to exceed $2,000.

WCB CASE NO. 76-2053 FEBRUARY 1, 1977

THERESE HALL, CLAIMANT
Peter Davis, Claimant's Atty.
Dennis VavRoskey, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests review by the Board of the Referee's order which granted claimant an award of 64 degrees for 20% unscheduled low back and cervical disability. Claimant contends this award is inadequate.

Claimant sustained a compensable injury on September 2, 1974, diagnosed as acute lumbosacral strain. On January 9, 1975 Dr. Quan, a psychiatrist, examined claimant and found definite evidence of an hysterical conversion. He recommended activity to relieve her anxiety and stated she was not precluded from employment.

On May 2, 1975 claimant was seen at the Disability Prevention Division. At this

time claimant was complaining of constant pain down her back into her legs to her toes and almost constant neck pain on the right. Dr. Van Osdel diagnosed strain, chronic cervical, dorsal and lumbar muscles and ligaments superimposed on moderate dorsal kyphosis.

On May 7, 1975 claimant underwent a psychological evaluation which revealed claimant was a poor candidate for employment due to her lack of education.

Claimant was examined by the Orthopaedic Consultants on January 6, 1976, they diagnosed chronic lumbosacral sprain, chronic cervical strain and marked functional overlay. They found claimant medically stationary and stated she could return to her regular employment. Loss of function of her back was minimal.

A Determination Order of April 21, 1976 granted claimant 32 degrees for 10% unscheduled low back disability.

The Referee found claimant has sufficient residuals from her injury to affect her return to her regular job or to compete in the labor market. However, claimant exaggerates the lifting requirements of her former job to a substantial degree. The Referee further found claimant's anxiety tension state pre-existed her industrial injury.

Claimant made a better impression at the hearing than the medical and psychiatric reports would indicate, however, her failure to even try to return to her old job which had been held open for her indicated an obvious lack of motivation to return to work.

The Referee concluded that claimant's lifting limitations entitled her to a greater award for her loss of wage earning capacity and he granted her an additional 32 degrees, making a total award to claimant of 64 degrees.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 25, 1976, is affirmed.

WCB CASE NO. 75-4678 FEBRUARY 1, 1977

PAUL FLORA, CLAIMANT
R. Ladd Lonnquist, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order affirming the Determination Order of September 11, 1975 which granted claimant no award of compensation.

Claimant, a 61 year old heavy equipment operator, suffered a compensable injury on February 17, 1972 when he was struck in the head. Claimant testified that soon after this injury he experienced a curtain of blackness descending over his left eye; eventually the curtain covered his entire left eye. Claimant now has only a bare perception of light in this eye and this is permanent.

Claimant has always had a bad left eye but did have periphery vision before the accident. Claimant claims he could read typed material one or two inches from his eye; could distinguish light from dark; could distinguish colors of light objects; could make out hand movements before his eye; and could see large objects, but not too plainly.

The record indicates in 1958 claimant's left eye vision was 20/400. Dr. Diller opined that the accident caused a total detachment of the retina making claimant totally blind.

The record further indicates claimant was seen at the hospital emergency room on December 4, 1971 because of an injury to his left eye as a result of a fight.

Dr. Johnson examined claimant on June 25, 1976 and confirmed that the left eye could perceive light perception only. Dr. Johnson said the loss of the left eye due to this injury is less than 0.1%.

The Referee found it difficult to award to claimant any compensation for an industrial injury due to the altercation in which he was involved which resulted in medical findings of claimant's left eye condition that were the same as those made by Dr. Johnson in June, 1976.

The Referee concluded claimant has failed to prove he has suffered any temporary total disability or permanent partial disability from this condition.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 22, 1976, is affirmed.

WCB CASE NO. 76-1696 FEBRUARY 1, 1977
WCB CASE NO. 77-

THEODORE E. WILBER, CLAIMANT
Stipulation to Settle Disputed Claim

It is hereby stipulated by and between the parties, claimant appearing by and through Allan H. Coons, of attorneys for the claimant, and the State Accident Insurance Fund appearing by and through Marcus K. Ward, Assistant Attorney General, of attorneys for the Fund, as follows:

1. That on or about November 3, 1975, the claimant, Theodore E. Wilber, was involved in a motor vehicle accident;

2. That on or about April 9, 1976, Zip O Log Mills, Inc., filed an employer's report of occupational injury relating to the conditions allegedly suffered by the claimant while in their employment on November 3, 1975;

3. That on or about June 10, 1976, the State Accident Insurance Fund denied responsibility for the claim;

4. That on or about April 5, 1976, claimant filed a request for hearing and on or

about June 11, 1976, claimant filed a supplemental request for hearing from the State Accident Insurance Fund denial;

5. That on or about October 19, 1976, this case went to a hearing before a Referee of the Workmen's Compensation Board;

6. That on or about November 17, 1976, an Opinion and Order was issued by Referee John F. Baker remanding this claim to the State Accident Insurance Fund for acceptance and payment of benefits as provided by law;

7. That on or about November 29, 1976, the State Accident Insurance Fund filed its Request for Board Review with the Workmen's Compensation Board;

8. That on or about January 7, 1977, claimant filed a Request for Hearing alleging unreasonable refusal and delay in paying compensation in accordance with the Referee's Opinion and Order of November 17, 1976;

9. That it now appearing that the parties are desirous of settling these matters on a disputed claim basis and the parties have agreed that all issues which were or which could have been raised in the requests for hearing dated April 5, 1976, June 11, 1976, and January 7, 1977, may be compromised and settled as a disputed claim by a payment from the State Accident Insurance Fund to claimant and his attorney and acceptance by the claimant and his attorney of the sum of $8,000.00.

10. That the parties understand that the denial by the State Accident Insurance Fund dated June 10, 1976, shall remain in full force and effect forever, and the State Accident Insurance Fund will not be responsible for any medical bills or any other expenses in connection with the denied claim;

11. That payment of the agreed sum in no way implies, directly or indirectly, that the State Accident Insurance Fund accepts responsibility for the denied conditions, or disabilities, or expenses resulting therefrom;

12. That claimant's attorney, Allan H. Coons, is authorized to collect from claimant an attorney fee of $2,000.00 out of the sum agreed upon as a reasonable sum for services rendered to the claimant;

13. That the request for Hearing and Request for Board Review, being all proceedings in this case, may be dismissed with prejudice.

It is so stipulated.

ORDER

Based upon the above stipulation of the parties, the Workmen's Compensation Board finds that there is a bona fide dispute between the parties as to the compensability and responsibility for the conditions denied in the State Accident Insurance Fund's denial of June 10, 1976. Pursuant to ORS 656.289(4) the foregoing stipulated settlement is therefore approved and the request for hearing and the Request for Board Review are hereby dismissed with prejudice.

ARCHIE WERT, CLAIMANT
Marvin Nepom, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order which found claimant to be permanently and totally disabled as defined by ORS 656.206.

Claimant, a 33 year old timber grader, suffered a compensable injury on February 24, 1972 when he stooped over while grading lumber and was unable to straighten up.

Complaining of pain between the shoulder blades, in the lower back and down the posterior of his right leg, claimant was first seen by Dr. Wright a chiropractor, who diagnosed subluxation of the fourth and fifth lumbar vertebra and advised chiropractic adjustments which claimant received from Dr. Wright and also from Dr. McGee, an osteopathic physician.

Claimant worked intermittently for the next six months and on September 12, 1973 he bent down at the mill and was hardly able to straighten up. Claimant commenced seeing Dr. Grossenbacher who diagnosed spondylolisthesis, grade 1 at L4-5. Neurological examination was normal and claimant insisted on returning to his previous occupation, although the doctor felt a recurrence was quite probable. He did not recommend closure but continued to treat claimant conservatively. On October 1, 1973 a Determination Order awarded claimant compensation for temporary total disability only. Claimant had a flareup of his back problems and his doctor advised a reopening of his claim. Claimant was seen by Dr. Vessely who confirmed Dr. Grossenbacher's earlier suspicion that a myelogram might be necessary. During November, 1973 a two-level posterior-lateral attempt at fusion for spondylolisthesis at L4-5 was performed. During the recovery claimant suffered an infection. In November, 1974 Dr. Shlim recommended nothing further be done except to continue to treat the infection.

The Fund, during February, 1975, recommended that vocational rehabilitation be instituted. Dr. Grossenbacher felt that the unsuccessful fusion had left a permanent defect which would require modified employment eliminating lifting over 35 pounds and repetitive twisting motions of the torso. On September 9, 1975 a Second Determination Order awarded claimant 112 degrees for 35% unscheduled low back disability.

In January, 1976 claimant was examined by the Orthopaedic Consultants whose conclusion was that claimant could not return to any type of manual labor on a steady wage-earning basis nor could he do any job that required prolonged retention of either standing or sitting. Although he had excellent motivation and would like to work, his work possibilities were limited. They felt further efforts should be made by the Vocational Rehabilitation Division to fit claimant into something he could perform. Because of the infection they felt it would be unwise to attempt a re-fusion.

The Vocational Rehabilitation Division reported that claimant's skills and physical capacities did not make job placement feasible. A psychological evaluation indicated claimant was functioning in the borderline range and that his abilities were not promising although he did have some limited mechanical knowledge and might be capable of on-the-job learning. Claimant attempted to take advantage of on-the-job training but failed.

Claimant argued that he is now permanently and totally disabled. The Fund contended that claimant had not met the burden of proving that he is permanently and totally disabled.

The Referee found that claimant was young, had done fairly well in school, was not illiterate. Claimant was able to perform light activities and walk three to four miles several times a week.

The Fund also contended claimant lacked motivation to seek a job, that he was not willing to accept a job at a lower salary. Claimant had indicated he was not interested in any job that paid less than $5.00 an hour.

The Referee found that claimant was unable to perform any suitable employment for which he was formerly qualified, that he attempted to work despite Dr. Grossenbacher's apparent disapproval and that he cannot lift over 35 pounds or do repetitive bending, stooping or twisting. All the suggestions made by the psychologists who examined claimant had been tried without success. The same is true with respect to the suggestion made by the Vocational Rehabilitation Division counselor.

The Referee concluded that although claimant was young and, by his own testimony, could drive for about 600 miles a day in a car (driving a trip to Michigan) and though claimant is able to read and write, and do certain activities, nevertheless, the evidence presented at the hearing was persuasive that claimant is now permanently and totally disabled as defined by statute.

The Board, on de novo review, finds that claimant has an 8th grade education and had done fairly well while in school, that at the present time claimant is able to read, write, spell, add and subtract yet despite his youth and these abilities, claimant has not attempted to obtain his GED, nor does it appear that he has any plans to do so. Claimant receives $300 a month from a private insurance company, $162 from Social Security, both benefits will cease upon claimant's return to employment. Claimant was earning $3.50 an hour at the time he was injured, this represents about half of what he is earning now when the two aforesaid benefits are combined with the $451 claimant is receiving from his previous award of September 9, 1975. Claimant stated he is looking for a job that pays at least $5.00 an hour.

Neither Dr. Grossenbacher nor the physicians at the Orthopaedic Consultants felt that claimant was unemployable and each rated his disability from moderate to moderately severe. Claimant is able to walk a mile or two a day a couple of times a week, he is able to drive his car and run errands, trim the lawn and weed his garden. On a recent trip to Michigan claimant was able to drive three or four hours before resting; this trip took four days and covered 2400 miles. Claimant apparently had no ill effects from the trip.

The Orthopaedic Consultants report indicates that claimant would like to work, however, the report notes that claimant wants to be declared permanently and totally disabled.

The Referee apparently did not believe that claimant had made a prima facie case which would justify an award of permanent total disability nor did he feel that claimant had shown sufficient motivation, however, in spite of this the Referee found claimant permanently and totally disabled. The Referee evidently disregarded motivation and made his finding solely upon claimant's physical limitations.

The Board finds that the medical evidence does not support a finding of permanent total disability based on claimant's physical limitations alone and that claimant's motivation, at best, is questionable. Therefore, the Board concludes that claimant was adequately compensated for his loss of wage earning capacity by the award of 112 degrees for 35% unscheduled low back disability granted him by the Determination Order of September 9, 1975.

The Board recommends claimant be referred to a service coordinator for job placement rather than for any vocational rehabilitation training program inasmuch as claimant's abilities do not seem to lend themselves to any educational process beyond on-the-job training.

ORDER

The order of the Referee, dated June 24, 1976, is reversed.

The Determination Order of September 9, 1975 is affirmed. The Fund shall be allowed to apply any payments to claimant for permanent total disability made pursuant to the Referee's order to the payment of compensation for permanent partial disability awarded by the Determination Order of September 9, 1975.

CLAIM # 133CB2906035 FEBRUARY 3, 1977

JERALD G. MCCARTNEY, CLAIMANT
Order

Claimant suffered a compensable injury on June 1, 1970 while employed by TRW, Inc., whose carrier was The Travelers. The claim was closed on November 9, 1970 and claimant's aggravation rights have expired.

On January 6, 1977 the Board received a request from claimant to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim. Claimant stated that on December 3, 1976 while sitting on a daveno he started to get up and his back went out and muscle spasms began. He became rigid and immobile and Dr. Berselli advised him to go to the hospital immediately by ambulance. He did so and was put in traction for five days and then released. Claimant alleges his back is still weak and necessitates the use of a cane and that he is not able to work.

On January 6, 1977 the claimant was advised by the Board that it had received his request and that upon receipt of a recent medical report from Dr. Berselli would consider it. It further informed claimant that the information should be furnished and forwarded to The Travelers who would have the opportunity to advise the Board of its position with respect to the request to reopen the claim. On the same date the Board received a letter from The Travelers stating that it objected to the reopening of the claim on the basis that the incident on December 3, 1976 was a new injury and not a part of claimant's compensable injury of June 1, 1970.

The carrier further stated that it had received no medical reports or hospital records from claimant's latest hospitalization of December, 1976, however, they enclosed photocopies of medical reports from a February, 1976 admission which it had voluntarily paid for.

The Board concludes that in the absence of any recent medical reports substantiating claimant's condition as of December, 1976 there is no justification, at this time, for reopening claimant's June 1, 1970 industrial injury claim. If claimant is able to furnish the Board with recent medical reports and information further consideration will be given to the request.

ORDER

Claimant's request that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered on June 1, 1970 is hereby denied.

WCB CASE NO. 76-439-E FEBRUARY 3, 1977

In the Matter of the Compensation
of the Beneficiaries of
GEORGE LOGERWELL, DECEASED
Marvin Nepom, Claimant's Atty.
Dennis VavRoskey, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer requests review by the Board of the Referee's order which affirmed the Determination Order of December 2, 1975 which awarded the workman compensation for permanent total disability. The employer had requested the hearing and the Referee denied relief requested by it and dismissed the matter.

The workman, now deceased, had sustained a compensable injury on January 14, 1974 when he slipped on some ice and fell against a watchman's clock he was carrying and sustained multiple rib fractures on the left side. He had received medical treatment and the claim was closed by a Determination Order dated July 1, 1974 which awarded the workman compensation for temporary total disability only.

In October, 1974 the workman had been hospitalized because of pain in the region of his left hip; the history taken at that time indicated a gradual increase in pain in the left hip since the January 14, 1974 injury. In October, 1974 the workman had ceased working. In December, 1974 Dr. Syphers diagnosed the workman's condition as "probable recurrent lymphosarcoma aggravated by a fall in February (sic) 1974."

The workman had sustained an injury to his right elbow in 1966 which required an operation for reticulum cell sarcoma of the right forearm in 1967. He had also received extensive cobalt chemotherapy. About two or three years thereafter he was found to have a malignancy in the rectum of the colon and a permanent colostomy was performed. In 1972 a rib biopsy was taken on the right side of his chest. During this period of time the workman had continued to return to work after each convalescence and had also continued with his hobbies of fishing, hunting and so forth.

In August, 1975 Dr. Doty, who had been treating the workman since December, 1967, advised that the workman was again in the hospital with pain in his back and pelvis. In October, 1974 the workman had been examined by the Orthopaedic Consultants who concluded that he had metastatic sarcoma of the left pelvis, not injury related; they

concluded that the left rib fractures suffered in January, 1974 were not "pathologic fractures," and that the workman had had a moderately severe osteoarthritis involving the dorsal spine. It was their conclusion that the workman would not be able to return to any occupation but not because of the industrial injury. They found no relationship between the industrial injury and the workman's hip and leg pain but considered his disability at that time entirely due to the malignancy and its metastatic manifestations. Dr. Doty read this report and agreed with the findings contained therein. He felt at that time that the workman was medically stationary and that the claim could be closed.

It was closed by a Second Determination Order on December 2, 1975 which made an award for permanent total disability. On January 7, 1976 the workman died.

At the hearing the workman's widow, hereinafter referred to as claimant, his daughter and his sister all testified that he had been an outdoorsman and had been very active up until the date of his injury on January 14, 1974; that in April of that year he commenced limping in the left leg and was unable to cross the left leg over the right without assisting the lift with his hands. They testified he had also been unable to ascend the stairway without lifting the leg up with his hands and he had had difficulty getting about and had preferred to sit as much as he could. Claimant and the rest of the family felt it was quite noticeable that the workman's condition had deteriorated substantially.

The employer contended at the hearing that expert medical testimony was necessary to causally relate the workman's left hip condition to the industrial injury of January 14, 1974 and that the medical reports did not sustain an award of permanent total disability but, in fact, showed no disability due to the industrial injury.

The Referee found that the workman had not been a particularly accurate historian and he was not convinced that either the Orthopaedic Consultants or Dr. Pasquesi were fully aware of the history of a progressively worsening symptomatology from April, 1974, forward. He found, based upon such history testified to by the workman's family at the hearing, that the workman's condition had steadily deteriorated subsequent to his industrial injury.

The Referee conceded that there were different schools of thought on the question of trauma causing or aggravating malignancy, that there was no medical concensus on the subject. He concluded that the ruling of the court in Uris v SCD, 247 Or 420 that lay testimony is credible for establishing causal relationship in certain circumstances was applicable in this particular case and, after giving consideration to all of the evidence, that the award for permanent total disability granted by the Determination Order of December 2, 1975 should not be disturbed.

The majority of the Board, on de novo review, finds no medical evidence which relates the terminal illness of the workman nor the latest disability which he suffered prior to his death to the industrial injury of January 14, 1974. To the contrary, the medical evidence indicates that the injury suffered on January 14, 1974 had completely healed by the spring of that year.

This is a case where medical testimony is necessary to causally relate the condition for which a workman seeks compensation to the industrial injury which he suffered. The report of the Orthopaedic Consultants is unambiguous; in their report, resulting from their October, 1975 examination of the workman, these physicians stated that they considered the workman's disability at that time entirely due to the malignancy and its metastatic manifestations, they felt the workman could not return to any occupation but not because of the industrial injury and the workman's hip and leg pains.

Inasmuch as the employer requested the hearing the burden was upon it to prove its contentions. The Board concludes that the employer has met this burden and, therefore, the order of the Referee must be reversed and further payments to the beneficiaries of the deceased workman on the award for permanent total disability discontinued.

ORDER

The order of the Referee, dated August 2, 1976, is reversed.

WCB CASE NO. 76-1129 FEBRUARY 3, 1977

MICHAEL BRADLEY, CLAIMANT
Paul Rask, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of December 31, 1975.

Claimant was a maintenance man and general "handy man" for the employer; he sustained a compensable injury on March 24, 1975. On March 25, 1975 claimant saw Dr. Gleason who diagnosed a lumbosacral strain. Claimant was released to work on March 28, 1975. He worked for two days before he had to quit because of the involved bending and lifting. He sought further medical attention.

Claimant was released for modified work on May 23, 1975, however, he did not improve and was referred to Dr. Marxer who found sciatic strain due to shortening of the left leg and some symptoms suggesting intraspinous lesion.

In September, 1975 claimant underwent a myelogram which proved negative. In November, 1975 Dr. Marxer felt claimant should find a job he physically could do. Claimant continued to complain but Dr. Marxer found no objective findings for these complaints.

Dr. Ho next examined claimant and found minimal impairment of function of the dorsal spine and motivational factors. He felt claimant could return to his regular occupation. A Determination Order of December 31, 1975 granted claimant 32 degrees for 10% unscheduled disability.

In June, 1976 Dr. Marxer examined claimant and found no basis for claimant's complaints; however, the strain was caused by the short leg. He thought the best therapy for claimant was to get a job.

The Referee found that claimant had been adequately compensated by the Determination Order. If the Evaluation Division had had all of the medical reports at the time of claim closure, the Referee felt the award granted might not have been as great.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 31, 1976, is affirmed.

WCB CASE NO. 69-2134 FEBRUARY 3, 1977
WCB CASE NO. 71-623

MINNIE B. JOHNSON, CLAIMANT
William Whitney, Claimant's Atty.
Charles Holloway III, Defense Atty.
Own Motion Proceeding Referred for Hearing

Claimant suffered a compensable injury on June 30, 1969 when she developed bilateral swelling in the wrist which was diagnosed as bilateral myositis and tenosynovitis. Her claim was closed by a Determination Order dated January 17, 1969 awarding claimant 5% loss of each forearm. The claim was reopened and closed twice by Determination Orders which awarded no additional compensation for permanent partial disability and claimant requested a hearing on the Third Determination Order. An order entered on November 4, 1971 affirmed the Third Determination Order. Claimant's aggravation rights expired on January 17, 1974.

On January 4, 1977 the Board received from claimant's attorney a petition to reopen the claim. The petition was supported by an affidavit of claimant and a letter from Dr. James B. Foley, dated September 29, 1976.

On January 12, 1977 Hartford Insurance Company, the carrier for Booth Packing Company, for whom claimant was working at the time of her 1969 injury, was advised of claimant's request and furnished copies of the documents submitted by claimant's attorney. The carrier was given 20 days within which to advise the Board of its position.

On January 20, 1977 the carrier replied, contesting the request and supplying the Board with certain medical reports and documents, the latest medical report being a report from Dr. Parvaresh dated August 5, 1971.

The evidence before the Board at the present time is not sufficient for it to determine the merits of claimant's request to reopen her 1969 claim. The matter is, therefore, referred to the Hearings Division with instructions to hold a hearing and take evidence on the issue of whether claimant's present condition is related to her June 30, 1969 industrial injury and, if so, has her present condition worsened since the last award or arrangement of compensation on November 4, 1971.

Upon conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his advisory opinion.

WCB CASE NO. 76-743 FEBRUARY 3, 1977

RAYMOND BAIRD, CLAIMANT
Robert Grant, Claimant's Atty.
Ronald Podnar, Defense Atty.
Own Motion Order

On March 23, 1976 claimant requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an injury suffered on June 8, 1967. The Board, on March 26, 1976 referred the request to Referee Gayle Gemmell with instructions to take evidence on the issue of whether claimant's present condition and need for medical care and treatment was related to her industrial injury of June 8, 1967 and

upon conclusion of the hearing to cause a transcript of the proceedings to be prepared and submitted to the Board together with her findings and recommendations.

Pursuant to this order, a hearing was held and on December 17, 1976 Referee Gemmell submitted to the Board a transcript of the proceedings and her advisory opinion.

The Board, after de novo review of the transcript and a careful study of the advisory opinion of Referee Gemmell, a copy of which is attached hereto and, by this reference, made a part hereof, adopts the Referee's recommendation.

ORDER

The claim is remanded to the employer, Boise Cascade Corporation, and its carrier, Employers Insurance of Wausau, to be accepted for payment of compensation, as provided by law, commencing on December 8, 1975 and until the claim is closed pursuant to ORS 656.278, less time worked.

Claimant's attorney is awarded as a reasonable attorney fee for his services in this matter, a sum equal to 25% of the compensation for temporary total disability awarded to claimant by this order, payable out of said compensation as paid, not to exceed $500.

WCB CASE NO. 76-1250 FEBRUARY 3, 1977

BYRTELL CHASSE, CLAIMANT
Sidney Galton, Claimant's Atty.
Stephen Frank, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant 64 degrees for 20% unscheduled disability. Claimant contends this award is inadequate.

Claimant sustained a compensable back injury on September 10, 1971 and has been mostly unemployed since that date. Dr. Jones, who examined claimant on December 22, 1971, diagnosed a lifting strain to the low back with some referred pain in the upper back and neck. He found claimant medically stationary.

A Determination Order of January 18, 1972 granted an award for temporary total disability only.

Claimant continued having recurring back problems and sought treatment from Dr. Chuinard. On March 17, 1975 Dr. Chuinard found claimant's condition improved both subjectively and objectively; he stated claimant has been retrained as a bookkeeper.

A Second Determination Order of April 24, 1975 granted claimant an award of 32 degrees for 10% unscheduled mid and low back disability.

Pursuant to a stipulation of August 5, 1975, claimant's claim was reopened for further medical care and treatment. On September 4, 1975 claimant was examined by the Orthopaedic Consultants who diagnosed minimal chronic neck sprain and a minimal coccygodynia. They further found the functional disturbance during this examination was moderate.

Dr. Fleming examined claimant on September 12, 1975 and found moderate psychopathology largely related to the industrial injury. He felt she should be encouraged to seek work on her own.

Claimant was entered at the Pain Clinic on October 21, 1975. Dr. Seres diagnosed mechanical low back pain, muscle contraction headaches, clinical depression, questionable motivation for rehabilitation and musculoskeletal psychophysiological disorder.

On January 15, 1976 Dr. Chuinard agreed with the findings of the Pain Center except he didn't believe that claimant lacked motivation; however, he did agree that claimant's motivation had changed after her retraining and she might be reluctant to return to the strain and responsibility of employment.

Dr. Newman of the Portland Pain Center diagnosed conversion hysteria, average to high level of intellectual function, and poor motivation for rehabilitation and return to work.

A Third Determination Order of March 8, 1976 granted claimant no further award for permanent partial disability.

The Referee found claimant has physical impairment that justifies avoidance of heavy work such as that which caused her injury. She has the equivalent of a high school education, has raised nine children (she is presently separated from her husband) and has had a varied work background including some types of work which she could do now if she desired to try.

The Referee concluded claimant was entitled to an award of more than 32 degrees for 10% unscheduled disability to adequately compensate her for her loss of wage earning capacity; he increased the award to 64 degrees.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 28, 1976, is affirmed.

WCB CASE NO. 75-3895 FEBRUARY 3, 1977

JOHN SCOTT, CLAIMANT
Claud Ingram, Claimant's Atty.
Roy Kilpatrick, Defense Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF and the Employer

Reviewed by Board Members Wilson and Moore.

The employer and the State Accident Insurance Fund each requested review by the Board of the Referee's order which remanded claimant's claim for head and left leg conditions to it for acceptance and payment of compensation as provided by law.

Claimant alleges a compensable injury on November 7, 1973 resulting from an altercation between claimant and his employer over claimant's job performance.

Claimant testified his employer, with provocation, struck him on the back of his head with an object which resulted in a head injury and a left sprained ankle. That day claimant sought medical attention from Dr. Miller who only prescribed medication. Claimant went home and later experienced dizzy spells, light headedness and a sense of loss of balance and was subsequently hospitalized.

The employer admitted a verbal disagreement but denies striking claimant. The employer further testified that during the verbal confrontation claimant sicked his dog on him.

An independent witness was present during the aforesaid incident and testified he saw nothing until he heard "sic him," turned around and observed claimant trying to turn his dog on the employer. The dog knocked claimant's glasses out of his hand and the employer retrieved the glasses and gave them back to claimant.

Claimant has sustained six industrial injuries while working for this employer.

The Referee found the credibility of claimant's testimony and that of the employer were diminished because of long-standing hostility between claimant and the employer, direct interest in the outcome of the case, and existing conflicts in testimony. He also found that claimant was not able to recall past incidents; however, based upon the evidence, the Referee concludes claimant had proven by a preponderance thereof that a compensable injury occurred as alleged.

The Referee further concluded claimant was not barred from pursuing his claim under ORS 656.265(4) because the evidence of the altercation occurring in which the employer not only participated but was sufficient to put the employer on notice as to an accident which might involve a compensable injury. The Referee ordered the Fund to accept the claim.

The Board, on de novo review, finds claimant did not sustain a compensable injury. The least biased testimony given by the only witness was that absolutely no physical altercation took place. Therefore, the claimant failed to prove he suffered a compensable injury.

The Board concludes that claimant's claim should be denied.

ORDER

The order of the Referee, dated September 15, 1976, is reversed.

WCB CASE NO. 76-5036 FEBRUARY 4, 1977

VICTOR STADEL, CLAIMANT
Sidney Galton, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

On January 24, 1977 claimant, by and through his attorney, requested Board review of the Referee's order entered in the above entitled matter on January 21, 1977.

On January 31, 1977 the State Accident Insurance Fund filed a motion requesting

the Board to strike from its records and files the letter of January 24, 1977 from claimant's attorney to the Board.

A letter of transmittal is never considered as part of the record nor is it given any consideration, therefore, the Fund's motion requests the Board to do a useless act.

ORDER

The motion made by the Fund on January 31, 1977 is hereby denied.

WCB CASE NO. 74-1755 FEBRUARY 4, 1977

CLAIR ADAMS, CLAIMANT
Ronald Thom, Claimant's Atty.
Dept. of Justice, Defense Atty.
Supplemental Order Awarding Attorney Fees

The Board's Order on Review issued January 17, 1977 in the above entitled matter failed to include an award of a reasonable attorney fee.

ORDER

It is hereby ordered claimant's attorney is awarded as a reasonable attorney fee, 25% of the increased compensation for permanent partial disability as granted by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 76-2932 FEBRUARY 4, 1977

TOMMY SUNDIN, CLAIMANT
Alan Scott, Claimant's Atty.
Noreen Saltveit, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of that portion of the Referee's order which affirmed the employer's denial of claimant's claim for an occupational disease.

Claimant filed a claim on April 8, 1976, upon the advice of Dr. Cherry, for back pain at work, ultimately diagnosed as a herniated intervertebral disc. Claimant had been examined by Dr. Asby on January 15, 1976 who, after conservative treatment failed to relieve claimant's symptoms, referred claimant to Dr. Cherry.

On the Form 801 claimant indicated the injury occurred in December, 1975. Dr. Storino was told by claimant that he felt a back twinge of pain in November, 1975 with no associated injury.

On May 14, 1976 Dr. Cherry performed surgery for herniated disc at L5-S1 on the left.

The employer issued a denial of claimant's claim on May 28, 1976.

On June 14, 1976 Dr. Cherry expressed his opinion that claimant had had no specific accident, however, claimant's herniated disc was the result of his occupation and the heavy work he performed.

Claimant testified he had no prior slips or falls and no sudden accident; but in January, 1976 the back problems became severe.

A representative of the employer interviewed claimant at which time he indicated "I can't say that my injury or problem was caused at work because I don't know where or how it started or happened."

The Referee found that claimant has not been able to relate his back problems to any incident or activity at work and, therefore, has failed to meet his burden of proving that he has sustained an industrial injury or an occupational disease at work.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 26, 1976, is affirmed.

WCB CASE NO. 76-3098 FEBRUARY 4, 1977

TED O. DICKERSON, CLAIMANT
Peter Davis, Claimant's Atty.
Delbert Brenneman, Defense Atty.
Own Motion Order

On December 22, 1976 the Board received a request from claimant's attorney for own motion relief pursuant to ORS 656.278.

Claimant suffered a compensable injury on July 3, 1966 and his claim was closed and his aggravation rights expired on June 26, 1975.

On April 22, 1976 Dr. Snodgrass, a neurologist, referred claimant to the Portland Pain Center for treatment and, on May 10, 1976, the employer's carrier was contacted through its counsel to secure processing of Dr. Snodgrass' referral. The carrier refused on June 14, 1976 to accept responsibility for any care for the claimant at the Pain Center and claimant requested a hearing to secure authorization for such treatment. On the date of the hearing, November 16, 1976, claimant was bedridden and unable to attend; the hearing was postponed.

On December 8, 1976 Dr. Boyden, claimant's treating orthopedist, reported claimant could be considered as a permanently and totally disabled person as a result of his 1966 accident.

Claimant requests that the carrier's denial be set aside and treatment be authorized for him at the Pain Center and that he be allowed compensation for temporary total disability while receiving such treatment and his attorney granted a reasonable attorney fee.

The carrier for the employer was notified and furnished the medical evidence upon which claimant intended to rely. On December 29, 1976 the carrier responded, stating

that it had denied responsibility for the aggravation claim as there was no indication that claimant's condition had worsened and the five year aggravation period had run. It further stated that claimant had been referred to the Pain Center as early as March 22, 1973 and an order of July 6, 1973 awarding claimant compensation for unscheduled low back disability indicated a referral might require reopening and payment of temporary total disability benefits but almost three years past before claimant requested such reopening and treatment.

The Board concludes that the contentions of the employer and its carrier do not refute the necessity for claimant now receiving such treatment, based upon the opinion expressed in Dr. Snodgrass' report of April 22, 1976. The passage of time has no relevancy nor does the fact that claimant's aggravation rights have expired apply in this case as claimant has asked for own motion relief.

ORDER

Claimant's claim for his July 3, 1966 industrial injury is remanded to the employer, Pierce Trailer and Equipment and its carrier, Northwestern Pacific Indemnity Company, for the enrollment of claimant at the Pain Clinic for such treatment as may be prescribed by Dr. Joel Seres and for the payment of compensation, as provided by law, commencing on the date claimant is enrolled and until his claim is closed pursuant to ORS 656.278.

Claimant's attorney is awarded as a reasonable attorney fee for his services, a sum equal to 25% of the compensation for temporary total disability to be paid to claimant as a result of this order, payable out of such compensation as paid, not to exceed $400.

WCB CASE NO. 75-4505 FEBRUARY 4, 1977

JIMMY FAULK, CLAIMANT
R. Kenney Roberts, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

On January 25, 1977 the State Accident Insurance Fund filed a motion requesting the Board to reconsider its ruling on the Fund's motion which sought to have the order of joinder heretofor issued in the above entitled matter set aside.

The Board, after full consideration of the entire matter, finds no justification for changing its previous ruling and concludes that the order joining the Fund as a party defendant in the above entitled matter was proper. Therefore, the motion to reconsider should be denied.

It is so ordered.

FRANK WILKINSON, CLAIMANT
Donald Krause, Claimant's Atty.
James Huegli, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the carrier's denial of claimant's claim.

Claimant, a mail/supply assistant, alleges he suffered an industrial injury to his left arm as a result of operating a reproduction machine. Claimant testified his alleged injury occurred in mid-April, 1975, when he wrenched his arm and felt immediate pain in his left shoulder and he immediately reported this incident to his supervisor. Claimant did not file a claim until March, 1976; the claim, originally lost by the carrier, was denied on June 21, 1976.

The office notes of Dr. Rohlfing indicate a treatment of claimant on April 15, 1974 for a painful left arm from the neck to the forearm; diagnosed as bicipital tendinitis, treated by injections. Another entry indicates treatment on March 21, 1975.

Claimant alleges the entry dates in the doctor's notes were in error; that they should read April 15, 1975 and June 21, 1975.

Claimant's shoulder condition finally required manipulation under general anesthesia. Claimant also has diabetis and he alleges a causal relationship between his insulin reactions and his shoulder manipulations under anesthesia.

Although claimant testified he immediately notified his supervisor of his accident the supervisor testified claimant never made any reference to him of an injury. In fact, claimant mentioned his arm hurting to the supervisor but gave no reason for this.

The Referee found that claimant's allegation that the doctor's notes gave inaccurate dates was not corroborated by any testimony or evidence.

The Referee found there was not a medical report which contained any mention of any type of incident occurring at claimant's employment.

The Referee, based upon the medical and lay evidence, concluded claimant had failed to prove he had sustained a compensable industrial injury.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 31, 1976, is affirmed.

Gerald Doblie, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests Board review of the Referee's order which reversed its partial denial of claimant's claim and referred the claim to the Evaluation Division of the Workmen's Compensation Board for a determination of the extent of claimant's disability and ordered the Fund to pay claimant's attorney a reasonable attorney fee.

Claimant is a 60 year old carpenter and millwright who worked for the employer approximately three years; prior to that he worked in plywood and sawmills for nearly twenty years. Claimant's duties consisted of maintenance and repair of equipment. The area in which claimant worked had substantial amounts of dust, particulates and fumes. Large fans were used to circulate the air in the area and some of the workmen wore face masks in certain areas, however, these masks would stop only the dust and dirt, not the fumes.

On or about January 27, 1975 claimant was exposed to burning oil smoke and after a few days he developed severe dyspnea which required hospitalization. Dr. Turner, a pulmonary disease specialist, felt there was clear-cut evidence of chronic obstructive pulmonary disease with a history suggesting exacerbation due to exposure to fumes at work. In July, 1975 claimant suffered another onset and was treated by Dr. Ochs, a general practitioner, who, on July 25, 1975, indicated claimant was continuing to have lung and breathing problems and should probably work in a different environment. He cautioned claimant to avoid exposure to fumes and smoke.

On January 13, 1976 Dr. Tuhy, a heart and lung specialist, examined claimant and found chronic obstructive pulmonary disease with mild chronic bronchitis which had been present for several years and was directly related, in his opinion, to claimant's history of smoking. Claimant had had a myocardial infarction for which he was hospitalized in August, 1975. Both Dr. Tuhy and Dr. Ochs felt that this myocardial infarction had no connection with claimant's work exposure.

On February 24, 1976 the Fund advised claimant that it would accept responsibility for his acute episodes of chemical bronchitis occurring on January 27 and July 23, 1975 and that time loss compensation and medical bills directly relating to such acute episodes had been paid. However, the Fund denied responsibility for the pre-existing underlying condition diagnosed as chronic obstructive pulmonary disease, associated with bronchial spasms and with fairly mild chronic bronchitis, based on the medical reports indicating that the probable cause of claimant's underlying condition was his history of smoking and, therefore, could not relate it to his work activity with the employer.

Claimant's claim was closed by a Determination Order of March 23, 1976 which awarded claimant compensation for time loss only.

On May 10, 1976 claimant was examined by Dr. Greve, a pulmonary and internal medicine specialist, who felt that claimant's underlying disease was probably related to his long history of cigarette smoking as well as a possible hereditary problem. He thought

claimant had a chronic obstructive pulmonary disease with a very marked component of reactive airway disease, also described as asthmatic bronchitis.

The Referee found that the employer takes a workman as he finds him, including any weaknesses, predispositions or sensitivities. In this case claimant's long history of smoking and/or the inherited lung abnormality made claimant more susceptible to the fumes to which he was exposed at his work activity, therefore, the employer and its carrier were responsible for his present condition.

The Referee found that the disease was developing prior to the January, 1975 exposure, however, claimant had worked steadily until such exposure. He concluded that claimant had proved by the weight of the evidence that the denial should be reversed.

With respect to Dr. Tuhy's conclusion that claimant had not suffered any permanent disability as a result of his exposure, a conclusion concurred by Dr. Ochs, the Referee found that both had advised claimant to avoid fumes and the need to avoid fumes did not exist until January, 1975. He concluded that but for the exposure and the residuals, and not considering the non-work related heart problem, claimant likely still would be working for the employer.

The Board, on de novo review, finds that the medical evidence clearly supports the partial denial of the Fund. In essence, this medical evidence indicates that claimant's chronic obstructive pulmonary disease with mild chronic bronchitis has been present for at least several years and is related directly to claimant's long history of smoking, although the two acute episodes of January and May, 1975 seem to be due to acute exposure to non-specific respiratory irritants. Dr. Tuhy's opinion was that claimant had suffered some temporary complete disability as a result of these two episodes but that neither had any probable permanent effects on lung structure or function. Dr. Ochs, claimant's treating physician, concurred in this opinion.

Dr. Greve related claimant's problem to cigarette smoking and a possible hereditary problem.

The Board finds no medical evidence which contradicts the opinions expressed by Drs. Tuhy, Ochs and Greve and concludes, therefore, that claimant had suffered only temporary acute episodes of chemical bronchitis, also diagnosed as acute exacerbations of bronchitis with bronchial spasms and had not suffered any permanent disability. Furthermore, the Fund has accepted the responsibility for the two acute episodes and paid time loss compensation and medical bills directly related to such episodes; claimant is entitled to nothing more. The partial denial for further responsibility made by the Fund, on February 24, 1976, is affirmed.

ORDER

The order of the Referee, dated August 26, 1976, is reversed.

The partial denial made by the Fund on February 24, 1976 is affirmed.

Robert Thorbeck, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

On January 3, 1977 the claimant mailed to the Workmen's Compensation Board a request for review of the Referee's order entered in the above entitled matter on December 3, 1976.

On January 26, 1977 the State Accident Insurance Fund, appearing specially, moved that the request for review be dismissed as not timely.

ORS 656.389(3) provides that the Referee's order is final unless within 30 days after the date on which a copy of the order is mailed to the parties one of the parties request a review by the Board under ORS 656.295. In the instant case the 30th day fell on January 2, 1977, a Sunday; therefore, the time within which to mail a request for review was extended through January 3, 1977.

Claimant's request for a review of the Referee's order in the above entitled matter having been timely filed, the Fund's motion to dismiss said request must be denied.

It is so ordered.

CLAIM # D53-153929 FEBRUARY 8, 1977

CHARLOTTE QUENELLE, CLAIMANT
Order

Claimant suffered a compensable injury on December 12, 1973 while an employee of Purdy Brush Company, whose workmen's compensation coverage was furnished by Employers Insurance of Wausau. The claim was closed by a Determination Order dated April 23, 1975 whereby claimant was awarded 32 degrees for 10% unscheduled low back disability.

Claimant requested a hearing on the adequacy of this award and, after a hearing, an order was entered on March 26, 1976 whereby claimant was granted an award for permanent total disability effective the date of said order. No appeal was filed by the employer and the order became final by operation of law.

On November 17, 1976 the employer, through its carrier, submitted to the Board medical reports and documents relating to vocational rehabilitation; also the original claim and the order entered on March 26, 1976. The employer, conceding that the Referee's order was not subject to any administrative or judicial consideration other than through the Board's continuing jurisdiction, pursuant to ORS 656.278, requested the Board to exercise such own motion jurisdiction and issue an order finding that claimant was not, at the present time, permanently and totally disabled.

The employer's position is that those medical reports and vocational rehabilitation documents generated since the date of the Referee's order establish that claimant has continued, and is progressing, with vocational rehabilitation and upon completion of her

program will probably be employable; therefore, claimant is not entitled to a continuing award for permanent total disability but is entitled to some award for permanent partial disability. In the alternative, the employer requested the Board to refer the matter to the Hearings Division for a hearing on the issue of whether claimant is, at the present time, permanently and totally disabled.

The Board finds that the claimant is presently in an approved plan for vocational rehabilitation and the prospects for her returning to the labor market appear to be good. However, until claimant has either completed such program or has been terminated therefrom for appropriate reasons the Board concludes that the employer's request that claimant's award be reduced is premature.

ORDER

The request made by the employer, through its carrier, on November 17, 1976 that the Board issue an order that claimant is not presently permanently and totally disabled is hereby denied.

SAIF CLAIM NO. KB 53968 FEBRUARY 8, 1977

JUDITH PHIPPS, CLAIMANT
Donald Yokom, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order Remanding Proceedings for Hearing

On November 1, 1976 claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for a compensable injury suffered in 1964. Claimant's claim was closed and her aggravation rights have expired. In support of the request claimant submitted certain medical reports, including an evaluation made of claimant's condition while at the Portland Pain Center.

The State Accident Insurance Fund responded, stating that it had offered to pay claimant's medical bills and time loss while she was at the Pain Center. Claimant, through her attorney, indicated that this would not be satisfactory; that since claimant's surgery and the last award and arrangement of compensation the scar tissue from the surgery had caused nerve damage and extreme pain which has rendered claimant totally disabled and that all of this was the result of the 1964 injury.

The Board does not have sufficient evidence, either medical or lay, at this time to make a determination on the merits of claimant's request. Therefore, the matter is referred to the Hearings Division with instructions to hold a hearing and take evidence on the issue of whether claimant's present condition indicates a worsening since her last award or arrangement of compensation which was March 16, 1965 and, if so, if such worsening is attributable to her 1964 industrial injury. Upon conclusion of the hearing the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his advisory opinion and recommendation.

ARTHUR J. COX, CLAIMANT
Gerald Doblie, Claimant's Atty.
Marshall Cheney, Defense Atty.
Own Motion Proceeding Referred for Hearing

On December 30, 1976 the claimant, by and through his attorney, petitioned the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and award claimant compensation for permanent total disability as a result of an industrial injury suffered while in the employ of Edward Hines Lumber Company on March 1, 1968. Claimant's claim was closed in 1969 and claimant's aggravation rights expired on November 6, 1974.

The last award or arrangement of compensation was made by a Referee's order of August 14, 1973 which granted claimant an additional 128 degrees for a total award of 288 degrees for 90% unscheduled permanent partial disability.

The claimant alleges that as a result of a worsening of his physical condition he has been unable to continue employment since December, 1975 and has found it necessary to seek further medical treatment. Medical reports from claimant's treating physicians, Drs. Russakov, Seres, and Baker were offered in support of the petition.

The employer was notified of the petition and furnished a copy of the medical reports. On January 26, 1977 the employer responded, urging that the Board refuse to exercise its own motion jurisdiction in this instance. The employer takes the position that there is a distinction between an initial wrong which is to be corrected, the wrong having occurred more than five years prior to the seeking of relief by the aggrieved party, and the seeking of relief more than five years after the initial Determination Order because of changes in conditions and circumstances which have occurred subsequent to the expiration of the five year aggravation period specified by ORS 656.273.

The Board is not persuaded by the argument made by the employer. It feels that the reports from the Pain Clinic indicate claimant's condition has worsened; however, there is not sufficient evidence before the Board at the present time to enable it to make a determination of whether claimant's worsened condition is attributable to his industrial injury of March 1, 1968.

The matter is referred to the Hearings Division with directions to hold a hearing on the issues of whether claimant's present condition has worsened since the date of his last award or arrangement of compensation on August 14, 1973 and, if so, is such worsened condition directly attributable to the March 1, 1968 industrial injury. Upon conclusion of the hearing the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board along with his advisory opinion and recommendation.

CLAIM # C 385882 FEBRUARY 8, 1977

FRANCIS VASBINDER, CLAIMANT
Own Motion Order

Claimant suffered a compensable injury on July 31, 1967 while employed by Oliver Logging Company, whose workmen's compensation insurance carrier is Fireman's Fund Insurance Company. Claimant's claim was closed by a Determination Order dated November 15, 1968; claimant's aggravation rights have expired.

On January 5, 1977 claimant requested the Board to reopen his claim by exercising its own motion jurisdiction pursuant to ORS 656.278. In support of his request the claimant attached a report from Dr. Schachner, dated October 25, 1976.

The carrier on January 7, 1977 notified claimant that it was denying his request to reopen; stating that a review of the medical information and its own investigation did not support claimant's contention that his present condition arose out of or in the course of his employment and, furthermore, that claimant's right to aggravation benefits had expired.

On January 11, 1977 the carrier was furnished a copy of the request and Dr. Schachner's report and advised that it had 20 days to notify the Board of its position with respect to the request to reopen. The Board's letter stated it appeared that the carrier may have agreed to pay the cost of surgery but it also appeared that claimant would be disabled for a period of time and the extent of his residual disability after surgery should be re-evaluated.

In response to the Board's letter the carrier wrote, on January 25, 1977, stating that it felt that it had properly denied any compensation or disability or time loss concerning the injury to the right leg but did acknowledge responsibility for medical payments for any treatment concerning the right leg under the provisions of ORS 656.245. It further denied any compensability for disability or medical payments concerning the left leg, stating the recent medical reports indicated that any injury to the left leg was probably a result of a more recent injury.

The Board agrees that the carrier's denial of responsibility for any injury to claimant's left leg was proper; this is supported by a portion of the report of Dr. Schachner. However, the Board concludes that claimant is entitled to receive compensation for temporary total disability during his recovery from the surgery performed on his right leg.

ORDER

Claimant's claim for an industrial injury suffered on July 31, 1976 is remanded to the employer, Oliver Logging Company, and its carrier, Fireman's Fund Insurance Company, to be accepted for payment of compensation, as provided by law, commencing on the date claimant enters the hospital for the surgery recommended by Dr. Schachner and until claimant's claim is closed pursuant to ORS 656.278.

SAIF CLAIM NO. PC 58806 FEBRUARY 11, 1977

ROBERT GRAHAM, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant wrenched his back pruning trees for the employer on January 28, 1967. Dr. Thompson found claimant had six lumbar vertebra with spondylolisthesis at L6 and he felt the injury aggravated his unstable back. In March, 1967 Dr. Thompson performed a hip spinal fusion and, in May, 1967, an excision of a sinus tract.

A Determination Order of January 9, 1968 granted claimant an award of 30% loss of an arm by separation for low back disability.

Dr. Young, a California physician, in February, 1973 investigated the fusion and he felt L4-5 was unstable. On October 8, 1973 Dr. Young explored the iliac sinus for

osteomyelitis; it was not present and on October 26 claimant was operated on for an anterior approach to fuse L5-S1 which had previously been missed.

Dr. Young performed surgery again in February, 1974 for removal of exostosis.

In January, 1976 the Orthopaedic Consultants examined claimant and found a solid fusion from L3-S1 but found claimant was not medically stationary.

On September 21, 1976 the Evaluation Division of the Board recommended claimant be sent to either the Rehabilitation Institute of Oregon, the Portland Pain Center or the Disability Prevention Division.

Claimant was admitted to the Rehabilitation Institute of Oregon. This evaluation indicated claimant, who is in his 30's, has had multiple lumbar spine surgeries with poor results. Claimant also has a strong psychological element along with his physical disability.

On January 18, 1977 the State Accident Insurance Fund requested a determination. The Evaluation Division found claimant could return to some types of employment, however, the market was markedly limited to him; they further found claimant lacked motivation and was content with being totally disabled. It recommended an additional award of 50% giving claimant a total award of 80% loss of an arm by separation for unscheduled low back disability for his loss of wage earning capacity.

The Board accepts this recommendation.

ORDER

Claimant is hereby granted an award of 50% loss of an arm by separation for unscheduled low back disability. This award is in addition to and not in lieu of the previous award.

SAIF CLAIM NO. DC 148488 FEBRUARY 11, 1977

HARRY A. STRONG, CLAIMANT
Dan O'Leary, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On November 15, 1976 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to the provisions of ORS 656.278 and reopen his claim for an industrial injury suffered on September 17, 1968. In support of the request was a report from Dr. Cherry, based upon his examination of claimant on November 4, 1976.

The State Accident Insurance Fund was advised of the request and on December 6, 1976 responded, stating that after reviewing the report of Dr. Cherry and a report from Dr. Robinson dated May 12, 1976 it was their opinion that there had been little, if any, change in claimant's condition although Dr. Cherry's report did indicate a few degrees less range of motion. The Fund asked that claimant be examined by Dr. Pasquesi inasmuch as Dr. Cherry's opinion as to claimant's impairment did not agree with that expressed by Dr. Robinson.

On January 11, 1977 Dr. Pasquesi submitted his report indicating that claimant had a combined impairment equal to 33% right upper extremity. He felt claimant's condition

was stationary; he found no loss of motion in the wrist, no discoloration and no swelling.

The Board, after carefully studying the medical reports of Dr. Cherry, Dr. Robinson and Dr. Pasquesi, concludes that there is not sufficient medical justification for reopening claimant's claim.

ORDER

Claimant's request of November 15, 1976 that the Board reopen his claim under the provisions of ORS 656.278 is denied.

WCB CASE NO. 75-4947 FEBRUARY 11, 1977

WILBUR SLATER, CLAIMANT
Gary Galton, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant
Cross-Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

Claimant requests Board review of the Referee's order of July 13, 1976, as amended on August 10, 1976, wherein the Referee approved the denial of claimant's request to reopen his claim made by the employer, O'Neill Transfer Company, and the denial of his request to reopen his claim made by the employer, R.A. Heintz Construction Company; affirmed the Determination Order of December 26, 1975; ordered defendant to pay Dr. Folk's bill of $35; ordered defendant to pay compensation for temporary total disability from September 15 to September 17, 1975; ordered defendant to pay to claimant as a penalty for unreasonable delay in the payment of compensation for temporary total disability from September 15 to November 13, 1975, 25% thereof, and directed the defendant to pay claimant's attorney a reasonable attorney fee in the sum of $600. In the amended order, the Referee directed defendant to pay claimant compensation for temporary total disability for the periods of March 29, 1976 through June 28, 1976 and June 11, 1976 to June 28, 1976.

The State Accident Insurance Fund filed a cross-request for Board review of the Referee's order.

Claimant had sustained two compensable injuries. The first injury was on June 27, 1969 while claimant was working for O'Neill Transfer Company and related to claimant's left leg. The second injury occurred on September 9, 1975 while claimant was employed by R.A. Heintz Construction Company.

The 1969 injury was closed, initially, by Determination Order dated May 6, 1971 whereby claimant was awarded 32 degrees for partial loss of the left leg. Claimant requested that this claim be reopened on the basis of aggravation was denied by the Fund on June 28, 1976. The 1975 claim was originally accepted as a non-disabling claim but subsequently the claim resulted in time loss and the claim was finally closed on December 26, 1975 with an award of compensation for temporary total disability only. Claimant requested a reopening of this claim which was denied by the Fund on June 28, 1976.

The Referee found that the claimant was entitled to compensation for temporary total disability from September 15 to November 13, 1975 because the 1975 claim which was

originally accepted as a non-disabling claim had developed into a claim which entitled claimant to compensation for temporary total disability and the Fund was aware of this on October 2, 1975 but apparently because of a clerical oversight the benefits were unreasonably delayed. He found this justified an assessment of a penalty of 25% of the compensation for temporary total disability, plus an award of an attorney fee of $600.

The Referee found that the only unpaid medical bill was one submitted by Dr. Folk in the sum of $35. The Fund was not aware until the date of the hearing of the relationship between Dr. Folk's medical services and the compensation claimed. The Fund indicated at that time that it would pay the medical bill upon receipt of the explanation that claimant had broken his glasses in the Heintz injury which required Dr. Folk's services. The Referee declined to assess penalties or attorney fees.

On the issue of whether claimant was entitled to a reopening of his claims; the Referee found that the medical reports and other evidence did not support a reopening of either claim. The claim of permanent disability in the Heintz claim was based on disabling effects of claimant's headaches which were diagnosed as migraine type and not related to trauma. The Referee concluded that claimant had failed to sustain the burden of proving he had suffered a permanent disability as a result of the Heintz claim and he affirmed the Determination Order of December 26, 1975. The injury suffered in 1969 while employed by O'Neill related to the left knee and the medical information submitted in behalf of the request for reopening related to treatment for a right leg pain.

On July 15, 1976 claimant filed a motion for reconsideration requesting payment of compensation for temporary total disability penalties and attorney fees for the respective deferral periods from March 29, 1976 through June 28, 1976 and June 11, 1976 through June 28, 1976. The Referee, by his amended order of August 10, 1976, allowed the requested payment of compensation for temporary total disability for the respective deferral periods but declined to assess penalties or award additional attorney fees.

The Board, on de novo review, concurs in the conclusions reached by the Referee except for the awards of compensation for temporary total disability for the periods March 29, 1976 through June 28, 1976 and June 11, 1976 through June 28, 1976. Claimant is not entitled to receive double compensation for temporary total disability between June 11, 1976 and June 28, 1976.

ORDER

The order of the Referee, dated July 13, 1976, as amended on August 10, 1976, is modified.

The Fund is ordered to pay claimant compensation for temporary total disability for the period of March 29, 1976 through June 28, 1976. In all other respects the Referee's order of July 13, 1976, as amended on August 10, 1976, is affirmed.

ROBERT KIEWEL, CLAIMANT
Robert Martin, Claimant's Atty.
Michael Hoffman, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests review by the Board of the Referee's order which granted claimant an additional award of 96 degrees making a total award to claimant of 160 degrees for 50% unscheduled central nervous system disability. Claimant contends he is permanently and totally disabled.

Claimant, a rigger, sustained a compensable injury in November, 1973 when he fell, striking his head against a steel plate.

On May 6, 1974 Dr. DeWeese examined claimant who was complaining of dizziness and intermittent ringing in his ears. Dr. DeWeese diagnosed post-concussion syndrome.

Claimant was examined on May 14, 1975 at the Disability Prevention Division by Dr. Mason who also recommended a job change. He found claimant's motivation suspect and recommended no further treatment.

A Determination Order, dated July 23, 1975, granted claimant 64 degrees for 20% unscheduled central nervous system disability.

On October 13, 1975 Dr. Pauly, a psychiatrist, examined claimant who was complaining of dizziness and sickness to his stomach which prevented him from driving a car, lifting heavy loads or pushing a lawn mower; all of which restricted claimant's life style. Dr. Pauly also diagnosed depression. Based upon claimant's loss of function and his present inabilities, Dr. Pauly felt that claimant was totally disabled from a psychiatric standpoint.

On December 5, 1975 Dr. Quan, a psychiatrist, after examining claimant, said that claimant's activities were markedly restricted because of equilibrium problems but he had no psychiatric impairment and no pre-existing psychological difficulties were noted.

The Referee found claimant could not return to his old job or to any job requiring sudden motion, stooping, bending, climbing or eye, hand or finger coordination. Claimant has neither worked since this injury nor has he applied for any job in any field of endeavor.

The Referee concluded that claimant had failed to establish that he could not hold down gainful regular employment because of his physical condition and other relative factors, therefore, he was not permanently and totally disabled. However, claimant has suffered a substantial loss of wage earning capacity because of his inability to return to the type of work for which he had been trained and had had experience in. The Referee granted claimant an additional 96 degrees, giving claimant a total award representing 50% of the maximum for unscheduled disability.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated April 9, 1976, is affirmed.

WCB CASE NO. 76-250 FEBRUARY 11, 1977

MARK BURTON, CLAIMANT
Gretchen Morris, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which denied claimant's claim for workmen's compensation benefits for an injury occurring on October 1, 1975 but held claimant was entitled to payment of compensation for temporary total disability from the date of the injury until his claim was denied on December 12, 1975.

On October 1, 1975 claimant was working for the employer, his principal duties were to pump gas although he did other jobs around the service station. On this date he was, with the help of other employees, putting tires on an overhead rack when he experienced a stretching painful sensation as he reached to grab a tire. Claimant finished the shift; he was stiff and sore for the next couple of days but continued to work regularly until October 13, 1975 when he sought medical treatment.

On the night preceding or early in the morning of October 13 while claimant was sleeping he moved in bed and felt a snapping sensation in his shoulder and a very severe jolt of pain in his arm. He was unable to move his arm. Claimant saw Dr. Endicott, who had previously treated him, and sought treatment for the pain he was experiencing and also for headaches of which he complained.

Claimant did not return to work for the employer after he had been seen by Dr. Endicott. He filed a written notice of injury with his employer on October 14, 1975, this claim was processed as a deferred non-disabling injury and his claim for workmen's compensation benefits as a result of the incident of October 1, 1975 was denied by the employer's carrier on December 12, 1975. The employer conceded at the hearing that claimant had had an accident while working for him on or about October 1, 1975 while putting tires upon a tire rack but contended that no "compensable injury" resulted because no medical treatment was required for any injury or pain claimant might have sustained in that incident nor did any disability result from the said incident. Claimant's complaints concerning the pain sensation he received on October 1 involved the low back; the pain sensation resulting from the October 13 incident involved the shoulder and neck area and was entirely different than the pain he had previously experienced. It was this pain of which claimant complained when he visited Dr. Endicott on October 13, 1975.

The Referee found that Dr. Endicott's statement of the relationship existing between the symptoms which he had treated on October 13, 1975 and subsequent thereto with the work accident on October 1, 1975 was unacceptable. Dr. Endicott tended to ignore the pain experience in the bed, however, the evidence indicates clearly that it was that incident which compelled claimant to seek medical attention. Prior to that incident claimant had had certain pain sensations, however, they were not sufficient to preclude him from working regularly, nor did they require him to seek any medical attention.

The Referee concluded that claimant had failed to sustain his burden of proving that he had suffered a compensable injury arising out of and in the course of his employment with the employer on October 1, 1975.

The Referee found that the employer had failed to deny claimant's claim within 14 days after it had received notice of claimant's injury, therefore, it was required to begin payment of compensation for temporary total disability not later than the 14th day following the notice of the injury and continue to make payment of such compensation until the claim was either accepted or denied. The Referee found that the employer had not done this and he concluded that the employer owed claimant compensation for the period between the date of the injury and until his claim was denied on December 12, 1975.

The Referee, in his order, stated that should it be found that this compensation for temporary total disability was not paid properly as required by statute then claimant would be also entitled to additional compensation as a penalty in an amount not to exceed 25% of the amount of temporary total disability compensation due claimant and also to an attorney fee for recovery of that amount to be fixed in an amount equal to 25% of the additional compensation paid to claimant.

The Board, on de novo review, concurs in the conclusion reached by the Referee that claimant's claim for a compensable injury occurring on October 1, 1975 should be denied but that claimant is entitled to receive compensation for temporary total disability from the date of his injury until his claim was denied on December 12, 1975.

The Board finds no evidence to dispute its finding that this compensation for temporary total disability was not paid promptly as required by statute and, therefore, concludes that claimant is entitled to additional compensation as a penalty in a sum equal to 15% of the amount of compensation for temporary total disability due claimant from the date of the injury until December 12, 1975 and that claimant's attorney is entitled to be paid by the employer an attorney fee in a sum equal to 25% of the compensation due claimant.

ORDER

The order of the Referee, dated July 14, 1976, is affirmed.

Claimant is awarded in addition to the compensation for temporary total disability due him for the period from the date of his injury to December 12, 1975, the date of the denial, a sum equal to 15% of such compensation payable as a penalty.

Claimant's attorney is awarded as a reasonable attorney fee a sum equal to 25% of the compensation due to claimant.

WCB CASE NO. 76-859 FEBRUARY 11, 1977

ROGER OGDEN, CLAIMANT
Hal Coe, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks review by the Board of the Referee's order affirming the State Accident Insurance Fund's denial of claimant's claim for workmen's compensation benefits.

Claimant had suffered a compensable injury on November 15, 1972 diagnosed as a cervical thoracic paravertebral fibromyositis with attendant cephalalgia. The claim initially was closed on April 17, 1973 with awards for time loss only. In late 1974 the claim was reopened. Dr. Klump, a neurological surgeon, referred claimant to Dr. Campagna, who found nerve root compression C7 on the right. In January, 1975 a diagnosis of cervical spondylosis of C5-6 and C6-7 was made and a laminectomy and foraminotomies were performed on January 29, 1975. Claimant was released to light work on May 1, 1975.

Dr. Campagna, on May 2, 1975, found mildly moderate disability of the neck relating to the November, 1972 injury and the claim was again closed on July 8, 1975 with an award of 32 degrees for 10% unscheduled neck disability.

Claimant was seen by Dr. Campagna on December 1, 1975, at that time he was complaining of headaches and shoulder soreness which Dr. Campagna diagnosed as post-traumatic aggravation of cervical spondylosis moderate functional overlay. He suggested the claim be reopened. On April 15, 1976 Dr. Campagna indicated that claimant's condition was stationary and there was moderate disability in the neck as a result of the 1972 injury.

In a deposition taken on June 8, 1976 Dr. Campagna indicated that although he had previously felt that all of claimant's neck disabilities were traceable to the 1972 injury that he later had been told that claimant had had a substantial head-neck and shoulder injury in January, 1971, therefore, he was now reluctant to connect claimant's current symptoms to the industrial accident. He felt it was possible that claimant's neck symptoms would have developed without the industrial accident. With respect to claimant's headaches he felt they were traceable to a 1963 injury.

The Referee concluded that claimant's credibility was substantially diminished by collateral evidence revealing material inconsistencies and claimant had failed to advise Dr. Campagna of the 1971 incident and the residuals thereof. He concluded that claimant had failed to carry his burden of proof that he had suffered a compensable aggravation of his November 15, 1972 injury and approved the denial.

The Board, on de novo review, affirms the order of the Referee. In claimant's brief presented to the Board it is urged that claimant's counsel is entitled to a fee for traveling from Klamath Falls to Medford for the deposition of Dr. Campagna taken at the request of the Fund. The Board finds that the hearing had been continued at claimant's request in order to produce a new report from Dr. Campagna and, as a result of this report produced by the claimant, cross-examination was required. The results of the deposition of Dr. Campagna were adverse to claimant, therefore, claimant's counsel's attendance at the taking of the deposition did not result in obtaining the acceptance of a denied claim. Pursuant to OAR 436-82-005 claimant's counsel is not entitled to an attorney fee.

ORDER

The order of the Referee, dated July 29, 1976, is affirmed.

WCB CASE NO. 76-363 FEBRUARY 11, 1977

MARY MATTERN, CLAIMANT
Carl Krack, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order of Dismissal

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

It is therefore ordered that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 76-1370 FEBRUARY 17, 1977

ROBERT A. WILSHIRE, CLAIMANT
Evohl Malagon, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order which remanded claimant's claim to it to be accepted for payment of compensation from November 9, 1975 and until termination was authorized pursuant to ORS 656.268.

Claimant is a 30 year old farm worker who operated a large tractor for the employer between September 10 and October 29, 1975. Claimant worked five days a week approximately 9 hours a day. The Referee found that claimant began having low back pains in August, that he did not work on either November 5 or 6 and on Sunday, November 9, while at home watching T.V. he attempted to arise from a chair and suffered severe back pain. Claimant was taken to the hospital for emergency and medical treatment and the diagnosis of migraine headaches was made.

During the several days preceding this incident claimant's back pain had been about the same as it had been since August. Claimant had been team-roping on Thursday nights weekly until October 30, 1975 when his horse was injured. He has not engaged in this activity since that date. Claimant stated he had no back complaints resulting from such activity nor did he seek medical treatment for his back when it first began to hurt. He thought he had had a muscle spasm on November 9, 1975, he had had such spasms in the past and they had always resolved themselves.

Claimant had first been seen by Dr. Ferguson who treated him with muscle relaxants and pain medication but claimant continued to have difficulties and was seen by Dr. Robinson, an orthopedist, on December 15, 1975. Claimant told Dr. Robinson that he was sitting in a chair and when he arose from the chair he had pain in his lower back. Claimant was hospitalized on December 21, 1975 and at that time reported that he was riding a tractor, running a disc harrow over a bumpy field. Dr. Robinson signed a report of injury on December 22, 1975, stating claimant's back snapped while getting out of a chair.

On January 12, 1976 Dr. Hockey examined claimant. Claimant reported to him that he had injured his back driving a tractor over rough terrain. Dr. Hockey felt that claimant had a right L4-5 herniated nucleous pulposus and he concluded that because of the close interval between the time that claimant was harrowing the field and felt the aching in his back and the incident on the evening of November 9 when he arose from the chair while at home, that the initial part of the disc rupture was related to the occupational injury and the acute onset of pain was only a continuation of it.

The Referee found that when claimant filed his report of injury, stating he had suffered a back injury while getting off a chair he was not aware that he might have suffered an industrial injury nor was he aware of this until so advised by Dr. Robinson. The Referee concluded that a workman unaware that a compensable injury had been sustained may be justified in a late reporting of a claim.

The Referee found that Dr. Hockey's conclusion was very persuasive. He did not feel that the incident of November 9 was of such exertive magnitude as to constitute a new injury and become an independent, intervening cause.

The Referee concluded that the medical evidence established that claimant's disability arose as a medical consequence of his industrial injury as alleged and that the disabling consequence in all probability would not have occurred except for the initial disc rupture related to the occupational disease.

The Board, on de novo review, finds claimant had been doing team roping two or three nights a month prior to October 30, 1975, ten days prior to the acute onset of low back pain suffered on November 9 while claimant was at home watching T.V. The Referee found that claimant started experiencing low back pain in August, 1975 which was prior to his employment by the employer. The evidence indicates that notwithstanding claimant's contentions that he had pain while he was working for the employer, claimant did not call any fellow-workers to testify nor was there any indication that he reported any alleged condition to the employer; in fact, there were several people who testified that claimant did not make any complaints nor have any problems during the period of time he worked for the employer in 1975.

Claimant's delay in filing his claim was not justified just because he was unaware that he had suffered a compensable injury until advised of that fact by Dr. Robinson. Claimant had an opportunity to tell the doctor at the emergency room at the hospital about anything that might have happened to him on the job, he also had a chance to tell Dr. Ferguson what had happened to him if he was contending that he had suffered a compensable injury. The physician's first report does not indicate there was an on-the-job injury. It is the claimant's burden to prove he has suffered a compensable injury.

The Board concludes that the medical reports, being based on erroneous facts, do not establish a causal connection between claimant's employment and any alleged accidental injury arising out of and in the course of the claimant's employment. Claimant has failed to prove by a preponderance of the evidence that he has suffered a compensable injury. His claim, therefore, should be denied.

ORDER

The order of the Referee, dated August 19, 1976, is reversed.

WCB CASE NO. 76-148 FEBRUARY 17, 1977

RAY WILLIAMS, CLAIMANT
Gary Galton, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order of Dismissal

On January 7, 1977 a Referee's order was issued in the above entitled case.

On February 8, 1977 the State Accident Insurance Fund requested review.

More than 30 days elapsed between the mailing of the Referee's order and the making of the request for review.

The Referee's order has become final by operation of law in accordance with ORS 656.289(3) and the Fund's request for review should be dismissed.

It is so ordered.

WCB CASE NO. 75-5040 FEBRUARY 17, 1977

JOEL MAKINSON, CLAIMANT
Allan Coons, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the denial of claimant's claim for workmen's compensation benefits for the reason that on July 3, 1975 claimant was an independent contractor, not a "workman" as defined by ORS 656.005(28).

Claimant was contracted by Mr. Orville Bovee, to hang sheet rock in two homes under construction in Roseburg. Mr. Bovee had been the owner and operator of a business called Orville's Drywall until he retired approximately three years prior to the hearing when he sold the business to his son Leslie. Orville had operated out of Roseburg while Leslie operates out of Eugene. Claimant was hired by Orville on behalf of Leslie who had a drywall subcontract from the general contractor, Al Colburn. Claimant was to receive .035 per square foot for the sheet rock hung. Colburn expected the drywall to be completed in both homes under construction within five days. Claimant was hired on a Saturday with the expectation that he would go to work on that day; however, he did not go to work until the following day when he put in a full day, he worked less than a full day on Monday and he then worked Tuesday and Wednesday, finishing one house, with the exception of five panels left off at the request of the general contractor.

Claimant testified that on July 2, 1975 while hanging ceiling sheet rock a piece fell striking him on the back of the head and shoulder. Claimant filed a claim on October 10, 1975, stating he had not filed sooner because he had been in California. The claim was denied on November 17, 1975.

The Referee found evidence indicated that claimant had continuously demanded payment in full with no deductions for social security, withholding tax etc. The claimant

had billed the Bovee's on an invoice entitled "Quality Drywall" Invoice #9907, dated July 14, 1975, showing the various work performed at .035 per square feet, totally $124.88. This bill was approved by Orville and sent to Leslie for payment.

The Referee found claimant intended to hold himself out as an independent contractor, that he was not subject to the direction and control of either of the Bovees, his work was paid for on a piece work scale, no specific days or hours of employment were specified. The only condition imposed was that the work be completed within five days. Apparently the claimant was able to select his own hours of work. Furthermore, claimant furnished his own assistant and his own tools and he received no specific instructions on how to perform the job and at the conclusion of the job submitted an invoice indicating the amount due and owing him.

The Board, on de novo review, concurs in the conclusion of the Referee that claimant was an independent contractor rather than a workman and, therefore, concludes that it is not necessary to determine whether claimant had sustained an industrial injury or if he had failed to report such injury within the time required by statute.

ORDER

The order of the Referee, dated April 26, 1976, is affirmed.

WCB CASE NO. 75-4644 FEBRUARY 17, 1977

JAMES MABRY, CLAIMANT
Rolf Olson, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks review by the Board of the Referee's order which remanded claimant's claim to it to be accepted for payment of compensation from August 5, 1975 until termination is authorized pursuant to ORS 656.268 and awarded claimant's attorney a reasonable attorney fee of $900 payable by the employer.

Claimant is a 35 year old welder who alleged that on August 5, 1975 he suffered an industrial injury which caused light headedness and chest pain. At the time claimant was welding tanks. The following day he saw the company nurse reporting the light headedness, also, dizziness, nausea and a sore throat. He was sent to Dr. Craske, an osteopathic physician, for examination. At first Dr. Craske thought claimant's symptoms might have been related to a form of toxicity to the ingredients used for the removal of grease and oil from the tanks which claimant was welding, however, he later felt that the symptoms were secondary to a local irritation from an ingredient which responded to abstinance with full recovery noted prior to claimant's return to work.

Later claimant collapsed, was hospitalized and seen by Dr. Jensen who concluded that claimant's symptoms were the result of a combination of the factors mentioned above acting in concert. The symptoms presented were consistent with a phosphoric acid fume exposure, alone or in combination with paroxysmal atrial tachycardia, secondary to caffeine stimulation. He felt it was reasonable and proper that the condition requiring treatment partially resulted from the industrial exposure to phosphoric acid fumes.

Claimant was released for regular work on September 9, 1975 by Dr. Craske. When he returned to work claimant refused to do any welding on tanks.

On September 23, 1975 Dr. Christensen diagnosed the headaches and dizziness as phosphoric acid allergy and concluded that it was a reasonable medical probability that inhalation of the irritating compounds of alkaline hydroxide contributed to the development of claimant's complaints. Dr. Patterson, a cardiovascular surgeon, on October 6, 1975 examined claimant. It was his opinion that although it was not possible to exclude the theory that the fumes caused some bronchial reaction it did not seem clear that claimant's current symptomatology could be explained on that basis. He felt that claimant's symptoms were not related to his welding but were related primarily to his anxiety problems.

The Referee, noting that claimant has the burden of proving a compensable injury and that compensation cannot be awarded unless there is competent medical evidence indicating a medical causal relationship exists between the employment and the alleged disability, found, in this case, the preponderance of the medical evidence indicated that claimant's alleged disability was causally related to his work activity, more particularly to his industrial exposure to phosphoric acid. Only Dr. Patterson was in disagreement and he found it not possible to exclude entirely that claimant might have had some irritant effects from fumes while welding which caused him bronchial reaction.

The Referee concluded that claimant had suffered a compensable injury as alleged.

The Board, on de novo review, affirms and adopts the order of the Referee.

ORDER

The order of the Referee, dated July 26, 1976, is affirmed.

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

WCB CASE NO. 76-2717 FEBRUARY 17, 1977

MAURICE KOONCE, CLAIMANT
Donald Richardson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review of the Referee's order which remanded to it claimant's claim for a back condition, peptic ulcer, nervousness and psychiatric problems and an anal fissure for acceptance and payment of compensation, as provided by law, and assessed a 25% penalty against the Fund for its unreasonable refusal to accept the foregoing conditions and awarded claimant's attorney a reasonable attorney fee.

Claimant, a meat cutter, had suffered injuries on October 17, 1974 which required treatment for: a hernia; an unstable back which was fused by Dr. Langston; a peptic ulcer; nervousness and psychiatric problems, and an anal fissure. Claimant filed a claim

for the hernia which was accepted by the Fund. The Fund also regularly and promptly paid each and every medical and hospital bill for the treatment claimant received for his unstable back, peptic ulcer, nervousness and psychiatric problems and the anal fissure, and compensation for time loss.

On May 25, 1976 a Determination Order awarded claimant 192 degrees for 60% unscheduled low back disability. Claimant, being dissatisfied with the inadequacy of this award, requested a hearing, contending that he was permanently and totally disabled.

At the hearing the attorney for the Fund in his opening statement stated that the Fund was not accepting responsibility for any condition other than the hernia even though it had paid all of the medical and hospital bills and had periodically paid compensation for temporary total disability up until the time it was allowed to cease such payment, pursuant to the Determination Order of May 25, 1976. After hearing this opening statement, the Referee ruled that the only issue before him at the hearing would be that of compensability of the four conditions for which the Fund, at that time, denied responsibility; that the issue of extent of disability would be premature.

The Referee found, based upon Dr. Langston's testimony, that claimant's back condition, diagnosed as an acute lumbosacral strain superimposed on degenerative disc disease at L5-S1, and for which a fusion was performed on January 5, 1975, was aggravated and produced by the October 17, 1974 injury. He found, based upon Dr. Evan's report of July 2, 1975, that claimant's peptic ulcer was probably related and complicated by the use of Empirin #3 which was medication prescribed for claimant's back condition.

Dr. Bennett, a psychiatrist, indicated on February 20, 1976 that claimant needed further supportive psychiatric help to aid him in adjusting to the chronic disabilities which he had but to which he had adjusted to very poorly. Dr. Pasquesi was of the opinion that claimant had a considerable physical disability but that the remaining disability was on a psychiatric or internal medicine basis or possibly both.

Claimant testified that he had had hemorrhoids in the past but after his industrial injury this condition worsened and extensive treatment was required. Both Dr. Parcher and Dr. Sullivan indicated that this condition of anal fissure was, within the realm of medical reasonability, industrially related.

Based upon the medical evidence, the Referee concluded that not only was the Fund responsible for claimant's hernia but also responsible for the other four conditions. He further concluded that the Fund's failure to either accept or deny these conditions, even though it did pay the medical expenses and compensation for temporary total disability, represented an unreasonable refusal to accept or deny the claims, therefore, subjected the Fund to penalties for such inaction. He assessed a penalty and also awarded claimant a reasonable attorney fee.

The hearing was requested by claimant on the issue of the adequacy of the Determination Order of May 25, 1976, however, because of the Fund's denial of all except the hernia condition made for the first time in the opening statement of counsel for the Fund, the Referee found that conceivably claimant might be denied his right of appeal from the aforesaid Determination Order and, therefore, the time for appeal of said Determination Order should be tolled effective the date of the hearing, until such time as a final decision on the issues before him, namely compensability of claimant's condition other than the hernia, is made.

The Board, on de novo review, of this rather unique case, concludes that the Referee had no choice but to treat the Fund's position as a denial or rejection of all the conditions other than the hernia condition. The Referee, having found, based upon the medical evidence, that such conditions were compensable, properly assessed penalties and awarded an attorney fee payable to claimant's attorney pursuant to ORS 656.386.

The Board affirms the Referee's order in its entirety.

ORDER

The order of the Referee, dated September 16, 1976, is affirmed.

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

WCB CASE NO. 75-687 FEBRUARY 17, 1977

MAURINE BAKER, CLAIMANT
Carl Brumund, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests Board review of those portions of the Referee's order which set aside the Determination Order dated June 25, 1975 and awarded an excessive attorney fee. The Referee had found that the claim was prematurely closed and should be reopened with payment of workmen's compensation benefits, including time loss, from June 6, 1974 until claim closure pursuant to ORS 656.268, and claimant be offered psychiatric treatment by a psychiatrist of her choice; that claimant's counsel be paid as a reasonable attorney fee 25% of the compensation payable to claimant as a result of the reopening of her claim, payable out of said compensation as paid, not to exceed $750 and an additional attorney fee equal to 25% of any additional award for permanent partial disability claimant might receive as a result of subsequent action by the Evaluation Division of the Board; the total fee, including that payable from the compensation for temporary total disability and the potential payment for permanent partial disability not to exceed $2,000.

Claimant suffered a compensable injury on October 11, 1973 when she was in the employ of the Salem Public Schools, working in the school cafeteria. Claimant testified she worked as long as possible following the accident but developed such pain she had to quit work and was examined by Dr. Peterson, who on October 29, 1973, noted complaints of headache, and pain in the arm and back. He diagnosed a sprain of the cervical dorsal spine and subsequently referred claimant to Dr. Chester, an orthopedic surgeon.

Claimant has a 7th grade education and her work experience was limited to that of a waitress until she became a cafeteria aide with the Salem schools approximately three years prior to her injury. Claimant testified she does not now feel physically able to perform any of the work she had done previously; she stated that she never had been nervous prior to her injury but immediately thereafter the pain had produced nervousness and now she was unable to concentrate and becomes upset over the most minor matters.

Dr. Chester examined claimant on December 13, 1973 and noted mild limitation of motion due to guarding and also a mild dorsal kyphosis but said the examination did not reveal any neurological impairment and that probably claimant had a pre-existing degenerative arthrosis in her cervical and upper dorsal spine. He referred claimant to the Disability Prevention Division.

Dr. Van Osdel, after examining claimant at the Disability Prevention Division on June 6, 1974, was of the opinion that claimant could do some types of employment. He found the contusion of the dorsal spine had been resolved and there was no objective evidence of nerve root compression or irritation. There was minimal aggravation of back anxiety state superimposed on a chronic moderate anxiety neurosis. He felt claimant's condition was stationary and no further orthopedic treatment was indicated.

On June 25, 1974 claimant's claim was closed by a Determination Order which awarded compensation for time loss only.

On March 11, 1975 Dr. Freeman, a chiropractic physician, advised the Fund he had concluded that as a result of claimant's fall she had sustained injuries to the supporting ligamentous structures of the spine which had allowed spinal subluxations to develop which were the prime cause of claimant's present condition and he recommended that the claim be reopened to allow chiropractic care to correct claimant's condition.

On July 14, 1974 claimant was examined by Dr. Furlong, a psychiatrist, who was of the impression that claimant was experiencing a depressive neurosis at that time; he found objective evidence of some degenerative disc disease and arthritis of her spine. Although claimant might experience some discomfort due to her chronic problems with arthritis and degenerative disc disease, he doubted that such discomfort could be nearly as disabling if she had not had the industrial injury in 1973. He felt that claimant had truly believed that she was in pain and discomfort to an extent that it was disabling to her, and also that effective psychiatric treatment for anxiety and depression symptoms would improve considerably her chances for successful rehabilitation.

Dr. Smith, a psychiatrist, who examined claimant on March 1, 1976, felt claimant was not in need of medical treatment for the "mild residuals of her formerly more severe depression which was caused by her industrial accident." He thought claimant had a psychophysiological muscular skeletal disorder, mild, due to the industrial injury but was not improving subjectively under her chiropractor.

The Referee concluded that the Evaluation Division of the Board apparently closed the claim on the basis of Dr. Van Osdel's appraisal and he doubted the appropriateness of such closure without having had an opinion from the treating physician as to whether he concurred with Dr. Van Osdel, both as to whether claimant was medically stationary and as to whether the residuals from the contusion of the dorsal spine were fully resolved. Dr. Chester's report, made shortly before claimant was referred to the Disability Prevention Division, indicated that claimant was, at that time, entirely unable to do anything in the way of work either around the house or around the yard without being completely incapacitated by pain and stated that claimant was not released for work at that time because he was still treating her and anticipated further treatment for several weeks duration.

The Referee finally concluded that the preponderance of the evidence demonstrated that the claim was prematurely closed.

The Board, on de novo review, finds no conflict between the earlier report from Dr. Chester and the report of Dr. Van Osdel, dated June 6, 1974. There seems to be a conflict with respect to claimant's psychiatric and psychological problems. Dr. Furlong feels that effective psychiatric treatment for claimant's anxiety and depressive symptoms might improve her chances for successful rehabilitation, however, he based his opinion on the assumption that claimant had not been stationary medically since her October, 1973 injury as concerns her psychiatric condition. The Board finds that this is not sufficient medical evidence to justify a conclusion that the claim was prematurely closed; under the provisions of ORS 656.245 claimant can receive whatever psychiatric treatment is deemed necessary by any psychiatrist she may choose.

ORDER

The order of the Referee, dated August 2, 1976, is reversed.

The Determination Order mailed June 25, 1974 is affirmed.

Claimant is entitled to receive, pursuant to the provisions of ORS 656.245, such psychiatric treatment as may be recommended by a psychiatrist of her choice.

WCB CASE NO. 74-4033 FEBRUARY 17, 1977

LOUISE CONN, CLAIMANT
Stephen Brown, Claimant's Atty.
Philip Mongrain, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of the Referee's order which found claimant to be permanently and totally disabled as of the date of his order, November 24, 1975.

Claimant had suffered a compensable injury on November 29, 1972. Dr. Goodwin, an orthopedist, examined claimant on December 18, 1972 and found a grossly unstable low back. He performed a laminectomy for excision of extruded disc L4-5, decompression nerve root and a laminectomy and decompression nerve root L5-S1 and a spinal fusion L4 to the sacrum on January 27, 1973.

A psychological evaluation of claimant revealed average intelligence and moderately severe depressive reaction which was moderately related to the industrial injury, the prognosis was fair to poor. The Back Evaluation Clinic diagnosed post-status spinal fusion and light laminectomy with removal of the disc between L4 and L5 on the left and chronic lumbar sprain and pain syndrome. They found loss of function of the back due to the injury was moderate.

In June, 1974 claimant was examined by Dr. Remy, a family practitioner, who felt claimant's condition was essentially unchanged and he did not think claimant could work. On July 17, 1974 Dr. Short, an orthopedist, advised claimant against returning to her former work in the plywood mill and to discontinue the use of Percodan. Claimant was also seen by Dr. Raaf, a neurosurgeon, who agreed with Dr. Short and indicated that it was possible that another fusion should be done, he doubted that claimant had a protruded intervertebral disc. Both Dr. Short and Dr. Raaf found that although claimant thought she had pseudoarthrosis of her fusion in fact she had a solid fusion.

A Determination Order was mailed on September 25, 1974 which awarded claimant compensation for time loss and 160 degrees for 50% unscheduled low back disability. Following this claim closure claimant was examined by Dr. Singer, his impression was that of an acute and chronic low back pain, status post-lumbosacral fusion with possibility of pseudoarthrosis. Dr. Singer indicated a possibility of a referral to the Pain Rehabilitation Center.

A supervising counselor for industrially injured employees testified that claimant was unretrainable. Claimant was found to be ineligible for vocational rehabilitation services because she was not job ready nor trainable.

The Referee found that claimant's complaints made at the hearing of constant pain in the low back just above the tailbone which radiated up her back and down the outside of her left leg were corroborated by the testimony of the daughter who lived with her. Claimant also had complained that she had to take pain pills and lay down on an extra firm bed if she tried to make beds or operate a vacuum cleaner. She stated it was necessary for her to take Empirin #3 and aspirin for relief and that she was unable to walk more than a couple blocks without experiencing a "grinding motion" in her back nor was she able to stand for prolonged periods of time and had difficulty sleeping.

The Referee found no reason to question claimant's credibility or motivation and, after taking into account her age, education, training and adaptability and potential, together with the residuals of her industrial injury, concluded that she was unable to work gainfully, suitably and regularly and, therefore, was permanently and totally disabled.

The Board, on de novo review, believes the medical evidence is not sufficient to support a finding that claimant is now permanently and totally disabled. The doctors at the Back Evaluation Clinic found loss of function of the back due to the injury as moderate. Although they did not feel that claimant was able to return to her former occupation, they did believe she was capable of doing light activities which imposed no stresses to her back, such as sales work, clerical work, etc.

Dr. Perkins, after a psychological evaluation of claimant, found claimant was experiencing a moderately severe depression reaction with anxiety and some focus on physical symptoms. Claimant's husband, to whom she had been married since she left high school at the conclusion of her 11th year, had died in November, 1973 and two weeks later her father died. Obviously, a significant portion of claimant's depressive upset was related to the loss of these family members. Dr. Perkins' prognosis for restoration and rehabilitation of claimant was fair to poor, considering all of the factors.

Claimant lives in an area where there are few light work jobs available and she doesn't feel that at the present time she could hold down any full time job nor does she feel that her condition is improving, however, according to Dr. Perkins, claimant realizes that emotionally it would be much better for her to return to work if it was possible. Dr. Perkins recommended that claimant be referred for personal counseling as a part of her rehabilitation program.

The Board concludes that claimant who, at the present time, is in her early 50's, has completed 11 grades of school, has an average intelligence and whose occupational experience includes working for six years as a checker in a grocery store, can not be considered unable to work gainfully, suitably and regularly. The award of 160 degrees for 50% of the maximum allowable by statute for unscheduled low back disability has

adequately compensated claimant for her loss of wage earning capacity resulting from the industrial injury.

However, the Board strongly urges that some program of vocational rehabilitation be instituted for claimant to enable her to return to the labor market doing lighter types sedentary work. This would be to her advantage emotionally and would be within her physical capabilities. The Board suggests that perhaps a program under the auspices of the Division of Vocational Rehabilitation might be financially augmented by the carrier.

ORDER

The order of the Referee, dated November 24, 1975, is reversed.

The Determination Order of September 25, 1974, is affirmed.

The carrier may apply payments of compensation for permanent total disability made pursuant to the Referee's order on payments of compensation for permanent partial disability awarded by this order.

WCB CASE NO. 76-1084 FEBRUARY 18, 1977
WCB CASE NO. 76-1859

DAVID BRANDT, CLAIMANT
Robert Hamilton, Claimant's Atty.
Mel Kosta, Defense Atty.
Stanley Jones, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer, D.G. Shelter Products, requests review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation commencing December 19, 1975 and affirmed the denial issued by BeeHive Auto Lease.

This case involves two employers; the issue is: which is responsible for claimant's present condition?

On December 20, 1974 claimant, while employed by BeeHive Auto Lease, slipped and injured his right knee. Claimant was treated conservatively by Dr. Lilly; after one month claimant had full pain-free motion in that leg. Claimant was off work two weeks then returned and worked until the summer of 1975 when he quit.

Claimant next took a job which required walking up to 15 miles a day; claimant experienced no difficulty doing this job. In December, 1975 claimant began working as a cleanup man for D.G. Shelter Products. On December 19, 1975 claimant bent over and his right leg snapped, causing intense pain.

Claimant returned to Dr. Lilly who performed surgery on January 7, 1976. Claimant was off work six to eight weeks. He filed claims against both employers.

D.G. Shelter Products, a self-insurer, denied claimant's claim for the December, 1975 incident; BeeHive Auto Lease and its carrier, Universal Underwriters Insurance,

also denied responsibility, contending claimant suffered a new injury.

The Referee found that Dr. Lilly's ultimate testimony corroborated claimant's that he had fully recovered from the first incident with no objective signs of permanent disability; however, after the second incident surgery was required and claimant was left with permanent disability. The Referee found the second incident contributed independently to that disability even though claimant's condition thereafter would have been less severe without the first incident.

The Referee concluded that the December, 1975 incident which occurred while claimant was employed by D.G. Shelter Products lighted up, aggravated and made symptomatic a pre-existing condition and, therefore, D.G. Shelter Products was responsible for claimant's condition. He remanded the claim to D.G. Shelter Products.

The Board, on de novo review, finds that Dr. Lilly, in his report of April 1, 1976, was of the opinion that claimant's primary injury occurred while claimant was employed by BeeHive Auto Lease and was aggravated in December, 1975 while claimant was employed at D.G. Shelter Products. Dr. Lilly based his opinion on the fact that claimant has a problem of chondromalacia of the patella and had some loose bodies in his joint which were removed, and the type of injury that occurred at BeeHive Auto Lease was the type of injury which would cause this whereas the injury that occurred while claimant was employed at D.G. Shelter Products would not have caused this type of condition. Dr. Lilly also testified that without the previous injury the type of injury suffered in December, 1975 would not have occurred.

The Board, therefore, concludes that claimant's basic injury resulted from the incident of December 20, 1974 and the incident of December 19, 1975 was an aggravation of this 1974 injury and, therefore, the responsibility of BeeHive Auto Lease. Claimant had thought he had suffered a new injury on December 19, 1975 based on Dr. Lilly's initial impression and expressed opinion, and the Board agrees with the Referee's conclusion that claimant had established at the hearing good cause for his failure to request a hearing within 60 days after BeeHive Auto Lease's denial.

ORDER

The order of the Referee, dated August 23, 1976, is reversed.

Claimant's claim is remanded to BeeHive Auto Lease for acceptance and payment of compensation, as provided by law, commencing December 19, 1975 until closure is authorized pursuant to ORS 656.268.

D.G. Shelter Products shall be reimbursed by BeeHive Auto Lease, and its carrier, Universal Underwriters Insurance, for all the compensation which the former has paid to claimant pursuant to the Referee's order of August 23, 1976.

Claimant's attorney shall receive an attorney fee of $800. If this fee has been paid by D.G. Shelter Products, then BeeHive Auto Lease shall reimburse D.G. Shelter Products, if it has not been paid then such fee shall be paid by BeeHive Auto Lease.

Claimant's attorney shall receive for his services at Board review, an attorney fee of $450, payable by BeeHive Auto Lease.

SHIRLEY FOX, CLAIMANT
Brian Welch, Claimant's Atty.
Merlin Miller, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer requests review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation as provided by law.

In early 1974 claimant, a grocery checker, began to have problems with her hands. On May 10, 1975 Dr. Harder performed surgery for tenolysis long abductor, right thumb. Her claim for right thumb and hand was accepted. In September, 1974 Dr. Harder found claimant's condition stable.

On October 18, 1974 Dr. Harder diagnosed instability of the first carpometacarpal joint bilaterally with chronic strain of the hands.

On September 12, 1975 Dr. Nathan examined claimant and found osteoarthritis in both thumbs. He indicated the changes in the carpometacarpal joint were more severe in claimant's left thumb than in the right. He stated the changes in the thumb was long standing and her employment aggravated the symptoms in the right hand. Dr. Nathan believed the symptoms of claimant's right hand demonstrated a causal relationship to her employment but this was not true with respect to the left hand. On October 7, 1975 the carrier denied responsibility for the left hand.

On December 10, 1975 Dr. Nathan performed surgery for an implant arthroplasty, right thumb.

In May, 1976 Dr. Cohen said the problem with both of claimant's thumbs were related to her employment. Dr. Nathan, in his deposition, indicated claimant's work activities would aggravate a pre-existing osteoarthritic condition of the left hand.

The Referee found that the preponderance of the medical evidence supported claimant's contention that her pre-existing osteoarthritic condition of the left hand was aggravated by her work as a grocery checker.

The Referee remanded claimant's claim to the employer.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 1, 1976, is affirmed.

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

ROBERT E. MCFARREN, CLAIMANT
Keith Tichenor, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund requests review of the Referee's order which granted claimant an award of 97.5 degrees each for bilateral loss of his forearms, a total of 195 degrees.

Claimant, 40 years of age, had worked for the employer 11 years prior to the commencement of his problems. About October, 1971 claimant became aware of an itching, irritating swelling of two fingers of his right hand. He went to the Veterans Hospital where the condition was diagnosed as contact dermatitis. On June 5, 1972 his claim was closed without any award for temporary total disability or permanent partial disability compensation.

On May 9, 1973 claimant was unable to continue his work and saw Dr. Dahl who recommended claimant stop working until his symptoms disappeared. In March, 1974 Dr. Dahl indicated claimant could return to work in another occupation.

In February, 1975 claimant was examined at the Disability Prevention Division where it was felt claimant could not return to any occupation where he would be exposed to extremes of hot and cold temperatures nor to a job requiring wearing of gloves or involving contact with strong detergents, chemicals and petroleum products.

A Determination Order of June 26, 1975 granted claimant 22.5 degrees each for bilateral loss of his forearms, a total of 45 degrees.

In July, 1974 claimant returned to his regular job, his symptoms reoccurred and claimant took a job as security guard until May, 1976. He then went to work for the Washington County Road Department and his symptoms reappeared and again his physician recommended claimant cease working. Claimant has not returned to any employment since that time.

The Referee found claimant was able to handle the security guard position without any difficulty but quit due to the low pay. The Referee found claimant's disability was restricted to the distal portion of claimant's upper extremities and concluded claimant had lost 65% function of each forearm, and awarded claimant 195 degrees for such losses.

The Board, on de novo review, finds that claimant's disability is strictly in the scheduled area and the only criterion for evaluating a scheduled member is permanent loss of function of that member. The Board finds that claimant's symptoms disappear whenever he removes himself from the exposure which causes the dermatitis, therefore, the Board concludes claimant has suffered no permanent loss of function of either forearm and is not entitled to any award for permanent partial disability. The effect of claimant's condition on his ability to earn a livelihood cannot be considered.

ORDER

The order of the Referee, dated July 21, 1976, is reversed.

LON ARNOLD, CLAIMANT
Keith Tichenor, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the denial of claimant's claim by the State Accident Insurance Fund.

Claimant had worked 29 years as a groundsman for the employer. On Friday, August 16, 1974 claimant was digging in soft sand and, after 15 minutes of such digging, he felt a burning pain in his chest radiating into his shoulders and arms coupled with light headedness and nausea, and heavy perspiration. The symptoms were not relieved when he ceased work but claimant left his job and returned home where he took aspirin and an antacid and a nap. When he awoke he was free of pain. The following day, a Saturday, he commenced mowing his lawn and soon suffered the same symptoms, relief was obtained by rest, aspirin, etc., Sunday, claimant felt alright at the beginning of the day and again commenced to mow his lawn; again he suffered symptoms and again obtained relief by resting, aspirin, etc. On Monday claimant was showering before departing to keep an appointment with the doctor which his wife had previously made for him when he was again seized with the same symptoms which were not relieved this time until he took some of his wife's nitroglycerin.

Dr. Simmons saw claimant later that same day and found an abnormality in his EKG and hospitalized claimant in the intensive care unit as a possible victim of a myocardial infarction.

Dr. Simmons was persuaded by the tests taken at the hospital that claimant had, in fact, had an infarct which could have occurred anywhere from 48 to 72 hours before he saw claimant on August 19. It was his opinion that the condition for which he treated claimant on August 19 and thereafter was causally related to claimant's work activity on August 16, 1974; that probably claimant had suffered an infarct on that date.

Claimant had no known heart problems prior to about one week before August 16, 1974, however, he has an underlying coronary artery disease, complicated by diabetes mellitus.

Dr. Griswold, a cardiologist, after examining claimant's medical records and listening to claimant testify was unsure whether an infarct had occurred at all or whether claimant suffered severe ischemia. It was his opinion that the condition for which claimant was treated on August 19, 1974 could have resulted from work activities done on the previous Friday, Saturday or Sunday, but he doubted that the work done on the previous Friday was responsible. He thought the EKG's taken on August 19 and thereafter reflected the effects of an aggravation of the underlying coronary artery disease by diabetes mellitus rather than from a recent infarct.

The Referee was more persuaded by the testimony of Dr. Griswold even though Dr. Simmons was the treating physician. The Referee felt that the most important answer of whether or not this was a work related condition was contained in the interpretation of the EKG's and the enzymes studies and that Dr. Griswold had far more experience in

this field. He concluded that claimant had failed to carry his burden of proving he had suffered a compensable injury.

The Board, on de novo review, finds that claimant first suffered chest pains, light headedness, nausea and heavy perspiring while digging in the soft sand on Friday, August 16, 1974, and that on the following two days claimant experienced identical symptoms on slight exertion and on the third day, without any exertion, claimant suffered symptoms which were of a severity to require the intake of nitroglycerin to relieve the pain.

Claimant proved legal causation; i.e., he was on the job exerting the usual stress hand shoveling and was working until he was stricken with the chest pains, etc. With respect to medical causation, the Board is more persuaded by the testimony of the treating physician, Dr. Simmons, who stated that claimant had suffered a myocardial infarction sometime within 48 to 72 hours before he examined him on August 19 and that it probably had occurred on August 16, and that claimant's work activity on that date was a material contributing factor to his myocardial infarction. Dr. Simmons is an internist and he is quite capable of correctly studying and interpreting EKG's and making serum enzyme studies, and he did.

Dr. Griswold's opinion appears to overlook the unbroken sequence of chest pain caused by slight exertion from the time of the digging incident on August 16 and the discovery by Dr. Simmons on August 19 that claimant had suffered a myocardial infarction. The claim should be accepted as a compensable injury.

ORDER

The order of the Referee, dated June 16, 1976, is reversed.

Claimant's claim is hereby remanded to the Fund for acceptance and payment of compensation, as provided by law, commencing August 16, 1974 until closure is authorized pursuant to ORS 656.268.

Claimant's attorney is granted as a reasonable attorney fee for his services before the Referee the sum of $850, payable by the Fund.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services at Board review, the sum of $450 payable by the Fund.

WCB CASE NO. 76-2913 FEBRUARY 18, 1977

LAWRENCE INGRAM, CLAIMANT
Dan O'Leary, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer requests review by the Board of the Referee's order which awarded claimant 112 degrees for 35% unscheduled low back disability.

Claimant, a truck driver, sustained a low back injury on August 10, 1973 and underwent a long course of conservative treatment. A Determination Order of April 29, 1974 granted claimant time loss only.

Claimant subsequently sustained an unrelated eye injury and can no longer qualify under I.C.C. requirements to drive a truck on interstate hauls.

Claimant underwent training for vocational rehabilitation and now owns his own T.V. repair shop. Claimant testified he has limitations in lifting T.V. sets; in standing for short periods of time; that he has to avoid bending and avoids service calls; and works mostly at his bench.

On March 22, 1976 claimant was examined by Dr. Duff who diagnosed chronic lumbosacral muscular and ligamentous strain and found mild permanent disability. A Determination Order of April 13, 1976 granted claimant an award of 16 degrees for 5% unscheduled disability.

The Referee found claimant to be highly motivated but his earnings from his business is presently limited because claimant is just getting established. Furthermore, claimant cannot return to any type of truck driving because of his back condition; without this claimant could qualify for and do intra-state hauling.

The Referee concluded claimant has lost considerable wage earning capacity and increased claimant's award to 112 degrees for 35% unscheduled disability.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 28, 1976, is affirmed.

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

WCB CASE NO. 76-3733 FEBRUARY 18, 1977

JOHN FRANTZ, CLAIMANT
Sidney Galton, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of July 9, 1976. Claimant contends he is permanently and totally disabled or, in the alternative, entitled to a greater award.

Claimant, 47, has a grade school education and received training at Portland Community College in janitorial and custodial work. Prior to this he had worked primarily as an agricultural field picker.

Claimant sustained a compensable injury on July 30, 1975, diagnosed as acute herniated cervical disc, right C6-7 affecting the C7 nerve root to a significant degree. On August 27, 1975 Dr. Franks performed an anterior cervical discectomy and fusion. The claim was first denied and later accepted.

A Determination Order of July 9, 1976 granted claimant an award of 16 degrees for 5% unscheduled neck disability.

Claimant returned to his old job, however, he testified that he had to work somewhat slower. On July 19, 1976 the employer, stating that claimant's job was too strenuous for claimant's claimed disability, fired him. Claimant has been unable to find work since, although he has filed 13 applications and phoned 14 more prospective employers. Claimant is now collecting unemployment benefits.

The Referee found, based on the evidence, that it was impossible to find claimant permanently and totally disabled. He concluded that claimant's inability to obtain employment might be based partly on the employer's attitude but this inability is not due to the injury. He affirmed the Determination Order.

The Board, on de novo review, finds claimant is entitled to a greater award of permanent partial disability than that granted by the Determination Order because claimant has lost his ability to enter a certain segment of the labor market which had previously been available to him. It concludes that claimant is entitled to an award of 48 degrees for 15% unscheduled disability for his loss of wage earning capacity.

ORDER

The order of the Referee, dated September 27, 1976, is modified.

Claimant is hereby granted an award of 48 degrees of a maximum of 320 degrees unscheduled neck disability. This award is in lieu of the award previously granted by the Determination Order dated July 9, 1976.

Claimant's counsel is granted as a reasonable attorney fee a sum equal to 25% of the additional compensation for permanent partial disability granted by this order, not to exceed $2,300.

WCB CASE NO. 75-538 FEBRUARY 18, 1977

HARLEY PARKER, CLAIMANT
Ralph Sipprell, Claimant's Atty.
Don Swink, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant an additional award of 96 degrees, making a total award to claimant of 192 degrees for 60% unscheduled disability. Claimant contends he is permanently and totally disabled.

Claimant, 57, has worked all his adult life either as a mechanic or a welder. He sustained a compensable injury on November 27, 1973. On February 7, 1974 Dr. Harder performed a hemilaminectomy with excision of disc and decompression of the first sacral nerve root on the right. On March 14, 1974 Dr. Harder indicated claimant will have a moderate degree of permanent disability and he should now avoid heavy lifting, excessive bending, or placing any undue strain on his back.

A Determination Order of August 30, 1974 granted claimant 32 degrees for 10%

unscheduled low back disability. Claimant continued to have problems and on November 1, 1974 Dr. Harder performed another laminectomy L4-5 on the right.

Claimant was examined by Dr. Van Osdel at the Disability Prevention Division on February 27, 1975, he recommended a job change for claimant.

Claimant was referred to vocational rehabilitation but his training program was complicated by claimant's indulgent use of alcohol and Valium. He finished his light welding course but has not found employment.

On September 9, 1975 Dr. Harder indicated claimant could return to light employment. A Determination Order of November 28, 1975 granted claimant an additional award of 64 degrees for 20% unscheduled disability.

The Referee found claimant had numerous other physical problems unrelated to his industrial injury; however, claimant is capable of performing light welding jobs for which he has been trained but seems to lack motivation. He concluded that the medical evidence did not support a finding that claimant was permanently and totally disabled, but claimant was now precluded from many job opportunities in the labor market and to compensate him for his loss of wage earning capacity the Referee granted an additional award of 96 degrees.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 26, 1976, is affirmed.

WCB CASE NO. 76-3019 FEBRUARY 18, 1977

MICHAEL HILLMAN, CLAIMANT
Donald Hull, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review of the Referee's order which denied claimant's request for temporary total disability benefits, penalties and attorney fees, and dismissed the case.

Claimant sustained a compensable injury on September 26, 1975 and was off work three days. Claimant was then released for modified work at full salary. On December 10, 1975 claimant was released to regular work.

On January 10, 1976 claimant was tightening nuts with a wrench (a different job than his regular one) when he experienced a recurrence of pain symptoms. Claimant was returned to his regular work and worked until February 9, 1976. Claimant left this employment because of a dispute in no way connected with his industrial injury. Claimant then went on unemployment.

Claimant testified he obtained full release to work from Dr. Staver because his union grievance man told him if he didn't return to regular employment he would be

replaced. The union grievance man had no authority to speak for the employer. Claimant further testified he cannot now lift weight or pull with his right shoulder.

In January, 1976 Dr. Pasquesi examined claimant and found claimant had no impairment, his strain was not completely healed but claimant could return to his regular job.

The Referee found that penalties and attorney fees were unjustified and, furthermore, if claimant had returned to work too soon, according to his own testimony, it was claimant's fault.

The Referee concluded that but for claimant's job termination claimant could still be working at his regular employment.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 31, 1976, is affirmed.

WCB CASE NO. 76-705 FEBRUARY 18, 1977

JAMES KLEATSCH, CLAIMANT
Allan Coons, Claimant's Atty.
Frank Lagesen, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant an award of 32 degrees for 10% unscheduled head and eye disability. Claimant contends this award is inadequate.

Claimant, a 35 year old service station manager at the time of his accident, sustained a compensable injury when he was hit over the head on May 7, 1973 during a robbery of the service station.

Claimant returned to his job and was subsequently fired -- not because of his injury but because it was the policy of the employer to dismiss any manager whose station was robbed.

At a prior hearing the Referee had found claimant was not entitled to any further temporary total disability or temporary partial disability compensation because claimant was physically able to return to work on May 9, 1973. On review the Board remanded the determination of permanent partial disability to its Evaluation Division. On January 29, 1976 a Determination Order granted claimant no compensation for permanent partial disability. Claimant, thereafter, went to work as a painter, but had to give it up due to headaches.

Claimant is now working as a cook, getting along reasonably well but has some difficulties with his eyes and continues to have headaches of which he has complained since his industrial injury. Claimant also has a pre-existing condition of epilepsy.

The Referee found, based on the medical evidence, that claimant's headaches and part of his eye problems were a result of his injury. The question is whether claimant lost any wage earning capacity as a result of these conditions.

The evidence indicates that if claimant could have returned to his service station manager job he probably could have performed the job. He turned to painting, an occupation in which he had prior experience. Claimant did miss time from work because of his headache problems, thus the impairment did affect his ability to work to some degree.

The Referee concluded claimant's eye problems and headaches caused minimal effects on claimant's ability to earn a living. Therefore, he granted claimant an award of 32 degrees for 10% unscheduled disability.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 2, 1976 is affirmed.

WCB CASE NO. 76-633 FEBRUARY 18, 1977

GUDMUN JOHANNESSEN, CLAIMANT
Hayes P. Lavis, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted him an award of 96 degrees for 30% unscheduled disability.

Claimant sustained compensable hand and low back injuries on August 5, 1974, diagnosed as contusion of the right hand and sprain of the mid-lower back. Dr. Cherry, on September 9, 1974, hospitalized claimant and on September 24, 1974, he performed a lumbar laminectomy at L5-S1 with removal of the herniated disc.

On July 7, 1975 Dr. Pasquesi examined claimant and found him medically stationary but not vocationally stationary. Dr. Pasquesi rated claimant's disability at 15% of the whole man.

On January 23, 1976 a Determination Order granted claimant 48 degrees for 15% unscheduled low back disability.

On February 16, 1976 Dr. Cherry reported claimant has a small amount of localized osteoarthritis. He rated claimant's physical impairment at 35% of the whole man. Claimant had been to vocational rehabilitation but was now working as an estimator for construction projects.

The Referee found claimant was entitled to an award for his disability greater than that granted by the Determination Order because of his substantial loss of wage earning capacity, i.e., claimant is now precluded from performing in the heavy labor market. The Referee concluded claimant was entitled to an additional award of 48 degrees.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 12, 1976, is affirmed.

WCB CASE NO. 76-3308 FEBRUARY 18, 1977

JESSIE E. HANSEN, CLAIMANT
Stipulation and Order of Dismissal

Whereas, claimant received a Determination Order on June 29, 1976, making no award for permanent partial disability as a result of injuries incurred while employed with the self-insured employer, Georgia-Pacific Corp., on September 11, 1974; and

Whereas, claimant appealed said Determination Order and, as a result of a hearing held in Portland on October 5, 1976, was awarded, by Opinion and Order, dated December 17, 1976, a total of 30% permanent partial disability as a result of the injuries suffered in the September 11, 1974, accident; and

Whereas, claimant has appealed said Opinion and Order and the employer herein has cross-appealed from said Opinion and Order; and

Whereas, the parties hereto desire to settle the issue of claimant's permanent partial disability flowing from the September 11, 1974, accident; and

Whereas, claimant and her husband plan to move to the State of Arizona and claimant is in need of receiving a lump sum settlement to facilitate said move. Claimant understands that receipt of her award in a lump sum will bar her from any further appeal of the Determination Order of June 29, 1976.

Now, therefore, it is hereby stipulated by and between the parties hereto that, in consideration for the dismissal of the employer's Cross-Appeal, the claimant shall dismiss her Request for Review dated January 6, 1977, and the employer shall support the claimant's request for a lump sum payment of the award of 30% permanent partial disability granted by the Opinion and Order of December 17, 1976, including lump sum payment of 25% ($1,680) attorney fees, and $200 in costs.

It is so stipulated.

Based upon the stipulation of the parties hereto, the claimant's Request for Review and the employer's Cross-Appeal thereon, are hereby dismissed and claimant's request for lump sum payment of the 30% permanent partial disability awarded granted by the Opinion and Order of December 17, 1976, is hereby approved. There shall be no further appeal from the Determination Order of June 29, 1976.

GERALDINE FOX, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable low back injury on April 14, 1967 which required extensive treatment, including surgery. Her claim was first closed by Determination Order on May 2, 1969 with an award of 48 degrees for 25% loss of an arm by separation for unscheduled disability.

Claimant's claim was reopened and closed again on April 23, 1970 with an additional award of 10 degrees unscheduled disability and 11 degrees for partial loss of left leg. Claimant appealed and the awards were increased to 124 degrees for unscheduled disability and 48 degrees for loss of left leg.

Claimant's claim was reopened for hospitalization and admission to the Physical Rehabilitation Center. Claimant was found eligible for vocational rehabilitation but she returned to her former occupation of power sewing machine operator despite medical advice to the contrary.

On September 10, 1971 a Third Determination Order granted claimant additional time loss only. Claimant appealed this Determination Order and received an additional 9 degrees from the Circuit Court.

The claim was reopened and a Fourth Determination Order granted claimant no additional compensation; again she appealed and was granted a total of 192 degrees equal to 100% unscheduled low back disability. The award for the left leg was found to be adequate. Claimant's aggravation rights have expired.

On December 5, 1975 claimant requested the Board to exercise its own motion jurisdiction and reopen her claim. On January 15, 1976 the Board remanded claimant's claim to the State Accident Insurance Fund for further medical treatment as recommended by Dr. McKillop.

On December 15, 1976 the Fund requested a determination. The Evaluation Division of the Board recommends, based upon the medical reports submitted, that claimant receive compensation for temporary total disability from February 24, 1975 through January 25, 1977.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from February 24, 1975 through January 25, 1977.

DONZELL FLANAGAN, CLAIMANT
Peter Davis, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of February 7, 1975.

Claimant, a steadyman for the employer, sustained a compensable injury on November 12, 1974 when he was involved in an altercation with another employee; he was struck with a heavy piece of metal in the right groin. Claimant was never the aggressor in this incident but was fired by the employer because of company policy. Claimant testified he would have returned to work after the accident if he had not been terminated.

On December 27, 1974 Dr. Harder indicated there was no physical evidence of abnormality and no treatment was necessary for claimant.

A Determination Order of February 7, 1975 granted claimant time loss only.

Dr. Harder again examined claimant on April 10, 1975 and found no objective findings; he stated claimant was not cooperating with him in the course of the examination and claimant had no serious injury to his back. The doctor felt claimant was malingering and had suffered no damage from this injury.

On October 13, 1975 Dr. Mintz diagnosed a contusion, right thigh and lumbar strain.

The Referee found, based upon the medical evidence, that claimant had failed to prove he has suffered any permanent partial disability. He found claimant and his witnesses lacked credibility.

The Board, on de novo review, agrees with the conclusions reached by the Referee.

ORDER

The order of the Referee, dated August 31, 1976, is affirmed.

In the Matter of the Compensation of
JAMES A. FAGNAND, CLAIMANT
And in the Complying Status of
NEW PUEBLO, INC., EMPLOYER
Rolf Olson, Claimant's Atty.
Dale Pierson, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer requests review by the Board of the Referee's order which made the proposed order in The Matter of the Compensation of New Pueblo, Inc., employer, executed on December 2, 1975, a final order.

The issues are whether New Pueblo Inc., was a non-complying employer on September 30, 1976 and whether claimant was a subject employee.

On September 30, 1975 claimant sustained an injury when a trench wall collapsed on him. There is no dispute over the injury or the fact that New Pueblo Inc., carried no workmen's compensation insurance coverage the time of the injury.

New Pueblo Inc., is a corporation with stock ownership split between two persons, Mr. McDougal, president of the corporation, and Mr. Case whose principal business is owner of the Hub Bar. At the time of the injury New Pueblo Inc., engaged a Harold Mitchell to install water lines and a drainage and sewer system for a project in Monmouth. According to Mr. McDougal, Mitchell and New Pueblo Inc., were entered in a joint enterprises on this project. The work was divided between the two, with New Pueblo Inc., doing the ditching and filling and Mitchell being responsible for the laying of pipe for sewer and water lines and construction of manholes. However, the evidence indicates New Pueblo Inc., was involved in some of the other tasks assigned to Mitchell.

On the date of the injury claimant stopped at the Hub for a cup of coffee. Case and claimant were friends and at this time Case asked claimant to help him work on his farm. At an earlier time Case had helped claimant put up some pre-fabricated walls. Subsequently McDougal, who was only a casual acquaintance of claimant's, arrived and asked claimant to come out to the job site and help him lift a fire hydrant.

When they arrived at the job site McDougal testified there was a backhoe there so he didn't need claimant to lift the hydrant; however, claimant did help fix the fire hydrant. This work was completed around 10 or 11 a.m. and then claimant just helped out doing minor chores.

McDougal testified that he did not explain to claimant about putting gravel around a sewer pipe McDougal had just repaired because it was obvious the work needed to be done. Claimant, however, testified that McDougal explained to him how to put the rock into the ditch and compact it around the pipe to avoid breakage. Claimant climbed into the ditch and the trench wall collapsed causing claimant's injury.

McDougal testified that claimant, by helping him, was just doing him a favor; pay was never discussed. However, McDougal stated he probably would have asked claimant what he owed him.

The Referee found that the weight of the evidence preponderates an implied contract

of employment. Pay was inferred, the tools used were provided by McDougal, there was no intimate relationship between McDougal and claimant, claimant worked under the instructions of McDougal and although claimant had committed himself to work for Case on his farm, McDougal had indicated Case would find McDougal's job more important.

The Referee concluded that the relationship between New Pueblo, Inc., and claimant was that of employer and employee and, therefore, New Pueblo Inc. was an employer subject to the provisions of the Workmen's Compensation Law and claimant was a subject employee who sustained a compensable injury on September 30, 1975.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 30, 1976, is affirmed.

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

WCB CASE NO. 76-238 FEBRUARY 22, 1977

WILLIAM GROVE, CLAIMANT
Ronald Thom, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of December 26, 1975, as amended on January 9, 1976. Claimant contends he is permanently and totally disabled.

Claimant was a 60 year old truck driver at the time of his industrial injury incurred when he was involved in a vehicle accident on August 24, 1972. Claimant continued working until August 28, 1972 and then sought medical treatment from Dr. Borman on September 1, 1972. Dr. Borman diagnosed lumbosacral strain and post-traumatic lumbar paraspinal myofascitis. On September 3, 1972 claimant was hospitalized for traction. Dr. Borman had performed a lumbar laminectomy two years prior.

A Determination Order of January 11, 1973 granted claimant time loss only; the claim was reopened at the request of claimant's doctor and closed by a Determination Order issued on July 31, 1973, again with time loss only.

On January 14, 1974 Dr. Ho examined claimant and diagnosed lumbar spondylarthritis with degenerative at L4-5 disc space. Dr. Ho indicated there would be permanent impairment of the low back. A Determination Order was entered on May 8, 1974 granting claimant an award of 208 degrees for 65% unscheduled low back disability.

On January 16, 1975 Dr. Miller performed a partial laminectomy with removal of herniated disc L4-5.

Claimant continued having symptoms and Dr. Miller felt, on November 14, 1975, that claimant was not medically stationary. Claimant's condition was the same as before the surgery.

A Determination Order of December 26, 1975, amended on January 9, 1976, granted claimant no further award for permanent partial disability.

Claimant testified he had been a truck driver for 46 years, 13 years with this employer. Claimant is now 64 years old.

The Referee found the medical evidence reveals claimant has moderate impairment due to his age and his injuries. Claimant is now precluded from heavy work involving bending and lifting and definitely cannot return to truck driving, although he can return to some other occupations.

The Referee found that claimant lacks motivation now that he is retired and he concluded that claimant has been adequately compensated for his loss of wage earning capacity by the award of 208 degrees.

The Board, on de novo review, agrees with the conclusions of the Referee.

ORDER

The order of the Referee, dated July 14, 1976, is affirmed.

SAIF CLAIM NO. EC 153101 FEBRUARY 22, 1977

ROBERT T. WILSON, CLAIMANT
Robert Haley, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

Claimant had suffered a compensable injury on October 11, 1968 while employed by Oregon Laundry whose carrier was the State Accident Insurance Fund. The claim was first closed by Determination Order dated February 10, 1971 and claimant's aggravation rights have expired. On April 22, 1976 claimant requested the Board to exercise its own motion jurisdiction and reopen his claim. The request was supported by reports from Dr. Gritzka dated March 31 and June 29, 1976.

The Fund was advised of the request and they responded on July 23, 1976, stating claimant injured his back on July 19, 1975 and had filed a claim therefor against his employer, Opera House Laundry, and its carrier, Fireman's Fund Insurance Company, this claim had been denied and claimant had requested a hearing. The Board was subsequently advised by claimant's attorney that the request for hearing on the July, 1975 incident had been settled by Stipulation and Order of Dismissal (WCB Case No. 76-1705).

The Board, at that time, did not have sufficient evidence to determine whether or not claimant's present condition was causally related to his October 11, 1968 injury, and the matter was referred to the Hearings Division with instructions to hold a hearing and take evidence on this issue.

On December 17, 1976 a hearing was held before Referee George Rode and, as a result of said hearing, Referee Rode found no evidence of any intervening injury and that the evidence of discomfort while claimant was working at the Opera House Laundry indicated only minor symptomatology. He concluded that claimant's present condition was causally related to the October 11, 1968 injury and, after furnishing the Board with a

transcript of the proceedings, on February 2, 1977, recommended that the Board accept claimant's request.

The Board, after reviewing the transcript of the proceedings, finds that Dr. Gritzka stated in his report of March 31, 1976 that he thought claimant's current condition was an aggravation of a pre-existing condition and as far as he could determine claimant's present condition was essentially the same as it was when he was treated by Dr. Eckhardt in 1972; however, Dr. Gritzka received the impression from talking to claimant that claimant's symptoms had decreased and, in fact, nearly disappeared between the time that he had been treated by Dr. Eckhardt and the current episode. This would indicate that claimant had suffered a new injury while working for Opera House Laundry and for which he had filed a claim. This independent intervening injury was the cause of claimant's present condition and the claim therefor was settled on a disputed claim basis in May, 1976.

The Board disagrees with the Referee's recommendation for the above reasons and concludes that claimant's present condition cannot be causally related to his 1968 injury.

ORDER

Claimant's request, dated April 22, 1976, that the Board pursuant to ORS 656.278, reopen his claim of the October 11, 1968 injury, is hereby denied.

WCB CASE NO. 75-5255 FEBRUARY 24, 1977

HAROLD WALKER, CLAIMANT
E. Scott Lawlor, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an award of permanent total disability as of July 9, 1976.

Claimant, a 58 year old truck driver, sustained a compensable head and left shoulder injury on August 24, 1971 when he was struck by a log. His condition was diagnosed as fracture of the left acromion, undisplaced fracture of the right distal fibula and undisplaced fractures of the left ribs and neck sprain.

A Determination Order of May 8, 1972 granted claimant 112 degrees unscheduled left shoulder disability and 38 degrees partial loss of left arm.

Claimant returned to work but his condition worsened and on March 22, 1974 claimant quit working.

On September 8, 1975 claimant was examined by the Orthopaedic Consultants who diagnosed axillary nerve palsy left shoulder, cervical degenerative arthritis, mild and hypertension. They felt that claimant cannot return to his regular occupation of truck driving in any capacity but could perform sedentary occupations. They found moderately severe loss of function of claimant's left shoulder all attributable to the 1971 injury.

A Determination Order of October 20, 1975 granted claimant an additional award for 48 degrees equal to 15% unscheduled neck and shoulder disability.

Claimant has an 8th grade education with no special training.

The Referee found that the medical opinions submitted did not consider such factors as company hiring policies, union contracts, seniority, etc., and these factors when considered with claimant's age, tend to make claimant's prospects for employment in the general labor market somewhat tenuous and speculative. Claimant has not sought employment although he did contact a vocational rehabilitation representative to no avail.

The Referee found, based on the evidence and taking into consideration claimant's age, education, training, experience and pre-existing low back disability, that claimant had established a prima facie case of "odd-lot" classification and the Fund had failed to prove that there was any suitable work available to claimant on a regular and gainful basis.

Claimant had a good work record, was not found to be a malingerer and the Referee concluded that claimant could not perform any regular, suitable and gainful employment on a full time basis and granted him an award for permanent total disability, effective the date of his order.

The Board, on de novo review, adopts the Referee's order. No attempt was ever made to find suitable work for claimant or to determine if he could be retrained for a different type of work.

ORDER

The order of the Referee, dated July 9, 1976, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with Board review, the sum of $400, payable by the Fund.

WCB CASE NO. 75-925 FEBRUARY 24, 1977

ARCHIE F. KEPHART, CLAIMANT
David Vinson, Claimant's Atty.
Marshall Cheney, Defense Atty.
Own Motion Order

On July 13, 1976 claimant, by and through his attorney, had requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his December 9, 1969 claim. At that time the Board did not have sufficient evidence upon which to make a determination on the merits of the request and referred the matter to its Hearing Division with instructions to hold a hearing and take evidence on the issue of whether claimant had aggravated his 1969 injury. Upon conclusion of the hearing the Referee was directed to have a transcript of the proceedings prepared and submitted to the Board with his recommendations.

On November 30, 1976 a hearing was convened before John F. Baker, who on January 20, 1977, submitted to the Board his recommendation together with a transcript of the proceedings.

The Board, after de novo review of the transcript of the proceedings, adopts the recommendation of the Referee, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

Claimant's December 9, 1969 claim is remanded to the employer, Edward Hines Lumber Company, a self insurer, to be accepted for the payment of medical services and compensation, as provided by law, commencing June 2, 1976 and until the claim is closed pursuant to ORS 656.278.

WCB CASE NO. 75-2962 FEBRUARY 24, 1977

The Beneficiaries of
WILLIAM FULLEN, DECEASED
James Gidley, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Beneficiaries

Reviewed by Board Members Wilson and Moore.

Claimant, the beneficiaries of the deceased workman, requests review of the Referee's order which denied claimant's claim for the workman's fatal heart attack.

The deceased workman had been employed as a heavy duty equipment operator prior to his retirement in September, 1972. He had done no further work until summoned to Portland by his daughter who, with her husband, operated a fencing business. The decedent had had no prior experience in this type of employment, but was asked to estimate fence installation costs; he had been paid 9% commission for this job. The workman had completed one deal himself and had been paid for it prior to the time of his demise.

He had completed one full week of work and on April 12, 1975, a Saturday, had been called into work although this was not a normal working day. When he left home that morning he had appeared normal, however, he had had heart problems in the past which had been treated by medication. He had made the call at the customer's residence and then had gone to his daughter's house feeling discomfort. He had appeared pale and uncomfortable and had stated he didn't feel good and needed to rest. The daughter called a medical clinic and was told she could go to the emergency room at the hospital. The workman had evidently elected not to go, but on Monday, he had been seen by a physician. The claimant stated that on Tuesday the workman had been pale and weak, and on Monday his ankles had been swollen.

On April 16 the daughter arrived at work and, seeing her father's car parked in front, had sent a workman looking for her father; the workman found him collapsed.

Dr. Mathiesen, the family physician, testified he had seen the workman on April 14, 1975 and that he was having severe chest pains. Dr. Mathiesen indicated the primary problem was arteriosclerosis, and that the workman, then 68 years old, had undertaken this new job which produced tension which, in turn was a material contributing cause to his heart failure.

Dr. Mathiesen read the April 16, 1975 emergency room report and opined that the

workman had had a massive coronary thrombus and that the heart stress on April 12 was due to the coronary insufficiency which completely closed off on the 16th, causing death.

Dr. Mathiesen admitted he was not a cardiologist and that the workman had been overweight; also, that despite his advice not to work, the workman had told him that he had some work he had to do. Dr. Mathiesen thought that had the workman followed his advice this incident would have not occurred at this time.

Dr. Griswold, in his report of October 3, 1975, expressed his opinion, after reading all of the medical evidence, that the work activity the workman had performed did not in any way contribute to his death.

The Referee concluded that the preponderance of the medical and lay evidence did not establish that emotional stress was a material contributing factor in the causation of the workman's heart failure. He affirmed the denial of the claim.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 23, 1976, is affirmed.

SAIF CLAIM NO. BB 16675 FEBRUARY 24, 1977

JERL H. CHRISTIAN, CLAIMANT
James Larson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order Referring For Hearing

On January 13, 1977 the claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a compensable injury suffered on September 10, 1973. The claim was initially closed by Determination Order mailed March 30, 1966 whereby claimant received an award for 35% loss of an arm for unscheduled disability. Thereafter, claimant received additional awards of 25% and 40%, giving claimant a total of 100% loss of function of an arm. Claimant contends he is permanently and totally disabled. In support of his request claimant submitted medical reports from several physicians, including some who treated claimant immediately after his industrial injury and some who treated claimant between February and July, 1976 and other relevant documents.

The Fund was advised of the request and furnished copies of all of the medical reports and other documents attached to claimant's request.

On February 2, 1977 the Fund responded, stating that based upon the report from Dr. Pasquesi, dated September 2, 1970, and the report from Dr. Bernson, dated July 15, 1976, (this report was also furnished by claimant) there was no additional permanent partial disability due to the injury of September 10, 1963; that claimant had already received a total of 100% loss of function of an arm and, in view of the medical evidence and the awards granted previously, asked that the Board not reopen the claim and determine claimant to be permanently and totally disabled.

At the present time the Board has conflicting medical evidence and its unable to make a determination with respect to the merits of claimant's request to reopen his claim

and find him to be permanently and totally disabled. Therefore, this matter is referred to the Hearings Division of the Board with instructions to hold a hearing and take evidence on the issue of claimant's present condition as it relates to his compensable injury of September 10, 1963.

Upon conclusion of the hearing the Referee shall cause a transcript to be prepared and forwarded to the Board together with his recommendation on claimant's request.

CLAIM # B 53-130659 FEBRUARY 24, 1977

CHARLES F. ADAMS, CLAIMANT
Jan Baisch, Claimant's Atty.
Own Motion Order Referring for Hearing

On January 24, 1977 the claimant, through his attorneys, requested the Board to exercise its own motion jurisdiction under the provisions of ORS 656.278 and reopen his claim for an industrial injury suffered on July 28, 1969 while in the employ of Ochoco Lumber Company, whose carrier was Employers Mutual of Wausau. The claim was originally closed by a Determination Order mailed December 8, 1970 and claimant's aggravation rights have expired.

The last award or arrangement of compensation was made by an Opinion and Order entered January 23, 1976 which granted claimant an additional 32 degrees for his unscheduled low back disability which gave him, taking into consideration previous awards, a total of 240 degrees for 75% unscheduled low back disability.

On October 22, 1976 Dr. Donald T. Smith, a Portland neurosurgeon, hospitalized claimant and on October 28, 1976 performed exploratory lumbar laminectomy L4-5 and L5-S1 on the left with decompression.

On December 29, 1976 the Employers Insurance of Wausau "denied" a request for reopening and the claimant requested a hearing on January 3, 1977, contending that the denial was a wrongful refusal to pay medical benefits pursuant to ORS 656.245.

The evidence before the Board at the present time is not sufficient upon which to determine the merits of claimant's request to reopen his 1969 claim. Therefore, the matter is referred to the Hearings Division with instructions to hold a hearing and take evidence on the issue of whether claimant has aggravated his 1969 injury, said hearing to be held in conjunction with the hearing requested by claimant protesting the carrier's denial as a wrongful refusal to pay medical benefits pursuant to ORS 656.245.

Upon conclusion of the hearing the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board together with a recommendation on the issue of whether claimant has aggravated his 1969 injury. The remaining issue shall be disposed of by an Opinion and Order of the Referee.

WCB CASE NO. 69-1801 FEBRUARY 24, 1977

EUGENE E. FIELDS, CLAIMANT
Charles Seagraves, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

Initially, claimant had filed a request for compensation for a heart attack which was denied. The denial was affirmed by the Referee and by the Workmen's Compensation Board and claimant failed to perfect an appeal from the Board's order to the Circuit Court. Later, on two occasions, claimant requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278(1) and reconsider his claim.

After the first request the Board stated that it was uncertain whether it had jurisdiction but said that it would not change its order even if it did. After the second request the Board determined that it did not have jurisdiction under ORS 656.278(1) to reconsider claims which had been denied and had become final. Thereafter, claimant brought a declaratory judgment action in the Circuit Court to challenge the Board's interpretation of ORS 656.278(1). Ultimately, the Supreme Court held in Fields v Workmen's Compensation Board, filed on November 26, 1976, that the Workmen's Compensation Board had jurisdiction under ORS 656.278(1) to reconsider a claim which was initially determined to be non-compensable and where the denial of compensation had become final.

On January 17, 1977 claimant's counsel advised the Board that he would like the Board, based upon the decision of the Supreme Court, to give reconsideration to claimant's request for own motion and consider the merits based on contentions with respect to certain laboratory tests were erroneous and also with respect to the history of symptoms and pain from the claimant.

The Board concludes, as it did in its earlier order of November 18, 1971, that there was and is a basis for honest difference of opinion with respect to conclusions to be drawn from the evidence. No additional evidence has been furnished to the Board since the initial petition to reconsider and the Board concludes that there was no obvious error in its former decision and, therefore, the request to exercise its own motion jurisdiction and review claimant's claim should be denied.

It is so ordered.

WCB CASE NO. 76-148 FEBRUARY 25, 1977

RAY WILLIAMS, CLAIMANT
Gary Galton, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order Vacating Order of Dismissal

On February 17, 1977 an Order of Dismissal was entered in the above entitled matter for the reason that the request for review made by the State Accident Insurance Fund in the above entitled matter was mailed on February 8, 1977, more than 30 days after the entry of the Referee's order.

The Referee's order was entered on January 7, 1977 and the 30th day fell on Sunday, February 6, 1977, a legal holiday. The fact that February 7, 1977 was also

a legal holiday (designated as Lincoln's birthday) inadvertantly was not considered. Therefore, the request for review mailed on February 8, 1977 was timely under the provisions of ORS 187.010(2) which provides:

> "Any act authorized, required or permitted to be performed on a holiday as designated in this section may be performed on the next succeeding business day; and no liability or loss of rights of any kind shall result from such delay."

The Board concludes that its Order of Dismissal entered in the above entitled matter on February 17, 1977 was improper and should be vacated and the Fund's request for review reinstated.

It is so ordered.

WCB CASE NO. 75-5223 FEBRUARY 25, 1977
WCB CASE NO. 75-5224

CLARENCE SHEPARD, CLAIMANT
Larry Bruun, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the employer's denial of claimant's claim.

Claimant had a prior injury in California when, while employed as a motorcycle policeman, he was struck by a vehicle causing a low back injury.

On October 16, 1974 claimant sustained a compensable industrial injury to his left foot; thereafter, the claim was closed as a "medical only." Sometime in July, 1975 claimant testified to an onset of symptoms due to back pain; he thought this was related to the October, 1974 foot injury because he had sustained no new injury on or off the job. He did not file a claim until November 19, 1975.

Claimant testified that he told his foreman, Mr. Drain, on a number of occasions, about his back pain and that it stemmed from his October, 1974 injury. Mr. Drain testified claimant, in mid-1975, mentioned back problems but did not recall claimant relating them to the 1974 incident. On September 24, 1975 Mr. Drain observed claimant having problems walking.

Claimant continued to work until September 24, 1975 when he terminated, he testified, because of the back pain and because his right leg had given out on him on a couple of occasions. Claimant denies a new incident on September 24, 1975.

Claimant saw Dr. Haevernick on September 29, 1975 who diagnosed back strain. The doctor, based upon the history given to him by claimant, found this to be an aggravation of the October 16, 1974 injury. Claimant was then referred to Dr. Ellison.

Dr. Ellison examined claimant on October 21, 1975 and diagnosed abnormality of

the lumbar spine with nerve root symptomatology. Dr. Ellison felt that the most recent episode was responsible for claimant's present problems.

Claimant testified he didn't know he had to fill out a new injury claim report; he felt his problems were due to the 1974 incident and that the report filed at that time was sufficient. On December 2, 1975 the carrier denied claimant's claim for a new injury.

The Referee found claimant had reported the October, 1974 foot injury the day it occurred, the claim was accepted and closed as a "medical only." Claimant testified he had no further problems until the following July when he noticed back pain which became more severe and forced him to quit work. Mr. Drain stated claimant, between July and September, 1975, never verbally related his back problems to the 1974 injury; the best he could recall was claimant saying he could not relate his back problems to any one thing but thought it was an aggravation of an "old injury." Claimant claimed a back injury occurred on October 16, 1974 yet he didn't file a claim until November 19, 1975 and, based on the conflicting evidence and claimant's lack of credibility, the Referee concluded nothing was done by claimant between these dates which could be construed as "giving notice" within one year.

The Referee found that the history upon which Dr. Ellison relied included an injury on October 16, 1974 caused by a lifting incident. There was not such episode, therefore, Dr. Ellison's opinion that claimant's present condition was caused by the October 16, 1974 incident does not establish medical causation. The Referee concluded the denial was proper.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated May 14, 1976, is affirmed.

WCB CASE NO. 75-4826 FEBRUARY 25, 1977

DONNA PUGLIESI, CLAIMANT
Donald Wilson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an additional 30%, making a total award to claimant of 128 degrees for 40% unscheduled low back disability. The Fund contends the award granted is excessive.

Claimant, 23, sustained a compensable injury on September 24, 1974, i.e., a low back strain superimposed upon pre-existing spondylolisthesis. On December 18, 1974 Dr. Hardiman performed a posterolateral lumbosacral fusion. The claim was closed by a Determination Order of September 23, 1975 with an award of 32 degrees for 10% unscheduled low back disability.

Dr. Hardiman continued to see claimant and, on January 16, 1976, indicated

claimant still had discomfort in her back but had a solid fusion. He prescribed some exercises for claimant to ease her stiffness.

Dr. Parsons examined claimant on June 14, 1975; claimant was complaining of pain in her low back and intermittant leg numbness. Dr. Parsons diagnosed spondylolisthesis L5-S1 and no evidence of nerve root compression. Dr. Parsons found no objective evidence of disability, no further treatment was necessary and he rated the degree of claimant's disability from her injury and resulting surgery as minimal.

The Referee found that a careful reading of Dr. Parson's report indicated a $\frac{1}{2}$ inch difference in claimant's left calf from her right, an atrophy which would ordinarily lead to a diagnosis of neurological deficit but this possibility was not discussed by Dr. Parsons.

The Referee concluded that the above medical finding was consistent with claimant's complaints of numbness and pain in her right leg and claimant has sustained a greater impairment of earning capacity and a substantial disability more than for which she was previously awarded by the Determination Order. He granted claimant an additional 30%.

The Board, on de novo review, finds medical evidence that clearly shows that claimant has a good solid fusion, there is no objective evidence of disability, no further treatment is indicated, and claimant's disability is rated as minimal. The Referee apparently based his increase of claimant's award on his interpretation of Dr. Parsons' examination of claimant and not on Dr. Parsons'.

Therefore, the Board concludes that claimant has been adequately compensated by the award of 32 degrees granted by the Determination Order.

ORDER

The order of the Referee, dated July 28, 1976 is reversed.

The Determination Order of September 23, 1975, is affirmed.

WCB CASE NO. 75-4630 FEBRUARY 25, 1977

FREDRICK NUNN, CLAIMANT
Donald Todorovich, Claimant's Atty.
James Huegli, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of August 29, 1975. Claimant contends he is permanently and totally disabled.

Claimant sustained a compensable injury on July 24, 1974 and underwent a year of conservative treatment. A Determination Order was issued on August 29, 1975 granting claimant an award of 160 degrees for 50% unscheduled low back disability and 48 degrees for 25% loss of left arm. Claimant has not worked regularly since his injury.

On February 17, 1976 claimant was examined by the Orthopaedic Consultants who found moderate functional interference during the examination. They recommended claimant's claim be closed as he was medically stationary and he should be weaned from Codeine. They found claimant's disability to be chiefly functional in nature; from a physical standpoint, claimant could perform some type of work. They further felt that claimant's awards were sufficient.

Claimant presently complains of low back pain and stiffness and spasms caused by prolonged sitting or standing or getting up too quickly. Claimant testified he generally spends six to seven hours a day in his recliner. Claimant has a 10th grade education and has been employed as a mechanic-welder and a truck driver.

Claimant tried two other jobs for very brief periods of time after his injury and could not maintain either.

The Referee found claimant's psychological evaluation indicated a moderate psychophysiological reaction with depression related to his injury. Claimant advised the psychologist he could work if he found a suitable job and that he had been job hunting; this is not supported by the evidence.

The Referee concluded that claimant is now precluded from returning to his previous employment, but he can do some types of work, therefore, claimant is not permanently and totally disabled and has been adequately compensated by the award of 160 degrees for his physical and psychological disabilities and their effect upon his wage earning capacity.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 9, 1976, is affirmed.

WCB CASE NO. 76-1227 FEBRUARY 25, 1977

EVA MCCULLOUGH, CLAIMANT
Sidney Galton, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which granted claimant an award of 176 degrees for 55% unscheduled low back disability. Claimant contends she is permanently and totally disabled.

The State Accident Insurance Fund cross appeals the Referee's order contending that the award is excessive.

Claimant sustained a compensable injury on October 22, 1971, diagnosed as a lumbar sprain. A myelogram performed in December, 1971 was normal.

On March 10, 1972 Dr. Logan examined claimant and diagnosed degeneration of the lumbosacral facet with right sciatic type pain. On May 24, 1973 Dr. Pasquesi

examined claimant and found claimant's subjective complaints were more intense than the impairment might signify; he rated her disability as 9% of the whole man. On August 13, 1973 claimant was examined at the Disability Prevention Division and subsequently underwent a psychological evaluation which revealed claimant was a poor candidate for employment. Dr. Perkins felt claimant would never work again.

On September 19, 1973 claimant was examined at the Back Evaluation Clinic. The physicians considered claimant's condition medically stationary and felt she could return to her previous occupation with the avoidance of heavy lifting, bending or stooping. They rated her functional loss of her back due to the injury as minimal.

A Determination Order of October 22, 1973 granted claimant an award of 64 degrees for 20% unscheduled low back disability.

On February 3, 1974 Dr. Grewe diagnosed lumbosacral strain with nerve root irritation, degenerative changes mild to moderate at L4-5 and L4-S1.

On March 29, 1974 Dr. Pasquesi again examined claimant and diagnosed chronic lumbosacral pain with left sciatic neuritis and rated her disability at 10% of the whole man.

On June 26, 1974 Dr. Grewe performed a bilateral facet rhizotomy at L4-5 and L5-S1. Claimant continued to have pain symptoms and Dr. Grewe referred her to the Portland Pain Clinic. Dr. Seres found chronic low back pain, masked depression, questionable motivation for rehabilitation and muscle contraction headaches.

A Second Determination Order of March 5, 1976 granted claimant an additional award of 48 degrees.

The Referee found that the medical and psychological evidence presented did not support a finding of permanent total disability nor did claimant fall within the odd-lot category because of claimant's lack of motivation. Claimant has a 10th grade education and has worked approximately 25 years in the grocery and delicatessen field.

Based upon all of the evidence presented the Referee found claimant has had a substantial loss of wage earning capacity, she is unable to return to her previous occupation because of her limitations on heavy lifting, bending, etc.

The Referee concluded claimant was entitled to an additional 64 degrees.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 28, 1976, is affirmed.

JIMMY FAULK, CLAIMANT
R. Kenney Roberts, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests Board review of the Referee's order which found it to be responsible for payment of benefits to claimant and directed it to make necessary monetary adjustments with the Employee Benefits Insurance Companies to reimburse the latter for any compensation paid pursuant to an order dated August 15, 1974; granted claimant an award for permanent partial disability of 160 degrees for 50% unscheduled neck and back disability; awarded claimant's attorney as a reasonable attorney fee a sum equal to 25% of the increased compensation, payable out of said compensation as paid, not to exceed the sum of $2,000, and ordered that the matter be referred to the Disability Prevention Division for vocational rehabilitation consideration.

Claimant suffered an injury on March 28, 1973 while employed by Independent Motor Transport, whose carrier was Employee Benefits Insurance Companies, hereinafter referred to as EBI. Dr. Nickolai diagnosed an acute strain; claimant suffered no time loss but had continuing pain in his shoulders, his left arm and neck for which he received chiropractic manipulation. Claimant responded satisfactorily to this type of treatment and in January, 1974 became asymptomatic.

On September 10, 1974 claimant was seen by Dr. Vassely, an orthopedic surgeon, complaining of persistent recurring pain in his neck, left shoulder and left lower back. Claimant had not worked since July 11, 1974 because of these problems. (On January 10, 1971 claimant, while employed by Master Chemical Corporation, whose carrier was the Fund, hurt his back pulling a pallet jack. Claimant was seen by several physicians but nothing objective could be found and it was considered that nothing further could be done to help claimant. His claim was closed on June 22, 1972 by a Determination Order which awarded claimant 16 degrees for 5% unscheduled neck disability). Dr. Vassely concluded that claimant's main problems began with his 1971 injury and that his present problems were a continuation thereof. He further concluded that claimant suffered only mild impairment.

Claimant wrote directly to the Board stating that he had filed two claims and requested an order to be issued, pursuant to ORS 656.307, designating who should pay his claim pending determination of the responsible paying party. An order of August 15, 1974 designated EBI as the paying agent and directing that a hearing be held to determine the responsible party. Subsequently, at the request of claimant's attorney, the hearing was dismissed. Claimant had started to receive payments of compensation from EBI. The claim was closed by a Determination Order of November 12, 1974 with an award of 32 degrees for 10% unscheduled disability. Claimant requested a hearing on the adequacy of this Determination Order. The Fund was not made a party defendant at this hearing and Referee Seifert granted claimant an award of 160 degrees for 50% unscheduled disability. (Prior to the hearing EBI had filed a motion to join the Fund because EBI was still paying under the order issued pursuant to ORS 656.307 and no determination had been made with respect to who was responsible for claimant's present condition. This motion was denied by a separate order prior to the hearing.)

When the request for review by EBI came before the Board, the Board became aware of the existence of the order issued under ORS 656.307 and, also, the motion of EBI to join the Fund at the hearing before Referee Seifert. It remanded the matter to Referee Seifert, the order of remand joined the Fund as a party defendant and Referee Seifert was directed to hold a hearing and determine whether claimant had suffered a new injury in 1973 or aggravated the 1971 injury.

The Referee, in a very well written opinion, found that following the March 14, 1973 injury claimant was treated with chiropractic manipulation and responded satisfactorily, discontinued treatment and became totally asymptomatic in January, 1974. He found that claimant's main problem began with the 1971 injury, that although he might have suffered an exacerbation in 1973, he became asymptomatic thereafter. Both Dr. Vessely and Dr. Poulson expressed opinions that the initial pain was started by the 1971 accident and further aggravated by the 1973 accident. Dr. Poulson felt that claimant had permanent disability with recurrent pain about his cervical spine but there was no impairment relating to claimant's neck, only disability due to pain which was probably a chronic cervical strain. Inasmuch as claimant had not improved since 1971, Dr. Poulson considered it unlikely that claimant would be capable of heavier work and, in July, 1975, he found that claimant had no impairment and 5% or less disability. Dr. Vessely who saw claimant again on April 11, 1975, continued to believe that claimant's problems stemmed from the 1971 accident which had never totally cleared but had been aggravated by the 1973 injury. He felt nothing other than conservative treatment was indicated, there was no significant disability although there was a significant functional component which aggravated claimant's recovery.

The Referee concluded that the incident of March 28, 1973 was a temporary exacerbation of the disability resulting from the January, 1971 injury and that the March, 1973 injury had minimal permanent effects. He found claimant's present condition was medically stationary and that it was the responsibility of the Fund.

The Referee found claimant has a good work record, he has a 10th grade education and his working life has always been in the labor field, a field to which he cannot now return although he has shown good motivation. The Referee found that although claimant had not undergone any surgery and that there were little objective findings on which to evaluate his complaints, there was evidence that claimant suffered persistant recurring disabling pain which precludes his return to jobs requiring heavy manual labor which was his main occupation in the past. The Referee concluded that claimant has suffered a greater permanent partial disability than that for which he was awarded by the Determination Order dated November 12, 1974 which awarded 32 degrees for 10% unscheduled disability.

Claimant's attorney had requested attorney fees payable by the employer and in addition to those awarded from any increased disability award. ORS 656.307 provides that where there is an issue regarding which of several employers or insurers is responsible for compensation, the Board shall designate who shall pay the claim if the claim is otherwise compensable, and when a determination of the responsible paying party has been made, shall direct any necessary monetary adjustment. In this case, the Board designated EBI as the paying agent, there was no denial by either employer or insurer but merely a dispute between carriers as to responsibility for claimant's condition. The Referee found that claimant's attorney performed no function on these issues at the hearing before him except as they related to the extent of disability and, therefore, any attorney fees paid must come out of the increased compensation awarded to claimant.

The Board, on de novo review, affirms the order of the Referee. When the order was issued by the Board on August 15, 1974 designating EBI as the party to pay benefits to claimant until a hearing was held to determine respective responsibility between the Fund and EBI, a hearing was directed by that order. Claimant's attorney had no authority to request the Referee to dismiss that hearing. The benefits which EBI was paying at that time to claimant were paid pursuant to the order of August 15, 1974. EBI was entitled to have the Fund joined as a proper party defendant when claimant subsequently requested a hearing on the adequacy of the Determination Order issued on November 12, 1974. It is not necessary, as the Fund contends, that claimant file a claim for aggravation of the 1971 injury, it is sufficient if there is even a slight suspicion that the claimant's condition may be the result of aggravation of a prior injury rather than a new injury.

Although the Fund requested review of this order it did not deem it necessary to submit a brief on behalf of its contentions although it had been given an extension of time within which to do so. The record shows that the order of remand was served on the Fund, also a notice of the hearing was mailed to EBI, the Fund and claimant. The Fund chose not to be present at the hearing. After filing its request for review the Fund instead of presenting briefs filed a motion in which, basically, it contended that the Board had no right to remand the matter for a second hearing before Referee Seifert and to join the Fund as a party defendant at that hearing. The Board has denied that motion.

ORDER

The Referee's Order on Remand, dated May 21, 1976, is affirmed.

Claimant was not represented by counsel at Board review, therefore it is not necessary to make an award of an attorney fee.

SAIF CLAIM NO. A 739616 FEBRUARY 25, 1977

BURT ADAMS, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable left eye injury for which he has received an award of 100% loss of left eye.

On January 3, 1977 the State Accident Insurance Fund requested a determination. The Evaluation Division of the Board recommends that claimant be awarded further compensation for temporary total disability from December 10, 1975 through May 1, 1976. The record indicates claimant has already been paid this compensation.

The Board concurs in this recommendation.

WILBUR CHRISTIANI, CLAIMANT
Charles Seagraves, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On May 24, 1976 claimant requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered on April 11, 1968. Claimant's aggravation rights have expired.

The Fund, after being furnished a copy of claimant's request together with the medical information attached thereto, responded, stating it did not feel claimant's present condition was a result of the April 11, 1968 injury.

The Board, at that time, did not have sufficient evidence before it to determine the merits of claimant's request and, therefore, by order dated August 11, 1976, referred the matter to the Hearings Division with instructions to hold a hearing and take evidence on the issue of whether claimant had aggravated his 1968 injury and was entitled to further medical care and treatment and for compensation as provided by law. Upon conclusion of the hearing the Referee was directed to have a transcript of the proceedings prepared and submitted to the Board with his recommendation.

On August 11, 1976, pursuant to the Board's order, a hearing was held before Referee John F. Drake and, based upon the evidence introduced at said hearing, Referee Drake submitted to the Board his recommendation that the Board reopen claimant's claim as requested.

The Board, after de novo review of the transcript and a study of the Referee's recommendation, adopts as its own the findings and conclusion of the Referee set forth in his recommendation, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

Claimant's claim is remanded to the Fund for acceptance and payment of compensation as provided by law, commencing January 29, 1976 and until the claim is closed pursuant to the provisions of ORS 656.278, less time worked.

Claimant's counsel is awarded as a reasonable attorney fee a sum equal to 25% of any compensation claimant shall receive as a result of this order, payable out of said compensation as paid, not to exceed $2,000; provided, if claimant shall receive compensation for temporary total disability only the attorney fee shall not exceed $500.

WCB CASE NO. 75-2446 FEBRUARY 28, 1977

LOWELL J. TERRELL, CLAIMANT
Gary Jensen, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

On February 11, 1977 the Board received from the State Accident Insurance Fund an amended request for Board review which stated that the Fund rejected the Referee's finding and award of disability contained in his Opinion and Order entered on November 10, 1976 and requested a Medical Board of Review under the provisions of ORS 656.808 et seq which was in effect at the time of the alleged exposure in the above entitled case. The amended request was made without waiver of the Fund's right to proceed with Board Review in the event the Board rules adversely to the rejection.

ORS 656.808 was repealed in 1973 and the appeal was not taken from the Referee's order in the above entitled matter until November 30, 1976, long after the repeal of the aforesaid statute.

For the foregoing reason, the Board concludes that the amended request for Board review must be denied and the matter will be reviewed by the Board upon receipt of the briefs from the respective parties concerned. The Fund's request for an indefinite continuance to and for a reasonable time after the Board's ruling upon this amended request and rejection of the Referee's Opinion and Order is also denied; however, upon request of either party, the Board will grant an extension of time within which to file briefs in the above entitled matter.

ORDER

The amended request for Board review in the above entitled matter received from the Fund on February 11, 1977 is hereby denied.

WCB CASE NO. 75-2377 FEBRUARY 28, 1977

JOHN PINNEY, CLAIMANT
Joe Richards, Claimant's Atty.
Jerard Weigler, Defense Atty.
Order Approving Stipulation and
Dismissing Request for Review

On November 22, 1976, the claimant, by and through his attorney, requested Board review of the Referee's order dated November 2, 1976 which affirmed the Determination Order of May 12, 1975.

The parties have now presented a stipulation to the Board amicably disposing of the issues in dispute and the Board, being fully advised, finds the stipulation, a copy of which is attached hereto and made a part hereof, should be executed according to its terms, and the request for Board review now pending should be dismissed.

It is so ordered.

STIPULATION FOR AGREED SETTLEMENT

The above-entitled case resulted from an injury sustained by John Pinney while employed by Pacific Coca Cola Bottling Company on August 27, 1973. All bills for medical care, including knee surgery, were paid by the carrier, Argonaut Insurance Companies, and, on May 12, 1975, a Determination Order was issued by the Board awarding claimant compensation equal to 22.5 degrees for 15% loss of the right leg.

Claimant requested a hearing which was held on August 24, 1976 before the Honorable Gayle Gemmell. The parties subsequently stipulated that claimant had received an overpayment of temporary total disability compensation in the amount of $826.32 and the hearing record was closed on October 6, 1976.

The Referee issued an Opinion and Order on November 2, 1976 finding that claimant had been adequately compensated by the Determination Order and affirming the same.

On November 22, 1976 claimant filed a Request for Review alleging that the award of 22.5 degrees was inadequate in view of the continuous pain and swelling and the development of traumatic arthritis of the lateral compartment of the right knee, together with loss of strength therein.

The parties have now agreed to fully compromise and settle the dispute raised by Mr. Pinney's original Request for Hearing and his pending Request for Review.

Now, therefore, it is stipulated and agreed:

The employer and insurance carrier hereby agree to pay, and John Pinney agrees to accept, the sum of $1,126.32 as an additional award, over and above the Determination Order, in settlement of the matters raised by claimant's Request for Hearing and pending Request for Review.

The aforesaid sum shall consist of a credit of $826.32 in accordance with ORS 656.268(3), already received by Mr. Pinney as an overpayment of temporary total, plus the additional sum of $300 to be paid by the insurance carrier upon approval of this Stipulation.

The parties respectfully request that the Workmen's Compensation Board issue its Order approving the aforesaid settlement and dismissing the Request for Review.

WCB CASE NO. 76-4845 FEBRUARY 28, 1977

RANDY D. DAVIDSON, CLAIMANT
Donald Wilson, Claimant's Atty.
Paul Roess, Defense Atty.
Order

On January 11, 1977 claimant, by and through his attorney, filed a request for review of the Referee's Opinion and Order entered in the above entitled matter on December 29, 1976.

The Board has now been advised by claimant's attorney that claimant's claim submitted pursuant to the provisions of ORS 656.273 for additional compensation and medical

care and treatment on account of the worsening of claimant's condition has been accepted, his claim has been reopened and the employer is paying claimant compensation for temporary total disability commencing on January 10, 1977.

The Referee's order had affirmed the award made by a Determination Order mailed August 4, 1976 whereby claimant was awarded 5% loss of the right leg. The claim for aggravation stated that the claimant's condition had worsened since the date of this Determination Order and the acceptance of said claim of aggravation requires an ultimate closure of claimant's claim pursuant to the provisions of ORS 656.268. Therefore, the Board concludes that the issue before it on review at the request of claimant is moot because the Determination Order of August 4, 1975 will ultimately be superseded by another Determination Order and the Referee's order relates only to the adequacy of the first Determination Order.

ORDER

Claimant's request for review of the Referee's order entered on December 29, 1976 in the above entitled matter is hereby dismissed without prejudice.

WCB CASE NO. 76-5087 FEBRUARY 28, 1977

DONNA COMPTON (BENNETT), CLAIMANT
Noreen Saltveit, Claimant's Atty.
Delbert Brenneman, Defense Atty.
Order

On February 8, 1977 claimant, by and through her attorney, requested the Board to remand the above entitled case to receive additional evidence not available at the time of the hearing, namely, testimony and/or reports by Dr. Pasquesi, claimant and her treating physician, Dr. Fagan, concerning an exacerbation of claimant's symptoms which occurred immediately prior to the hearing but for which claimant was unable to obtain an appointment with Dr. Fagan prior to the hearing.

The employer, in its reply, quotes from a request for reconsideration made by claimant's attorney to Referee George Rode which indicates claimant is to be examined by Dr. Fagan in May, 1977 and it is possible that claimant may need surgery. Referee Rode denied the request, stating that should Dr. Fagan decide to perform surgery this would constitute a reopening of the claim without any action by either the Referee or the Workmen's Compensation Board, he assumed that such surgery would be related to the compensable injury.

The employer has stated that if Dr. Fagan, after he re-examines claimant in May and reviews Dr. Pasquesi's report, decides surgery is necessary the claim would be reopened and fully processed.

The Board concludes that the motion is premature. Inasmuch as the employer has agreed to reopen the claim should surgery be found necessary as a result of the May, 1977 examination, the Board further concludes that at this time it also would be premature to review the Referee's order entered in the above entitled case. The Board will hold in abeyance such review until advised whether claimant's claim has been reopened. If the claim is reopened the request for review will be dismissed.

ORDER

The motion made by claimant for an order remanding the above entitled case for additional evidence not available at the time of the hearing is hereby denied.

WCB CASE NO. 76-1604 FEBRUARY 28, 1977

HANNUM BOUTIN, CLAIMANT
Jerome Bischoff, Claimant's Atty.
Theodore Conn, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer requests review by the Board of that portion of the Referee's order which because of the employer's conduct awarded claimant's attorney a fee of $1,000 to be paid pursuant to the provisions of ORS 656.382(1). The order also affirmed the Determination Order of March 25, 1976 which awarded claimant no compensation for permanent partial disability.

Claimant sustained a compensable injury to his low back in June, 1974 which, at first, was denied and then, after a hearing, remanded to the employer for acceptance and payment of compensation as provided by law.

Claimant has been represented by counsel since March 1, 1975 for this injury suffered in June, 1974. On July 3, 1975 the employer's sawmill was completely destroyed by fire. Thereafter claimant, a tallyman and lumber grader, worked only part time until September or October, 1975 when the planing mill shut down. Claimant then began drawing unemployment compensation.

On December 3, 1975 Mr. Jackson, Industrial Relations Director for the employer, and Mr. Clay, assistant manager for the employer, went to claimant's house. Mr. Jackson testified they went to claimant's house to see how he was and if his claim could be closed. Claimant advised them he felt good as ever and thought his claim should be closed.

On April 8, 1976 Mr. Jackson again went to claimant's house because the employer had received claimant's request for hearing. Mr. Jackson testified that claimant was surprised that his case was being appealed (even though claimant and his attorney had made a prior agreement to do this), and indicated to Mr. Jackson that his condition had not worsened and that he had nothing to do with the filing of the appeal. Upon hearing this Mr. Jackson went to see Mr. Lynch, an attorney, and told him what claimant had said. Mr. Lynch advised Mr. Jackson to get it in writing and have claimant sign it. Mr. Jackson met claimant on the highway and this was done.

Claimant testified he signed the letter because he was afraid that otherwise he would not be returned to work for the employer. Claimant further testified that Mr. Avery, the resident manager for the employer, wanted to get rid of him; he admitted, however, that he had never received any threats from Avery, Jackson or anyone else relating to signing the letter.

The Referee found, based on the medical evidence presented, that the Determination Order of March 25, 1976 granting claimant no award for permanent partial disability was proper and correct. He affirmed the Determination Order.

The Referee found claimant's request for penalties and attorney fees for unreasonable resistance was well taken because of three events which occurred prior to the hearing. The first was the incident at claimant's house on December 3, 1975. The employer contends he was merely trying to find out how claimant was getting along and if the case could be closed. The Referee found this a rather questionable purpose; the second incident of April 8, 1976 was more serious. The Referee concluded that the visit to claimant's house on April 8, 1976 and the drafting of the letter for claimant's signature went beyond unreasonable resistance and was a frank attempt to intimidate the claimant; that there was no excuse for the employer's actions. The third event started out innocently but before the discussion was concluded Mr. Avery talked to claimant about the approaching hearing. He should not have done so.

The Referee concluded that there was no compensation owing to claimant, therefore, penalties could not be assessed; however, the employer was ordered to pay claimant's attorney an attorney fee of $1,000.

The Board, on de novo review, finds that the employer's conduct does not constitue unreasonable resistance as contemplated by ORS 656.382(1); however, the Board finds that the employer's conduct in this case was deplorable and such conduct should not be repeated.

ORDER

The order of the Referee, dated August 18, 1976, is modified.

That portion of the Referee's order which directed defendent to pay to claimant's attorney as a reasonable attorney fee the sum of $1,000 under the provisions of ORS 656.382(1) is deleted from the order which in all other respects is affirmed.

WCB CASE NO. 76-652 FEBRUARY 28, 1977

JAMES STEWART, CLAIMANT
Keith Tichenor, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests review by the Board of the Referee's order which denied claimant's claim for aggravation of his condition.

Claimant had sustained a compensable injury in 1966 for which he received 76.8 degrees for 40% loss of function of an arm for an unscheduled disability. Claimant did not return to work for over two years, then started working for the employer part time as an asphalt roller operator. On June 14, 1974 claimant reinjured his low back. After this accident, claimant testified, he has been unable to work. His claim was closed on March 28, 1975 by a Determination Order which granted claimant 96 degrees for 30% unscheduled disability.

Claimant applied for and received a lump sum payment and thereby waived his right to appeal the adequacy of the award made by the Determination Order.

Claimant's problems following the 1974 injury were a pre-existing disability, lumbar strain, advanced degenerative changes in the spine, and functional overlay.

On August 6, 1975 Dr. Daack examined claimant, he did not expect any improvement in claimant's condition and stated claimant was not recommended for any type of work, but he didn't say claimant's condition was worse than before.

On November 10, 1975 Dr. Moseley examined claimant and found claimant completely and permanently unable to work due to the pain of the osteoarthritis which probably was not related to claimant's injuries.

On February 5, 1976 Dr. Parsons felt claimant's condition had not worsened, he found no evidence for aggravation and recommended no treatment other than palliative.

On June 30, 1976 Dr. Cherry found claimant to be permanently and totally disabled; he felt if claimant was less than this condition at the last time he was evaluated that his condition had aggravated.

The Referee found the records did not support a conclusion that claimant's condition has worsened since his earlier evaluation.

The Referee concluded that claimant has failed to prove by a preponderance of the medical evidence, that his condition has worsened since his lump sum payment award.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 28, 1976, is affirmed.

WCB CASE NO. 75-2111 FEBRUARY 28, 1977
WCB CASE NO. 75-2387

RICHARD FAULKNER, CLAIMANT
Gerald Knopp, Claimant's Atty.
G. Howard Cliff, Defense Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

The State Accident Insurance Fund requests review of the Referee's order remanding claimant's claim for a new injury to it for acceptance and payment of compensation, as provided by law; assessing a penalty equal to 25% of the compensation for temporary total disability due claimant until February 12, 1976 against both the Fund and Industrial Indemnity; awarding an attorney fee of $450 payable by each carrier and ordering the Fund to reimburse Industrial Indemnity for any compensation benefits the latter had paid to claimant.

Claimant's main work is that of a custodian. While employed by Associated Meat Packers, whose carrier was Industrial Indemnity, claimant suffered a compensable injury on September 13, 1972 which involved his right upper back, right shoulder, arm, wrist and right knee. Claimant's claim for this injury was closed by a Determination Order dated January 17, 1973 which awarded claimant compensation for time loss only.

(Ultimately, after a hearing, claimant was granted an award of 32 degrees for 10% unscheduled disability by a stipulated order dated June 13, 1974).

On August 24, 1973 claimant ceased working for Associated Meat Packers because of the severity of his pain and subsequently was employed by David Douglas School District, whose carrier was the Fund. On February 17, 1975, while so employed, claimant sustained an injury to his low back while mopping a stairway.

Claimant filed a claim for aggravation with Industrial Indemnity which was denied on April 23, 1975. Thereafter, claimant filed a claim for a new injury with the Fund, this claim was denied on May 22, 1975. Neither carrier requested that the Board issue an order pursuant to ORS 656.307 designating a paying agent until such time as a responsible party could be determined by a hearing.

On May 23, 1975 the claimant requested a hearing; the issue before the Referee was whether the episode of February 17, 1975 constituted a new injury chargeable to the Fund or was an aggravation of claimant's 1972 injury which would be chargeable to Industrial Indemnity.

Claimant's treating physicians were Dr. Empey and Dr. Laidlow. On April 3, 1975 claimant was examined by Dr. Laidlow who found spurring of several vertebral bodies of both the thoracic and lumbar vertebrae with no evidence of interspace narrowing. On October 3, 1975 Dr. Laidlow expressed his opinion, based both upon the history given to him by claimant and the examination notes made by Dr. Empey, that the injury of February 17, 1975 was an exacerbation of a pre-existing problem initiated by the September 13, 1972 injury.

Dr. Pasquesi who examined claimant on January 16, 1976 diagnosed a chronic scapulo-thoracic bursitis, right upper dorsal and scapular pain and mild lumbosacral strain. It was his opinion that claimant had had a definite injury on February 17, 1975 in which the primary injury was to the low back, but was an aggravating factor to the upper back; he concluded that the time loss suffered by claimant and the medical treatment received by claimant were predominately the result of claimant's 1975 low back injury. He felt, therefore, that claimant did receive a subsequent accident which aggravated a pre-existing condition, but also caused disabling symptoms which kept claimant from working for a period of $2\frac{1}{2}$ months.

Both Dr. Laidlow and Dr. Pasquesi were deposed; for some reason unexplained the deposition of Dr. Empey was not taken. Dr. Laidlow indicated in his deposition that after the first injury claimant's primary complaints related to the upper back but there were some low back complaints. Dr. Pasquesi reported no low back complaints before the February, 1975 accident.

The Referee found that Dr. Pasquesi's reports and his testimony was more reliable, primarily, because Dr. Pasquesi is a qualified and experienced orthopedic surgeon and neither Dr. Laidlow or Dr. Empey are. Furthermore, Dr. Laidlow had only seen claimant a couple of times. The Referee concluded that the medical evidence indicated that the first compensable injury involved the upper back area and the February 17, 1975 injury was a trauma to the low back and an aggravation of the back condition, therefore, claimant had suffered a new injury on February 17, 1975 for which the Fund was responsible.

On February 12, 1976, after a hearing, the Referee had found that claimant had a fixed right to compensation and that there had been no determination made as to which employer was responsible; therefore, he issued an order pursuant to ORS 656.307

designating Industrial Indemnity as the paying agent during the interim period until the final determination could be made on the issue before him.

The Referee concluded that inasmuch as neither carrier had requested the Board to issue an order pursuant to ORS 656.307, a penalty in the sum of 25% of the compensation due claimant up and to the date of his interim order (February 12, 1976) should be assessed against each of the carriers. He also directed both carriers to pay claimant's attorney an attorney fee of $450.

Having found the Fund to be the responsible carrier the Referee directed it to reimburse Industrial Indemnity for any compensation it may have paid to claimant pursuant to his order of February 12, 1976.

The Board, on de novo review, adopts the Massachusetts-Michigan rule of imposing liability for successive injuries upon the carrier providing coverage at the time of the last injury unless such injury is merely a recurrence of the first which doesn't contribute even slightly to the causation of the disability. Both Dr. Laidlow and Dr. Empey felt that the February 17, 1975 injury was an exacerbation of a pre-existing problem initiated by the accident of September 13, 1972. Dr. Laidlow had stated that after the 1972 injury although claimant's primary complaints related to the upper back he had also had some low back complaints; Dr. Pasquesi was of the opinion that claimant had no low back complaints prior to the February, 1975 accident, however, the testimony of the claimant indicates that the episode of February 17, 1975 was merely a continuation of his earlier 1972 injury. Claimant testified that following the September, 1972 injury his entire right side hurt from his shoulder to his waist and across the belt line and the parts of his body which were painful following the February 17, 1975 incident were the same parts of his body that were painful and continued to be painful following the September 13, 1972 injury. He testified that he had had nothing but pain for almost three years off and on; his back would be okay for a while and then the pain would return although in different parts of his back. He testified that he felt it was a continuation of the 1972 injury.

After the February, 1975 incident claimant immediately filed a claim for aggravation; it was not until this claim was denied that he filed a claim for a new injury. Dr. Pasquesi, in his deposition, testified that the February 17, 1975 episode caused only a temporary exacerbation of symptoms "which eventually receded to where it was before." He did not feel that any additional permanent disability resulted from that episode. Dr. Laidlow also testified, by deposition, that following the February, 1975 incident he found no evidence of a neurological injury, that said incident had added no permanent disability and that claimant was treated simply because of subjective symptoms of pain.

The Board concludes that claimant had had continuing back problems which became severe and temporarily disabling while he was employed by the David Douglas School District; all of the medical authorities have said that there was no additional permanent disability as a result of the episode of February 17, 1975, that it merely precipitated what was going to happen in a very short time anyway. Thus the February 17, 1975 incident must be construed merely as a recurrence of the September 13, 1972 industrial injury which did not contribute even slightly to the causation of the temporary disability suffered by claimant.

The Board concludes that claimant did not suffer a new injury on February 17, 1975 but did aggravate his September 13, 1972 injury and, therefore, his condition remains the responsibility of Industrial Indemnity. The Referee's order must be reversed.

ORDER

The order of the Referee, dated June 14, 1976, is reversed.

Claimant's claim for aggravation of his September 13, 1972 injury is remanded to the employer, Associated Meat Packers, and its carrier, Industrial Indemnity, to be accepted for the payment of compensation, as provided by law, commencing on February 17, 1975 and until the claim is closed pursuant to ORS 656.268.

Claimant is awarded as a penalty a sum equal to 25% of any compensation for time loss due to him from February 17, 1975 until February 12, 1976, said penalty to be paid by the aforesaid employer and its carrier.

Claimant's attorney is awarded as a reasonable attorney fee $900 for his services before the Referee, to be paid by the aforesaid employer and its carrier.

Claimant's attorney is awarded as a reasonable attorney fee for his services in connection with this Board review, the sum of $250, payable by the aforesaid employer and its carrier.

WCB CASE NO. 76-945 FEBRUARY 28, 1977

MICKEL C. HOPKINS, CLAIMANT
Gary Galton, Claimant's Atty.
Dept. of Justice, Defense Atty.
R. Kenney Roberts, Defense Atty.
Request for Review by Employer
Cross-Request for Review by Claimant

The employer seeks Board review of the Referee's order which found it to be responsible for claimant's disability occurring about January 13, 1976 and ordered it to accept claimant's claim as one of aggravation and provide claimant medical services and time loss benefits from and after January 13, 1976 and until the claim is closed pursuant to ORS 656.268, further ordered Argonaut Insurance Company to reimburse the State Accident Insurance Fund for any compensation which the latter had paid claimant pursuant to the Board's order of May 5, 1976, awarded claimant's attorney a reasonable attorney fee to be paid out of the compensation for temporary total disability and any award of compensation for additional permanent disability awarded as a result of the subsequent closure of the claim, the total fee not to exceed $2,000, approved the payment by the Fund of the bill from Kaiser Hospital and affirmed the denial issued by the Fund on March 4, 1976.

The claimant cross appeals for request for review, contending the Referee should have found the Fund responsible for claimant's disabling condition commencing on or about January 13, 1976, not affirmed the Fund's denial of March 4, 1976, set aside the Determination Order dated May 5, 1976, and awarded attorney fees payable by the Fund.

Claimant, while employed by Teeples and Thatcher, Inc., suffered a compensable injury to his low back on October 15, 1974. The claim was accepted by this employer's carrier, Argonaut. Claimant was released to work as of January 14, 1975 and commenced working as a laborer at the Trojan plant where he worked until early May, 1975. He did

not miss any time from work nor did he require medical attention or pain medication, although his low back continued to give him pain. Claimant quit this job because he did not like to commute from Portland and the Trojan plant which was approximately 45 miles each way.

In the early part of May, 1975 claimant commenced working for Forrester Construction Company, whose workmen's compensation coverage was furnished by the Fund. On May 13, 1975 claimant slipped while carrying a 60 pound pipe and injured his upper back. Claimant was treated at Kaiser Hospital, the diagnosis was thoracic paraspinal strain and thromboid strain. Claimant was seen several times at the hospital between May 13 and June 12, 1975. By May 20, 1975 complaints of pain in the mid-thoracic spine down to the low back and bilateral leg pain were noted and claimant received physical therapy for these problems. He filed a claim which was accepted by the Fund.

On May 23, 1975 claimant was examined by Dr. Pasquesi at the request of Argonaut and with regard to the October 15, 1974 injury. At the time of this examination claimant did not mention his May 13, 1975 injury but told Dr. Pasquesi that since returning to work in January, 1975 his back had continued to trouble him and the pain was increased somewhat when he returned to his regular work of laying pipe. At that time claimant's complaints were of almost constant pain in the mid-lower back. Dr. Pasquesi diagnosed a chronic lumbosacral strain and he felt claimant had minor to moderate pain but no impairment, although the condition might get worse and require subsequent reopening of the claim.

On July 15, 1975 the Fund was informed that claimant was released to return to work as of May 26, 1975 and was stationary and without disability insofar as the May 13, 1975 injury was concerned.

On September 2, 1975 Dr. Coletti, who had treated claimant for his 1974 injury, informed Argonaut that he agreed with Dr. Pasquesi's diagnosis and the October 15, 1974 claim was closed on October 8, 1975 with a Determination Order which awarded claimant compensation for time loss only.

On January 13, 1976 Dr. Soot examined claimant who was complaining of low back pain. Claimant did not tell Dr. Soot about his May 13, 1975 injury and the condition for which Dr. Soot has continued to treat claimant since that date involved symptoms from a lumbosacral strain. Claimant is not able to return to heavy work and Dr. Soot has not released claimant to work but has referred him to the Disability Prevention Division for vocational rehabilitation consideration. X-rays of claimant's spine indicate spondylolysis and spina bifada occulta, claimant is prone to easy reinjury and Dr. Soot was of the belief that claimant's present condition was contributed to by both the 1974 and 1975 injuries but he felt that the 1975 injury was more responsible for claimant's present condition.

On March 4, 1976 the Fund denied further responsibility for claimant's condition after June 4, 1975 because claimant's present conditions were related to the October, 1974 injury.

On March 5, 1976, at the request of Argonaut, who had been paying claimant compensation for temporary total disability on a deferred basis, the Board issued an order, pursuant to ORS 656.307, designating the Fund as the paying agent until such time as the responsible party was determined by an order.

On March 8, 1976 the Fund requested a determination of claimant's claim for the

May 13, 1975 injury and, on May 5, 1976, a Determination Order was issued allowing compensation for time loss from May 13, 1975 through March 23, 1976, less time worked and awarded 32 degrees for 10% unscheduled low back disability.

Claimant sought to establish that both Argonaut and the Fund were responsible for his present condition, based primarily on the opinion expressed by Dr. Soot. The Referee found, however, that Dr. Soot's opinion was qualified and inconsistant. The Referee found sufficient evidence that claimant had never fully recovered from his October, 1974 injury, that he was having difficulty preceded the incident of May, 1975 and that incident merely precipitated what was going to happen in a short time. The Referee found that the combination of the prior injury and claimant's continuing heavy work activities plus the spondylolysis and the spina bifada occulta assured that it would ultimately happen.

The Referee relied upon the exception to the Massachusetts-Michigan rule that where successive injuries occur full liability is placed upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability, i.e., if the second injury takes the form of merely a recurrence of the first, and if the second incident does not contribute even slightly to the causation of the disabling condition, the insurer on the risk at the time of the original injury remains liable for the second. He concluded that in this case the second accident may have contributed to claimant's present condition but it did not contribute even slightly to the causation of the disabling condition and, if both accidents did contribute to claimant's condition, the degree of contribution by each accident would be so speculative that any attempt to apportion or pro-rate responsibility would be both unrealistic and arbitrary.

Based upon the evidence developed at the hearing, the Referee found that certain billings from Kaiser Hospital had never been sent to the Fund. The Fund indicated that it would pay these bills on a diagnostic basis. Claimant insisted that they should be paid as a part of the Fund's claim. The Referee, having found that the Fund was not responsible for claimant's present condition, directed the Fund to pay the bills on a diagnostic basis.

The Referee concluded that neither Argonaut nor the Fund could be directed to pay claimant's attorney an attorney fee because Argonaut had not denied claimant's claim and the Fund was not responsible for the claim filed by claimant against it, therefore, the attorney fee must be paid out of the compensation awarded claimant.

The Referee thereupon entered his order as set forth in the opening paragraph of this order.

The Board, on de novo review, affirms the order of the Referee.

ORDER

The order of the Referee, dated July 22, 1976, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with Board review, the sum of $150, payable by Teeples and Thatcher, Inc., and its carrier, Argonaut Insurance Company.

WCB CASE NO. 76-2323 FEBRUARY 28, 1977

MARVIN LEITH, CLAIMANT
Lyman Johnson, Claimant's Atty.
Own Motion Order

On January 20, 1977 the Board received a petition from the claimant, by and through his attorney, requesting the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and allow claimant's claim of aggravation filed with the carrier on April 26, 1976 and denied by the carrier on April 29, 1976.

Claimant requested a hearing on the denial and, after a hearing, Referee Douglas W. Daughtry affirmed the denial on the ground that claimant had failed to establish by a preponderance of the evidence that his present condition was materially related to the June 25, 1971 accident for the purposes of aggravation.

On January 25, 1975 the carrier was advised by the Board of claimant's request, furnished a copy thereof and informed it had 20 days within which to state its position. On February 7, 1977 the carrier responded, stating that it felt it had no responsibility for the present condition of claimant's health.

The Board, after giving full consideration to the petition and the documents attached hereto, concludes that it has not been presented with any evidence that was not presented or available for presentation at the time of the hearing. Therefore, claimant's request that the Board, pursuant to ORS 656.278, order claimant's claim for aggravation of his June 25, 1971 industrial injury accepted should be denied.

It is so ordered.

SAIF CLAIM NO. HC 224743 FEBRUARY 28, 1977

NORMAN L. HUX, CLAIMANT
Marvin Hollingsworth, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On September 7, 1976 claimant requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for payment of medical expenses and compensation as provided by law, relating his present condition to an industrial injury suffered on December 28, 1969. Claimant's aggravation rights expired on January 28, 1975.

The Fund, after being advised of claimant's request responded by denying any further responsibility for claimant's 1969 injury.

The Board concluded that the evidence before it at that time was not sufficient for it to make a determination of whether claimant's present condition was attributable to his 1969 industrial injury and had worsened. Therefore, by an order dated October 6, 1976, the matter was referred to the Hearings Division with instructions to hold a hearing and take evidence on that issue. Upon conclusion of the hearing the Referee was directed to prepare a transcript of the proceedings and submit it to the Board with his recommendation.

Pursuant to this order a hearing was held on December 17, 1976 before Referee Joseph D. St. Martin. Based upon the evidence introduced at the hearing, Referee St. Martin recommended that the Board reopen claimant's claim for payment of medical expenses and compensation as provided by law, including a reasonable attorney fee to be awarded to claimant's attorney.

The Board, after de novo review of the transcript of the proceedings and the Referee's recommendation, adopts as its own the findings and conclusions contained in the recommended order, a copy of which is attached hereto and, by this reference, made a part of this order.

ORDER

The claim is remanded to the State Accident Insurance Fund for the payment of compensation as provided by law, commencing November 28, 1975 and until the claim is closed pursuant to the provisions of ORS 656.278, less time worked.

Claimant's counsel is awarded as an attorney fee a sum equal to 25% of any compensation which claimant shall receive as a result of this order, payable out of said compensation as paid, not to exceed the sum of $2,000; provided, should claimant receive compensation for temporary total disability only then the attorney fee shall not exceed $500.

WCB CASE NO. 76-2103 FEBRUARY 28, 1977

JAMES COLLINS, CLAIMANT
Thomas Davis, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer requests review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation as provided by law, assessed a penalty equal to 25% of the accrued medical bills for the unreasonable denial of the claim and awarded claimant's attorney an attorney fee payable by the employer.

Claimant, a 56 year old potman, alleged he suffered a compensable injury on March 13, 1976 when he was touched by a fellow employee and twisted his trunk to one side.

The cause of the "horseplay" injury was testified to by the other participant, a fellow worker, Mr. Nicholson, and by two witnesses. Claimant's work, like that of his fellow employees, is filthy and the employer furnishes a shower and a locker room for the employees to use if they so desire. Claimant worked the 4 p.m. to midnight shift and on March 13, 1976, after showering, was in the locker room getting dressed. Mr. Nicholson came by and mussed up claimant's hair, claimant, in a reflexive action, then twisted his trunk. Claimant had back pain and saw a doctor that same day.

Dr. Rush, an orthopod, diagnosed a lumbar back condition which aggravated a compensable back injury sustained on August 27, 1973.

On March 26, 1976 the carrier denied claimant's claim as not arising out of and in the course of his employment.

The evidence indicates the employer has safety signs posted throughout the plant against horseplay, however, a fair amount of horseplay does go on, most of it in the shower area. The employer contends claimant was the aggressor in this incident but this contention is not supported by the evidence.

The Referee found that the posting of signs by the employer to prevent horseplay is immaterial; that the injury did occur on the employer's premises while claimant was utilizing facilities provided by the employer for the employees' benefit.

The Referee concluded that this was a classic example of a compensable injury arising out of horseplay on the employer's premises and the employer's denial was improper and unreasonable.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 10, 1976, is affirmed.

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

WCB CASE NO. 76-1291 MARCH 1, 1977

WESLEY CARTER, CLAIMANT
Stipulated Order

The above-named claimant sustained back injury on February 26, 1975. His claim was closed by determination order of the Board dated March 9, 1976. From that order claimant requested review by a Referee of the Board contending he had been rendered permanently and totally disabled as a result of the injury aforesaid. A hearing was held on July 12, 1976 before Referee McLeod who denied his claim to have been rendered permanently and totally disabled, found him not to be so, but further found by order dated September 30, 1976 that the disability actually so sustained was the equivalent of 60% of a whole man being an increase of 35% of a whole man. A true and correct copy of said order is attached hereto and by this reference made a part hereof.

From Referee McLeod's order the claimant timely requested review by the Workmen's Compensation Board contending that Referee McLeod erred in not making to him an award of permanent total disability.

Pending the Board's formal review of Referee McLeod's order the parties hereto expressed a desire fully to settle and compromose their difference by the respondent submitting to and the claimant accepting a finding by the Board that claimant is not permanently and totally disabled as a result of his injury of February 26, 1975, neither as of the date of the hearing on July 12, 1976, nor as of the date of this order, and based upon said stipulation it is so found. The consideration for said finding is that the Board shall make, and does hereby make to claimant an award of permanent partial

disability the equivalent of 80% of a whole man, being an increase of 20% of a whole man over the awards previously made.

It is agreed by and between claimant and respondent that claimant may be paid the whole of his award on a lump sum basis.

It is further ordered that claimant's attorney be paid as and for a reasonable attorney's fee 25% of the increases obtained for claimant over and above the award made by Closing & Evaluation, said attorney fee to be paid out of and not in addition thereto provided, however, that the total fee shall not exceed the sum of $2,300.

This order having been entered based upon stipulation no appeal rights lie.

WCB CASE NO. 75-4980 MARCH 1, 1977

JAMES HANNON, CLAIMANT
Stipulation and Order

It is stipulated and agreed by and between the claimant, James Hannon, with the approval of his attorneys, Emmons, Kyle, Kropp & Kryger, and the employer, Nissen Motor Company, by and through Universal Underwriters Insurance, by Gary G. Jones, their attorney, that the Claim for Aggravation heretofore filed by the claimant on the 25th day of October, 1976, shall be accepted by the insurer and the employer, that temporary total disability benefits shall commence as of the 21st day of September, 1976 and shall continue until the same shall be terminated pursuant to the Workmen's Compensation Laws of the State of Oregon and the Administrative Rules of the Workmen's Compensation Board; that said case shall remain open for further medical care and treatment, until determination shall be made by the Workmen's Compensation Board pursuant to ORS 656.268.

It is further stipulated and agreed that there shall be paid to Emmons, Kyle, Kropp and Kryger, attorneys for claimant, a reasonable attorney's fee in the amount of 20% of the temporary total disability benefits due to claimant by virtue of this Stipulation, but in no event to exceed the sum of $400, the same to be a lien upon and payable out of such compensation, provided further that if said temporary total disability benefits shall be insufficient, then said attorney's fees shall be payable out of any further permanent partial disability awards.

It is further stipulated and agreed that the insurer shall pay the cost of the report of Dr. Larry Bassinger in the amount of $17.50, Albany General Hospital's bill in the amount of $10.00 for copies of their records and the bills for medical care incurred to date.

The foregoing Stipulation is hereby accepted and it is so ordered.

RAYMOND MAYES, CLAIMANT
Peter Davis, Claimant's Atty.
Dennis VavRosky, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the denial of claimant's claim by the employer.

Claimant, who was 43 years old at the time of the hearing, claims he suffered a left arm disability, the symptoms of which appeared within a few hours after claimant went to work on November 29, 1975. Claimant alleges the pain commenced in his left wrist on the first day and on the second day his left arm had swollen and he soaked the arm in Epsom salts. Claimant was able to continue to work. On December 8, 1975 claimant was seen by Dr. Marshall who diagnosed tenosynovitis. Claimant's claim first was accepted as a disabling injury on December 16, 1975 but denied on May 19, 1976.

Claimant's job was to manually operate a power saw, cutting boards which are used for making wooden shipping crates; in order to perform his job claimant is required to cut stacks of up to 8 boards by manually pushing a revolving saw blade through them, using his left arm. Claimant is also required to stack the boards on a pallet. Claimant contends this work caused his present complaints.

Dr. Marshall referred claimant to Dr. Gritzka who found no causal relationship between claimant's condition and his job other than that contained in the history related to him by claimant. Claimant was then referred to Dr. Eckhardt by Dr. Gritzka; Dr. Eckhardt applied a cast to the arm but the Referee found no convincing evidence that Dr. Eckhardt ever connected the claimant's injury with claimant's job.

The Referee found that the only medical document which did state that claimant's condition requiring the treatment was the result of an industrial injury was found in a report from Dr. Marshall, however, this report was the result of history given to Dr. Marshall by the claimant; additionally, the report erroneously indicated that this part of claimant's anatomy had never been injured before.

Evidence which clearly shows that claimant had suffered previous injuries to both his right and left arm was not brought forth until cross-examination at the hearing. At that time claimant admitted to filing a claim for injury to his right arm while working for Allied Plating Company, and also admitted he filed another claim when his chin had been injured while working at a place called Franzo. Further cross-examination elicited from claimant that he had also injured his left arm and had suffered similar symptoms to those he described with respect to his present claim; at the time of that injury claimant was employed by Portland Anodizing Company, and was working with the stationary floor buffer, buffing pieces of metal. Claimant was off work approximately one year as a result of this injury.

The Referee found that practically all of the previous jobs which claimant admitted that he had performed were of much heavier nature than the work which he now claims caused his present injury. Granting that an employer takes a workman as he finds him, the Referee found it too speculative, under the evidence introduced at the hearing, to

independently find causal relationship between claimant's present complaints and his job.

The Referee concluded claimant had not carried his burden of proving that he had suffered a compensable injury, the preponderance of the medical evidence precluded a finding of compensability.

The Board, on de novo review, affirms the order of the Referee.

ORDER

The order of the Referee, dated September 8, 1976, is affirmed.

WCB CASE NO. 75-5296 MARCH 3, 1977

In the Matter of the Compensation of
JAMES A. FAGNAND, CLAIMANT
And in the Complying Status of
NEW PUEBLO, INC., EMPLOYER
Rolf Olson, Claimant's Atty.
Dale Pierson, Defense Atty.
Dept. of Justice, Defense Atty.
Amended Order on Review

On February 22, 1977 an Order on Review was entered in the above entitled matter. The third paragraph on page 3 of the order incorrectly states that claimant's attorney's attorney fee shall be paid by the employer; it should be amended by deleting it therefrom and inserting in lieu thereof the following:

> "Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with this Board review, the sum of $300, to be paid by the Fund and recovered by the Workmen's Compensation Board from the employer, James A. Fagnand, pursuant to ORS 656.054."

In all other respects the Order on Review entered in the above entitled matter on February 22, 1977 is reaffirmed.

WCB CASE NO. 75-5233 MARCH 3, 1977

MARGARET RAYMOND, CLAIMANT
David Hittle, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which awarded claimant 64 degrees for 20% unscheduled low back disability and affirmed her award of 54 degrees for 40% loss of right foot. Claimant contends she is permanently and totally disabled or, in the alternative, is entitled to a substantial increase in her award of permanent partial disability.

Most of claimant's work experience has been as a cook, waitress or bartender. She has a high school education and has completed one term at Chemeketa Community College but discontinued in February, 1976. In the fall of 1974 claimant began a job as a part-time teacher's aide at St. Paul.

Claimant suffered a compensable right ankle injury on May 19, 1973. Claimant was treated by Dr. Struckman who placed claimant in a short leg brace.

Claimant's pain continued and she had significant loss of dorsiflexion of the ankle. A Determination Order of July 19, 1974 granted claimant 27 degrees for 20% loss of the right foot.

On November 22, 1974 Dr. Struckman again examined claimant and found she was getting secondary tibial tenidinitis due to tendon strain. He hospitalized claimant and performed surgery for lengthening right Achilles tendon.

A Determination Order of August 22, 1975 granted claimant an additional 27 degrees for loss of the right foot.

In March, 1976 Dr. Struckman reported claimant had first started complaining of back pain in December, 1973 with radiation into the right buttock and thigh. When examined on March 17, 1976 claimant was complaining of low back ache. Dr. Struckman felt this low back pain was related to claimant's industrial injury.

Claimant began counseling with Vocational Rehabilitation in June, 1975. Claimant wanted to be a teacher's aide. This training commenced in September, 1975 with claimant having good attendance and outstanding grades. Claimant requested the Board for special maintenance allowance but the Board refused the request at that time. In February, 1976 claimant advised her vocational rehabilitation counselor that she had increasing pain in her right ankle and had withdrawn from her training program.

Claimant has not tried to find work, nor has she filed any applications for employment.

The claimant contends she is permanently and totally disabled. The Referee found this contention was not supported by the evidence. The Referee concluded, however, that claimant has suffered a loss of wage earning capacity due to her low back disability and he granted 64 degrees for 20% unscheduled disability to compensate her for this loss.

The Board, on de novo review, concurs with the findings and conclusions reached by the Referee. The Board believes that claimant is entitled to some program of vocational rehabilitation and it strongly urges claimant to re-apply through her vocational rehabilitation counselor to the Board for special maintenance which, if granted, would enable her to again attend community college and ultimately return her to full time, gainful and suitable employment.

ORDER

The order of the Referee, dated August 6, 1976, is affirmed.

WCB CASE NO. 74-3030 MARCH 3, 1977

T. RAY GRUND, CLAIMANT
William Daw, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer requests review of the Referee's order which found claimant to be a subject employee working within the course and scope of his employment at the time of his injury and remanded claimant's claim to the Compliance Division for submission to the Fund.

Claimant and his wife were hired by Mr. Abell to manage the Village Victorian apartment house which was owned by a Washington company. Claimant and his wife moved into the premises and were given free rent ($135 a month); a salary was also paid for managing the apartments. Claimant requested, at this time, that the paycheck for managing the apartments be paid to claimant's wife as claimant has another job. Mr. Abell signed the paychecks.

Mr. Abell testified he knew claimant was doing tasks in connection with the management of the apartments and was assisting his wife in the management of them, but claimant was not to collect the rents or sign Village Victorian checks. Claimant had no authority to fire his wife; this was the right of Mr. Abell only. Deductions were taken from Mrs. Grund's paycheck.

Claimant sustained an injury on July 16, 1975, involving an automobile fire at the apartment house. He lost no time from work.

The Referee found claimant's injury was compensable. The Referee concluded claimant was a subject employee at the time of his compensable injury and the injury occurred within the course and scope of claimant's employment.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 15, 1976, is affirmed.

CLAIM # H104C351720 MARCH 3, 1977

BONNIE A. TERRY, CLAIMANT
Allan Coons, Claimant's Atty.
Eldon Caley, Defense Atty.
Own Motion Order Referring the
Matter for Hearing

On December 29, 1976 the Board received a request from claimant, by and through her attorney, that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an industrial injury suffered on September 17, 1969. The claim was initially closed by a Determination Order mailed March 18, 1970 and claimant's aggravation rights expired on March 17, 1975.

The Board was subsequently furnished medical reports from Dr. James dated November 16, 1976 and December 2, 1976 and also four affidavits from persons who are either related or know claimant, all in support of the aforesaid request to reopen claimant's claim. The carrier was given copies of the request and affidavits by the claimant; the reports from Dr. James were furnished to the carrier by Dr. James.

Claimant has also requested a hearing on the carrier's denial of her request, dated December 2, 1976 for further medical care and treatment pursuant to ORS 656.245.

At the present time the Board does not have sufficient evidence before it upon which to make a determination with respect to the merits of claimant's request to have her 1969 claim reopened. Therefore, the matter is referred to the Hearings Division with instructions to hold a hearing in conjunction with the hearing on the issue of claimant's entitlement to further medical care and treatment pursuant to ORS 656.245. The Referee is directed to take evidence on both issues and, upon conclusion of the hearing, to submit a transcript of the proceedings to the Board together with his recommendation with respect to the claimant's request for the reopening of her 1969 claim. The Referee is further directed to enter a separate and appealable opinion and order on the issue of claimant's entitlement for further medical care and treatment pursuant to ORS 656.245.

WCB CASE NO. 75-925 MARCH 3, 1977

ARCHIE F. KEPHART, CLAIMANT
David Vinson, Claimant's Atty.
Marshall Cheney, Defense Atty.
Supplemental Order Awarding Attorney Fees

The Board's Own Motion Order issued on February 24, 1977 in the above entitled matter failed to include an award of a reasonable attorney fee.

ORDER

It is hereby ordered that claimant's counsel receive a reasonable attorney fee of 25% of the compensation for temporary total disability awarded by its Own Motion Order, payable out of said compensation as paid, not to exceed the sum of $500.

WCB CASE NO. 76-38 MARCH 3, 1977

RONALD LOGAN, CLAIMANT
Timothy Bailey, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Fund's denial of claimant's claim for a compensable injury.

Claimant alleges a compensable injury on October 26, 1975 when he fell causing injury to his left knee. Claimant testified he had a popping sensation in the left knee with immediate onset of pain. He further testified he limped slightly the rest of his shift in the kitchen.

Claimant was fired on the 29th of October for reasons unrelated to the injury. He filed a claim on October 31, 1975.

Claimant's roommate testified claimant was limping when he got off work on the 26th. Claimant told him he had fallen. Claimant testified the dinner cook, Mr. Wright, and the dishwasher, Mr. Stianson, could have witnessed his fall. Mr. Stianson testified that he did not remember seeing any accident, nor did he remember talking to claimant about the alleged injury and did not see claimant limping prior to his discharge.

Mr. Wright testified that he stood at the grill and had a clear view of the area where claimant worked and was able to see or hear what went on in the kitchen, could even hear low voice comments. He saw or heard nothing indicating claimant had fallen in the manner alleged.

Mrs. Pennery, the chef, testified claimant made no mention to her of having fallen and did not notice claimant limping.

Claimant testified he first sought medical attention from Dr. Payne on the 30th; Dr. Payne referred claimant to Dr. Balme.

The Referee found the testimony of Mrs. Pennery and Mr. Wright were the most persuasive as to accuracy and credibility. The Referee further found it was a strongly discrediting factor that claimant had sought no medical attention until October 30, after testifying that his knee was out of alignment and that he suffered an immediate onset of pain and swelling and limping. This despite the fact that claimant had had previous knee problems which resulted in surgery.

The Referee concluded that the weight of the evidence preponderates that claimant did not sustain a compensable injury.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated May 18, 1976, is affirmed.

WCB CASE NO. 76-648 MARCH 3, 1977

THOMAS BRADY, CLAIMANT
Gary Rossi, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review of the Referee's order which granted claimant an additional award of 128 degrees for a total of 192 degrees for 60% unscheduled low back disability plus 22.5 degrees for 15% loss of left leg.

Claimant cross-requests Board review of the Referee's order, contending he is "odd-lot" permanently and totally disabled.

Claimant sustained a compensable injury on May 12, 1973, diagnosed by Dr. Lindsay as acute and chronic degenerative joint disease with early herniated disc syndrome. On August 10, 1973 Dr. Adams performed a herniated nucleus pulposus excision of L-4 and L5-S1 on the left.

On August 2, 1974 claimant was examined by the physicians at the Back Evaluation Clinic who found mild chronic radiculitis and stated claimant was medically stationary. They indicated claimant could return to his occupation with limitation of no heavy lifting. Loss of function of claimant's back was mildly moderate due to this injury.

A Determination Order of September 20, 1974 granted claimant 64 degrees for 20% unscheduled low back disability and 22.5 degrees for 15% loss of left leg.

On March 4, 1975 Dr. Gripekoven examined claimant and found claimant's problems were primarily mechanical in nature with mild nerve root irritation, secondary to scarring. Dr. Gripekoven did not feel claimant was a good candidate for surgery; claimant had a functional component to his complaints.

A 2nd Determination Order of June 30, 1975 granted claimant time loss only.

On June 1, 1976 claimant was examined by the Orthopaedic Consultants; the X-rays revealed degenerative osteoarthritis and degenerative disc changes. The doctors felt claimant's condition was medically stationary and that claimant wouldn't benefit from further treatment or from a spinal fusion. Claimant was not able to return to work as a logger or any other type of work that would put strain on his back. They rated claimant's disability as moderate; this rating covered claimant's back and lower extremities.

The Referee found claimant has been employed in truck driving most of his working life. He has a third grade education and no formal training and is essentially illiterate. The Referee found claimant to be a credible witness and well motivated.

The Referee found, based on the medical evidence, that claimant was not "odd-lot" permanently totally disabled. The physicians who examined claimant rated his disability, as related to the industrial injury, as moderate but all felt claimant could do some types of work. The Referee concluded claimant has lost substantial wage earning capacity and is entitled to a greater award than 20% for such loss; he increased the award to 60% to adequately compensate him for this loss. He affirmed the award claimant was granted for his left leg.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 14, 1976, is affirmed.

Claimant's attorney is granted as a reasonable attorney fee for his services in connection with Board review, the sum of $300, payable by the Fund.

DONALD MICHEL, CLAIMANT
Laurance Paulson, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests Board review of the Referee's order which awarded claimant 240 degrees for 75% unscheduled back and bladder disability, 90 degrees for 60% loss of left leg, and affirmed the award of 37.5 degrees for 25% loss of the right leg granted by the Determination Order of May 6, 1976.

Claimant, a division engineer for Evans Products, sustained a compensable compression fracture of his back at L1; and a spinal injury which in turned involved disability to claimant's bladder and both legs.

Claimant returned to work for the employer in December, 1973 but in October, 1974 was laid off along with 100 other employees. On December 1, 1974 claimant began working for Publishers Paper Company. This job does not require any extensive traveling as did the job for Evans Products and claimant's earnings and fringe benefits are practically identical to those he received from Evans.

Dr. Raaf's report of January 22, 1976 diagnosed compression fracture of the first lumbar vertebra resulting in severe lower spinal cord and cauda equina injury. Marked leg weakness and bladder and bowel function impairment. Claimant still has motor and sensory deficits and disability from pain. Dr. Raaf rated claimant's back disability at 20%; loss of function of the left leg at 35%; loss of function of the right leg at 25%; and loss of bladder at 10%.

A Determination Order of May 6, 1976 granted claimant an award of 144 degrees for 45% unscheduled back disability; 52.5 degrees for 35% loss of the left leg and 37.5 degrees for 25% loss of the right leg.

Claimant testified his primary problem at this time is that he tires easily.

Claimant has a B.A. in engineering and has also taken post graduate work in this field.

The Referee found claimant to be highly motivated and that he had not suffered a major loss of wage earning capacity; however, his field of industrial endeavor has been greatly narrowed. Claimant can no longer travel extensively, he is unable to climb ladders and to get around actively in plants on inspection tours, all duties which claimant has had to perform on previous jobs.

The Referee concluded that because of claimant's extraordinary motivation he is presently working beyond his physical capabilities. Therefore, the Referee granted claimant an additional 96 degrees for unscheduled back disability and an additional 90 degrees loss of left leg.

The Board, on de novo review, finds that claimant has lost no wage earning capacity and that the award granted by the Determination Order for his unscheduled disability was adequate as were the awards granted thereby for claimant's scheduled

disabilities. These awards are substantiated by Dr. Raaf's report of January, 1976 and adequate compensate claimant for the loss of function of both lower extremities. Therefore, the order of the Referee must be reversed.

ORDER

The order of the Referee, dated October 22, 1976, is reversed.

The Determination Order of May 6, 1976, is affirmed in its entirety.

WCB CASE NO. 75-2094 MARCH 3, 1977

In the Matter of the Compensation of
PHILLIP DAVID, CLAIMANT
And in the Complying Status of
RICHARD AND PATRICIA COX
dba R.C. Janitorial Service
Thomas Laury, Claimant's Atty.
James Dicey, Defense Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review of that portion of the Referee's order which affirmed the defendant's denial of claimant's claim for benefits subsequent to July 26, 1974.

Claimant, in his brief to the Board, contends the Referee erred in making a decision with respect to claimant's extent of permanent partial disability; he further requests penalties and attorney fees and compensation for temporary total disability from the date last received until the present.

The defendant admitted to being a subject non-complying employer from April 1, 1971 to January 30, 1975.

Claimant was hired by the defendant on September 6, 1973 and continued therein until March 8, 1974 when he was fired. On January 29, 1974 claimant had notified the employer he injured his back at work and the employer paid for claimant's medical care. Claimant continued to receive chiropractic treatment through February, 1974 and was finally referred to Dr. Kayser who hospitalized claimant and performed surgery. Claimant filed a claim which was accepted by the Fund. In May, 1975 defendant denied claimant sustained an injury on January 29, 1974.

The Referee found an abundance of evidence indicating claimant did sustain a compensable injury although not on the date he alleged it happened.

The Referee found that the evidence of a causal relationship between claimant's surgery of December 30, 1974 and his January, 1974 injury was less persuasive. The evidence indicates that when claimant saw Dr. Berland in July, 1974 he had no back complaints and was completely recovered from his January, 1974 injury. Additionally, in December, 1974 when claimant consulted Dr. Kayser claimant told him his symptoms were caused by operating a clutch on a new truck he had recently purchased rather than to the January, 1974 incident.

The Referee concluded, therefore, that claimant had failed to present sufficient evidence to establish that his surgery in December, 1974 was causally related to his injury of January, 1974, although he found the incident of January, 1974 to be compensable.

The Board, on de novo review, concurs with the conclusions reached by the Referee. There is nothing in the Referee's order which indicates that he considered claimant's extent of permanent partial disability, claimant's contentions to the contrary.

ORDER

The order of the Referee, dated May 21, 1976, is affirmed.

WCB CASE NO. 76-1519 MARCH 3, 1977

JOE MARTINEZ, CLAIMANT
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Fund's denial of claimant's claim for aggravation.

Claimant, a 46 year old warehouseman, sustained a compensable cervical back injury on July 16, 1971. A Determination Order of August 22, 1974 granted claimant an award of 48 degrees for 15% unscheduled disability. On April 28, 1975, by stipulation, claimant was awarded a total of 112 degrees for 35% unscheduled back disability.

Claimant testified that since August, 1975 his condition has become worse and he was eventually hospitalized for physiotherapy which alleviated his condition. Claimant has received no other medical treatment for his industrial injury.

Dr. Price's report of June 22, 1976 indicates that the physiotherapy treatments have given claimant considerable temporary relief but have not cured anything.

The Referee found Dr. Price's report clearly shows that claimant's medical treatment is purely palliative in nature and is provided for under the provisions of ORS 656.245; the report does not support a claim for aggravation.

The Referee concluded claimant has failed in his burden of establishing that his condition has worsened since the last award or arrangement of compensation. He affirmed the denial.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 1, 1976, is affirmed.

WILMA ERWIN, CLAIMANT
Own Motion Order

On December 13, 1976 the Board received a request from claimant to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an industrial injury suffered on August 12, 1970 while employed by American Building Maintenance whose workmen's compensation coverage was furnished by Allstate Insurance Company. She stated she had hurt her knee in August, 1976 and she believed it was an aggravation of her 1970 injury.

Claimant had previously requested Allstate to reopen her claim but was informed the five year period within which to file a claim for aggravation had expired and they were unable to reopen her claim. Claimant's claim was initially closed by a Determination Order mailed September 2, 1970 and claimant's aggravation rights expired on September 1, 1975.

On December 16, 1976 the Board advised claimant that before it could consider her request it was necessary for her to furnish the Board with current medical information establishing the facts that her condition had worsened and that the worsened condition was attributable to her 1970 industrial injury which had caused pulled ligaments in claimant's right knee.

On February 7, 1977 Dr. Adlhoch, Department of Orthopedics, Kaiser Permanente Medical Care Program, advised the Board, after reviewing his records, that claimant had visited their emergency clinic on August 15, 1970 and a diagnosis of a sprain, right knee was made, said injury relating to claimant's job. Claimant had had relatively few visits thereafter because of her knee but in 1976 apparently commenced to complain of increasing difficulty and was seen by Dr. Adlhoch on November 11, 1976. Prior thereto Dr. Baldwin, an orthopedic surgeon, had performed an arthrogram of the left knee; it was normal but claimant continued to complain and an arthroscopy was done by Dr. Courogen which revealed an essentially normal left knee joint. The puncture scars healed well and it was Dr. Adlhoch's impression that claimant's left knee was normal; he was unable to explain why she continued to have symptoms but stated he was unable to find any disability.

The Board notes that claimant's industrial injury of 1970 was to her right knee and the problems for which she required treatment and surgery in 1976 were for her left knee; however, despite this confusion it is Dr. Adlhoch's opinion that claimant has no permanent disability at this time. Therefore, there is not sufficient medical evidence to justify the reopening of claimant's 1970 claim.

ORDER

Claimant's request, dated August 12, 1976, that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an industrial injury suffered on August 12, 1970 is hereby denied.

LYLE ADAMS, CLAIMANT
William Schulte, Claimant's Atty.
Barbee Lyon, Defense Atty.
James Huegli, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which set aside the Fund's acceptance of claimant's claim for the reason the claimant was never an employee of SJ's Restaurant.

Claimant broke his right arm on November 7, 1975 at which time he was performing services for SJ's Restaurant as an independent contractor.

Claimant filed a claim on December 22, 1975. On December 31, 1975 the Workmen's Compensation Board's Compliance Division found SJ had been a non-complying employer from November 1, 1975 through November 13, 1975. On January 8, 1976, after notice from the Compliance Division of its action, the Fund accepted claimant's claim.

From November 4 through November 7, 1975 claimant worked a total of 17 hours at the restaurant, cleaning out trash in the basement. Claimant hired and paid two other persons to do the work under his direction; however, claimant did minor electrical and plumbing chores himself.

The Referee found that the primary test of an employer-employee relationship, i.e., the right to control, was lacking here in view of the fact that it was understood between the parties involved that claimant was an independent contractor and the work was handled accordingly. SJ made no attempt to control claimant's work..

Claimant came and went as he pleased, furnished his own tools, and could work for others; he also hired two other workers and paid them. Claimant was paid $5 an hour plus expenses. SJ did not withhold any money from claimant's paycheck for taxes or workmen's compensation.

The Referee concluded that claimant was an independent contractor rather than an employee at the time of his injury, therefore, he was not entitled to workmen's compensation benefits.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 27, 1976, is affirmed.

ARDIE SCOTT, CLAIMANT
Pamela McCarroll Thies, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant an award of 30 degrees for 20% loss of the left leg. Claimant contends the award is inadequate, also that he is entitled to an award for permanent disability of both arms.

Claimant, a 48 year old lumber mill worker, sustained fractures of the fibula and tibia of his left leg on January 6, 1973. Dr. Donahoo performed surgery. Subsequently, a sympathetic dystrophy of the left leg was diagnosed. A series of sympathetic blocks were administered and claimant developed phlebothrombosis in both arms and as a result the veins are smaller than normal.

Claimant was examined at the Disability Prevention Division by Dr. Mason on March 25, 1974. He diagnosed marked quadriceps and calf atrophy, left; limitation of dorsiflexion in the left ankle; severe habit limp, left; minimal vasomotor instability of the left ankle and foot; and emotional overlay.

Improvement of claimant's condition was slow. Claimant finally abandoned his occupation of mill worker, a job which he had performed for most of his adult life and was rehabilitated as an auto mechanic at Technical Training Service where he has been retrained as an instructor.

Claimant testified he has trouble working overhead as his arms tire easily and his fingers tingle; he cannot walk over five blocks; and his left leg has given out on him causing him to fall.

A Determination Order of January 31, 1975 granted claimant an award of 22.5 degrees for 15% loss of left leg.

On August 22, 1975 Dr. Lynch examined claimant who was then complaining of arm difficulties which Dr. Lynch related to phlebothrombosis but did not believe were a permanent condition.

The Referee found, based on the evidence presented, that claimant was entitled to a greater award for the loss of function of his left leg. He increased the award to 30 degrees. He found no medical evidence that claimant had suffered any permanent disability in either arm, nor had he sustained any permanent disability in the unscheduled area.

The Board, on de novo review, concurs with the conclusion reached by the Referee.

ORDER

The order of the Referee, dated September 24, 1976, is affirmed.

LAWRENCE SCOTT, CLAIMANT
Roger Reif, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review of the Referee's order which granted claimant an award for permanent total disability commencing on October 22, 1976, the date of the order.

Claimant, a bulldozer operator, sustained a compensable injury on October 26, 1973 diagnosed as recurrent disc disease. Claimant had had a prior back injury and laminectomy in 1972.

Claimant came under the care of Dr. Morgan who hospitalized claimant for traction. Claimant was re-hospitalized in February, 1974 and underwent a laminectomy at L4-5 on the right.

Claimant was again hospitalized under the care of Dr. Kloos in June, 1974 and a right lumbar laminectomy with removal of extruded disc pieces was performed. On August 12, 1974 claimant saw Dr. Kloos after having been involved in an automobile accident; he felt claimant had sustained only minimal muscle and ligament strain of the low back as a result of that accident.

Both Drs. Fagan and Kloos referred claimant to the Disability Prevention Division; claimant was given a psychological evaluation which indicated that claimant was emotionally disturbed because he was unable to return to his former lifestyle which was very active, almost manic, and inability to continue in his line of work.

Claimant continued to have difficulties but it was the concensus of Drs. Thompson, Smith and Fagan that, as of December, 1974, no further surgical exploration should be done.

On April 14, 1975 claimant was examined by the Orthopaedic Consultants who diagnosed residual radiculopathy L4-5 on the right. The physicians recommended constant use of a firm low back support with rigid stays and that claimant not return to his former occupation but did feel claimant might possibly be able to teach engineering which he had done before. Loss of function of claimant's back was moderate.

On July 23, 1975 Dr. Fagan advised the Fund that claimant's condition was becoming markedly worse; on August 14, 1974 Dr. Fagan indicated claimant was severely disabled with extreme pain.

Claimant was examined at the Portland Pain Clinic on November 18, 1975, a diagnosis of chronic low back pain was made; claimant showed little motivation in participation in the program there. Dr. Seres rated claimant's disability as moderate. Dr. Russakov felt claimant's disability was moderate to moderately severe, with residual functional capacity to do a maximum of light work.

Claimant is 53 years old, he has a 9th grade education and has completed two years of college in mechanical engineering and taught basic engineering problems at

college for almost one year. Claimant has not worked since his injury in October, 1973 nor has he sought any employment.

The Referee found claimant a credible witness who appeared in real pain at the hearing. Claimant's condition appears to have progressively deteriorated.

The Referee concluded, based on claimant's age, education, training, and physical limitations, that claimant had established a prima facie case that he fell within the odd-lot category and that the Fund failed to meet its burden of showing that gainful and suitable work was available to claimant. She found claimant was permanently and totally disabled.

The Board, on de novo review, affirms the order of the Referee. If a claimant makes a prima facie case of being odd-lot permanently and totally disabled, the burden shifts to the defendant to show availability of work which claimant could perform regularly and gainfully based on his present physical limitations. In this case claimant's teaching ability is limited to field problems not classroom work and claimant cannot do the work associated with being an engineering foreman. The Fund's attempts to show that there was work available which claimant was qualified and physically able to do were, at best, feeble.

ORDER

The order of the Referee, dated October 22, 1976, is affirmed.

WCB CASE NO. 75-4899 MARCH 8, 1977

ARTHUR MUELLER, CLAIMANT
William Reisbick, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Fund's denial of claimant's claim for an occupational disease.

The issues are: (1) was claimant's chronic pulmonary emphysema disease caused by or aggravated by his employment? and (2) assuming it was, is claimant's claim barred under the provisions of ORS 656.807 for untimeliness?

Claimant began working for the employer on January 17, 1953 as a welder. On March 15, 1972 claimant consulted Dr. Smith for X-rays because he was having breathing difficulties. On April 4, 1972 claimant terminated his employment. On June 27, 1972 Dr. Smith diagnosed pulmonary emphysema.

On April 28, 1975 claimant filed a workmen's compensation claim for an occupational disease; on November 3, 1975 the Fund denied claimant's claim for an occupational disease on the ground it was not timely filed.

Claimant testified he first became aware of breathing difficulties about 1967. A chart note from the Permanente Clinic dated April 13, 1972 indicates "has been known to have pulm. emphysema for 10-15 yrs."

Dr. Smith testified on claimant's behalf; Dr. Parcher testified for the employer. Their opinions are diametrically opposed.

The Referee found claimant discovered he had pulmonary emphysema about 1961 and he quit smoking but his continued working for the employer and his natural aging process both exacerbated his pulmonary disease.

The Referee concluded that claimant's emphysema was not caused by claimant's employment but was aggravated by his work environment and that an aggravation of a pre-existing condition is compensable.

On the issue of timeliness the Referee found that claimant had not worked since April 4, 1972. At that time ORS 656.807(1) made void any claim arising from a last exposure occurring prior to three years before the filing. By amendment, effective October 5, 1973, the limitation was enlarged from three to five years (Oregon law 1973, Ch. 543, Sec 3). The Referee concluded that the change in this statute was substantive rather than procedural and because the time limit was three years and 180 days on April 4, 1972, the date claimant was last exposed in his employment, his claim was barred because it had not been filed within three years from that date.

The Referee also found that the same statute required that a claim be filed within 180 days of the date claimant became disabled or the date he was informed by a physician that he was suffering from an occupational disease, which ever is later. He concluded that claimant had not worked since April 4, 1972, therefore, it was reasonable to assume that was the date he first became disabled and the claim was not filed for more than three years which was in excess of 180 days after the date he had been informed by Dr. Smith that he was suffering from an occupational disease as well as in excess of three years from his last exposure.

The Referee concluded that the claim was barred by ORS 656.807(1) and that the defendant's denial should be sustained.

The Board, on de novo review, concludes that the denial should be affirmed, however, its conclusion is based on a finding that the medical evidence shows only that claimant's work, while he actually was working, temporarily increased his symptomatology; it does not show that claimant's work had any substantial effect on the initial etiology of his disease or his natural progression. The Board concludes that claimant has failed by medical proof to show he has a compensable condition, except on a temporary basis. In the Matter of the Compensation of Robert Robinson, WCB Case No. 75-4068, Order on Review entered on October 27, 1976.

The opinion of the Referee that the change in ORS 656.807(1) was substantive rather than procedural and, therefore, the three year statute should apply is incorrect. In a very recent case the Court of Appeals ruled that the amended version of ORS 656.807(1) must be construed to allow consideration of claims filed within five years of last exposure which existed on October 5, 1968 or thereafter; stating, in part, that the most apt application of the policy of the law that the Workmen's Compensation Act is to be liberally construed for the benefit of the worker, is to the construction of a statute which is silent or ambiguous as to its retroactive effect upon the worker's claims. Holden v Willamette Industries Inc. filed February 22, 1977.

In the instant case the evidence indicates that Dr. Smith was not positive whether he had informed claimant in 1972 that claimant's working environment aggravated his emphysema, he merely thought he probably had done so. Furthermore, it is only an

assumption made by the Referee that when claimant ceased working on April 4, 1972 he was thereafter disabled. The Board, therefore, cannot agree with the Referee's conclusion that claimant's claim was barred by the provisions of ORS 656.807(1); however, that issue is moot inasmuch as the Board has concluded that the medical evidence does not support claimant's claim for aggravation and for that reason the claim was properly denied.

ORDER

The order of the Referee, dated August 31, 1976, is affirmed.

WCB CASE NO. 76-2144 MARCH 8, 1977

BILL WELLS, CLAIMANT
J. David Kryger, Claimant's Atty.
Richard Davis, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the employer's denial of claimant's claim for aggravation but ordered the employer to provide claimant with medical care pursuant to ORS 656.245.

Claimant, a 44 year old illiterate heavy construction worker, sustained a compensable injury on July 30, 1974, straining his neck and low back. Claimant saw a succession of doctors and on September 22, 1975 Dr. Hoffman indicated claimant could return to lighter work; he referred claimant to Vocational Rehabilitation.

A Determination Order of October 21, 1975 granted claimant an award of 96 degrees for 30% unscheduled neck and back disability.

Claimant continued to have flareups of pain symptoms following the use of the jackhammer at work. Claimant denies this. Dr. Hoffman wants to hospitalize claimant but claimant refuses, stating he can't afford to lose time from work.

The Referee found that claimant's flareups of symptoms were due to claimant's continuing to do heavy construction work and this will doubtlessly cause more serious permanent impairment in the future. The Referee felt claimant should take advantage of vocational rehabilitation services available to him and that he was entitled to receive continuing medical care and treatment under the provisions of ORS 656.245.

The Referee concluded that the evidence did not sustain a finding of an aggravation of claimant's condition.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 31, 1976, is affirmed.

RUTH HOWARD, CLAIMANT
Sam McKeen, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of the Referee's order which remanded claimant's claim for aggravation to it for acceptance and payment of compensation as provided by law.

Claimant sustained a compensable injury on February 23, 1972, injuring her right knee. A Determination Order of March 12, 1973 granted claimant 37.5 degrees for 25% loss of the right leg; a second Determination Order of August 21, 1973 granted claimant an additional 15 degrees, and a stipulation of October 30, 1974 increased claimant's disability to 75 degrees for 50% loss of the right leg.

On December 11, 1975 the Fund denied claimant's claim for aggravation on the ground that claimant's current problems stem from a fall claimant had on April 16, 1975.

On April 17, 1975 Dr. Robinson indicated claimant's disability was continuing and claimant had fallen and injured her right knee. On January 5, 1976 Dr. Robinson stated that had claimant not sustained the industrial injury then the minor re-injury (when she fell) would have been asymptomatic a long time ago.

Dr. Robinson has treated claimant's leg condition since 1973, he gave her no physical treatment but did prescribe medication. In June, 1975 Dr. Robinson retired and claimant came under the care of Dr. Holford who continued to provide the same services to claimant as had Dr. Robinson.

Claimant testified her condition has worsened since the last arrangement of compensation on October 30, 1974. She further testified that she has more persistant pain now and her leg has become weaker, causing her to fall.

The Referee found that claimant's increased instability of her knee has been demonstrated and, therefore, constitutes an aggravation of her February, 1972 industrial injury.

The Referee remanded claimant's claim to the Fund for acceptance.

The Board, on de novo review, finds that claimant now has no greater loss of function of her right leg than she had at the time of the stipulation of October 30, 1974 which granted her an increase which resulted in a total award equal to 50% of her right leg. The Board finds that claimant still retains 50% use of her leg, therefore, the Referee's order must be reversed.

ORDER

The order of the Referee, dated June 28, 1976, is reversed.

The denial by the Fund of claimant's claim for aggravation is approved.

WCB CASE NO. 75-109 MARCH 8, 1977

MYRTLE OTTERSTEDT, CLAIMANT
Jan Baisch, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order affirming the Fund's denial of claimant's claim for aggravation.

Claimant sustained a compensable injury on October 22, 1968, her claim was closed on November 4, 1969 with an award granting claimant time loss only. Claimant was subsequently granted an award of 48 degrees for 15% unscheduled disability by an Opinion and Order entered May 18, 1971.

On October 11, 1974 claimant filed a claim for aggravation which was denied by the Fund on December 20, 1974 and claimant requested a hearing. On June 27, 1975 the Fund filed a motion to dismiss the request for hearing, contending that the medical reports did not support aggravation and that its letter of December 20, 1974 denying the claim was not an admission of a valid aggravation claim.

The Referee found that ORS 656.273, as presently amended, allows a physicians report indicating the need for further medical services or additional compensation to be a claim for aggravation; if the evidence, the medical reports and the testimony show a worsening of claimant's condition, then the claim for aggravation should be allowed.

In the instant case the Referee found that the reports from Dr. Nash were sufficient to constitute a claim for aggravation; however, he found that none of the medical reports presented were convincing evidence that claimant's present condition was a result of her 1968 industrial injury. Furthermore, claimant's vague and unconvincing testimony failed to implement the medical reports. He concluded that claimant had failed to show that her condition had worsened since the last award or arrangement of compensation which was granted on May 18, 1971.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 15, 1976, is affirmed.

CLAIM # 65-68644 MARCH 9, 1977

LEO H. ALBERTSON, CLAIMANT
James Lynch, Claimant's Atty.
Own Motion Order Referring for Hearing

On February 2, 1977 claimant requested the Board to reopen his claim for an industrial injury suffered on May 20, 1970 through the exercise of its own motion jurisdiction granted by the provisions of ORS 656.278. Claimant's request was supported by a medical report from Dr. Campagna, dated December 30, 1976, stating an opinion that the injury to claimant's neck which necessitated surgery on January 16, 1976 was

the result of his industrial injury suffered on May 20, 1970. Claimant's claim has been closed and the five year aggravation period has expired.

Copies of the request and report were furnished to Scott Wetzell Services Inc.

On February 22, 1977 the carrier responded, stating that they strongly resisted reopening of the claim because there was a serious medical question as to whether claimant's current condition was a direct result of the injury sustained on May 20, 1970.

At the present time the Board does not have sufficient evidence before it upon which to make a determination on the merits of claimant's request. Therefore, the matter is referred to the Hearings Division with instructions to hold a hearing and take evidence on the issue of whether claimant's present condition is a direct result of his industrial injury sustained on May 20, 1970. Upon conclusion of the hearing the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendation on claimant's request to reopen his May 20, 1970 claim.

SAIF CLAIM NO. C 253262 MARCH 9, 1977

WILLIAM MYERS, JR., CLAIMANT
Don Wilson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order Referring for Hearing

On February 2, 1977 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen claimant's claim for an industrial injury suffered on May 14, 1970. It is alleged that claimant is in need of additional medical care and treatment and additional disability benefits. Claimant's claim has been closed and more than five years have expired since the date of the first closure. The request is supported by medical reports from Dr. Johnson and Dr. Baskin.

Claimant asked the Fund to reopen the claim but the Fund on December 8, 1976 responded, stating it would not provide any additional benefits. Claimant alleges such response must be deemed a rejection to provide further medical care and treatment pursuant to ORS 656.245.

The Fund, after being furnished a copy of the request and medical reports, responded on February 22, 1977, stating it had provided claimant all treatment indicated, including a stay at the Portland Pain Clinic and providing claimant with a stimulator; that the last medical report from Dr. Baskin, dated August 16, 1976, indicated a solid lumbar fusion and claimant has already received an award of 160 degrees for 50% unscheduled disability.

The Board construes the response of the Fund to be in opposition to claimant's request and, not having sufficient medical and lay evidence before it at the present time upon which to make a determination on the merits of claimant's request, refers the matter to the Hearings Division with instructions to hold a hearing on the issue of whether claimant's present condition represents a worsening since the last arrangement or adjustment of compensation which was made on January 10, 1974, thereby justifying a reopening of the claim as requested by claimant and also on the issue of entitlement to additional medical care and treatment pursuant to ORS 656.245.

Upon conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be transcribed and submitted to the Board together with his recommendation on claimant's request to reopen his claim for the industrial injury of May 14, 1970. On the remaining issue of claimant's entitlement to medical care and treatment pursuant to ORS 656.245, the Referee shall enter a separate and appealable order.

(No Number Available) MARCH 9, 1977

RANDY ROGERS, CLAIMANT
Gary Susack, Claimant's Atty.
Daryll Klein, Defense Atty.
Own Motion Determination

Claimant sustained a compensable left knee injury on December 19, 1969 when a snowmobile track ran over his left knee. His claim was originally closed by a Determination Order of December 10, 1970 with an award of 20% loss of left leg. Claimant has undergone five surgeries for his left knee between February 10, 1970 and May 16, 1973.

A Second Determination Order of January 9, 1974 granted claimant an additional 45% loss of left leg; claimant appealed and, after a hearing, was granted an additional 10%, giving claimant a total award of 85% loss of left leg. Subsequently, claimant developed problems with his right leg which he claimed were attributable to his 1969 injury to his left leg.

On May 9, 1976 claimant was hospitalized and surgery on May 10, 1976 for osteochondritis desicans medial condyle right femur was performed. By stipulation, approved on September 2, 1976 the carrier agreed to accept the claimant's claim for his right leg as an aggravation of his December 19, 1969 injury. The claim was submitted to the Evaluation Division for closure. Claimant's aggravation rights have expired.

The Evaluation Division of the Board recommends claimant be granted compensation for temporary total disability from May 9, 1976 through January 28, 1977, less time worked and an award of 37.5 degrees for 25% loss of right leg.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from May 9, 1976 through January 28, 1977, less time worked and 37.5 degrees of a maximum 150 degrees for loss of right leg.

SAIF CLAIM NO. A 595300 MARCH 9, 1977
SAIF CLAIM NO. A 827843
SAIF CLAIM NO. KC 355392

LESLIE HARTUNG, CLAIMANT
Milo Pope, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order Referring for Hearing

On January 18, 1977 the Board was advised by claimant's attorney that claimant had suffered three industrial injuries, namely, on January 10, 1957 while employed by Thews Sheet Metal, on October 12, 1960 while employed by Merriman Plumbing, and on February 17, 1972 while in the employ of Lyndon Farms. Claimant filed claims for each injury and in each the Fund was the insurer. Claimant's aggravation rights have expired with respect to the 1957 and 1960 injuries. Claimant filed a claim for aggravation of his 1972 injury which was denied by the Fund.

Claimant has requested a hearing on the denial of his claim of aggravation of the 1972 injury. He now requests that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claims for the 1957 and 1960 injuries; claimant further requests that the issue of his request for the reopening of the 1957 and 1960 claims be heard on a consolidated basis with the issue of the denial of his claim for aggravation of his 1972 injury. Claimant contends he is permanently and totally disabled from injuries referable to his back and resulting from all three industrial injuries.

On January 27, 1977 claimant's attorney was advised that before the Board could act on claimant's request for own motion relief it would be necessary to serve said request on the Fund and to furnish the Board and the Fund current medical information dealing with claimant's present condition and whether it has worsened and, if so, whether the worsened condition is attributable to any or all of the claims referred to in claimant's request.

On February 5, 1977 the Board received a set of medical reports dating back to January 10, 1957, the Fund was furnished copies of said reports and given 20 days within which to respond to claimant's request.

On February 7, 1977 the Fund responded, stating that claimant's current back problems were covered by Claim # A 827843 (the injury of October 12, 1960) and that the Fund had voluntarily reopened the claim on December 8, 1975 and closed it again on December 28, 1976. It furnished the Board copies of the opening and closing letters and also the medical report submitted in behalf of the claim of aggravation of the industrial injury suffered on February 17, 1972 (Claim # KC 355392). Based upon that report and a report received from Dr. D.D. Smith, dated January 3, 1977, the Fund stated that, at this time, it would not consider reopening claimant's claim.

The Board believes that these matters can be more fully considered and accurately determined if they are referred to the Hearings Division, therefore, the claimant's request for own motion relief with respect to his industrial injuries of January 10, 1957 and October 12, 1960 are referred to the Hearings Division with instructions to hold a hearing and take evidence on the merits of the aforesaid request in consolidation with the issue of the propriety of the Fund's denial of claimant's claim for aggravation of his February 17, 1972 injury.

Upon conclusion of the hearing, the Referee shall cause to be transcribed a complete record of the proceedings and submit a copy thereof to the Board together with his recommendation on the claimant's request to reopen his 1957 and 1960 claims. The Referee is also directed to enter a separate and appealable Opinion and Order on the propriety of the Fund's denial of claimant's claim of aggravation of his February 17, 1972 injury.

WCB CASE NO. 75-5034 MARCH 9, 1977

MELLIE FLECK, CLAIMANT
Dennis Henninger, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which found the employer's payment of claimant's medical expenses under the provisions of ORS 656.245 was correct and proper.

Claimant contends she is unable to work now and has suffered an aggravation of her condition. The employer contends only medical treatment under the provisions of ORS 656.245 is involved.

Claimant sustained a compensable injury on April 3, 1974, diagnosed as a cervical strain; she was released to work on April 30, 1974. The claim was closed on June 14, 1974 with an award of compensation for temporary total disability only. Four days later claimant consulted Dr. Goodwin about discomfort in her right knee. She filed a claim for the knee injury which was denied.

In early March, 1975 claimant quit work due to increased discomfort in her right knee. On March 17, 1975 Dr. Newton examined claimant and diagnosed possible internal derangement right knee and on December 17, 1975 performed an arthroscopy and lateral meniscectomy.

In August, 1975 claimant had consulted Dr. Fleming for neck symptoms. She also consulted Dr. Newton, complaining of neck problems but, at that time, she was more concerned with her right knee difficulties. At some time after claimant was seen by Dr. Fleming the carrier commenced paying for the treatment of claimant's cervical strain.

Claimant testified her neck symptoms returned in August, 1975 and she received therapy and cortisone shots. Claimant stated she wears a cervical collar whenever she has to sit for a prolonged time or travels and she has been unable to work since August, 1975 because of neck pain which interferes with her ability to concentrate.

The Referee found there was no medical evidence submitted which indicated claimant was unable to work due to her neck symptoms. There was evidence that claimant quit work in March, 1975 because of leg problems. On September 30, 1975 Dr. Fleming stated that claimant had been complaining in late August of neck pain which he found was consistent with cervical strain. But the Referee noted Dr. Fleming did not state this neck pain was of such severity as to prevent claimant from working.

The Referee concluded that there was no medical evidence which verified claimant's inability to work resulting from a worsened condition of her cervical strain. He concluded that the payment of claimant's medical expenses under the provisions of ORS 656.245 was sufficient.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 15, 1976, is affirmed.

WCB CASE NO. 75-1822 MARCH 9, 1977

CHARLES PITTS, CLAIMANT
Herbert Putney, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which granted him an additional award of 96 degrees, for a total award of 208 degrees for 65% unscheduled low back disability. Claimant contends he is permanently and totally disabled.

The Fund cross-requests Board review. Neither party filed briefs.

Claimant sustained a compensable low back injury on January 5, 1973. On March 28, 1973 Dr. Luce performed a decompressive laminotomy and foraminotomy L4-5 and L5-S1 with removal of protruded mid-line intervertebral disc L5-S1. On September 21, 1973 Dr. Luce performed a bilateral forinotomy and laminotomy L4-5 interspaces.

On January 14, 1975 claimant was examined at the Disability Prevention Division by Dr. Halferty who recommended a job change for claimant. A psychological evaluation revealed claimant's psychopathology related to the injury was moderately severe.

A Determination Order of March 6, 1975 granted claimant 112 degrees for 35% unscheduled low back disability.

Claimant has other non-related medical problems which interfere with his ability to work; a war wound to the left elbow, gout and contact dermatitis.

The Referee found claimant is now precluded from returning to his former occupation of jitney driver; however, the evidence presented, including still photographs and movies, indicated claimant can tolerate more physical activity than that to which he admits. Claimant has not been employed since his second surgery. Claimant testified he has contacted the employer about going back to work and the employer informed him by letter than they had nothing further in the line of work for him. This testimony was flatly contradicted by company officials. Claimant attempted vocational rehabilitation but nothing came of it and claimant refuses to contact them again.

The Referee concluded, based on the medical evidence, that claimant is entitled to an additional award of 96 degrees to adequately compensate him for his loss of wage earning capacity.

The Board, on de novo review, adopts the Referee's order. There was no medical evidence to support a finding of permanent total disability.

ORDER

The order of the Referee, dated February 6, 1976, is affirmed.

WCB CASE NO. 76-2596 MARCH 9, 1977

TERRY STARK, CLAIMANT
Stipulation of Compromise

This matter coming before the Workmen's Compensation Board upon stipulation of the parties, the Employer and its carrier, Farmer's Insurance Group, appearing through Jeffrey M. Kilmer, attorney for the carrier, and the Claimant appearing through Allen G. Owen, and the parties representing:

(a) That the Claimant duly filed a claim for an injury arising out of and in the course and scope of his employment with Superior Machine Products, Incorporated, alleging in substance that on or about January 21, 1976, while the Claimant was engaged in playing football at a location off the Employers' premises during an unpaid afternoon rest break, he suffered loose body fractures of the right hip and joint;

(b) That the Employer denied Claimant's claim for the reason that the injury was not sustained in the course and scope of the Claimant's employment, that the activities causing Claimant's injury were not for the benefit of the Employer, that the activity was not a risk assumed by the Employer, and that the injury occurred during the time the Claimant was not paid;

(c) That Claimant duly appealed the denial whereupon a hearing was held on August 27, 1976, resulting in a Referee's Opinion and Order dated November 5, 1976, holding the injury compensable;

(d) That the Referee's ruling is now an appeal to the Board, and that the issue of compensability is very close;

(e) That the parties are desirous of settling and compromising the Claimant's claim, subject to the approval by the Workmen's Compensation Board, as follows:

1. Claimant withdraws his claim for injury as hereinabove set forth and the Employer, based thereon, withdraws its request for a Board review;

2. Claimant retains any and all compensation benefits paid to the Claimant or paid on Claimant's behalf by the Employer to date;

3. Claimant's attorney receives from Farmer's Insurance Group, as a reasonable attorney's fee, the sum of $500 in a lump sum;

4. Upon approval of the stipulated settlement, Claimant's claim be dismissed with prejudice to the Claimant;

(f) That there exists additional and valuable consideration for this settlement in the form of another and separate agreement by and between the Claimant and the

Employer, the subject of which does not relate to anything concerning Workmen's Compensation Claim, or medical treatment.

Therefore, all parties to this dispute request the Workmen's Compensation Board to approve this compromise.

It is hereby ordered that Claimant be allowed to withdraw his claim for injury arising out of an incident of January 21, 1976, and the same is hereby withdrawn;

It is further ordered that the within appeal is hereby dismissed with prejudice to the Claimant;

It is further ordered that the Claimant retain all Workmen's Compensation Benefits paid to him or on his behalf to date by Farmer's Insurance Group;

It is further ordered that Claimant's attorney, Allen G. Owen, receive as a reasonable attorney's fee the sum of $500, to be paid by Farmer's Insurance Group.

WCB CASE NO. 76-774 MARCH 9, 1977

WILLIAM WANE, CLAIMANT
Henry Kane, Claimant's Atty.
Ron Podnar, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant an additional award of 48 degrees, giving claimant a total award of 60 degrees for 20% unscheduled disability. Claimant contends this award is inadequate.

Claimant, a Systems Technician II, sustained a compensable injury on March 15, 1975, diagnosed as protruded intervertebral disc L5-S1 on the right. On March 26, 1975 Dr. Parsons performed a lumbar laminectomy.

On April 4, 1975 Dr. Sullivan performed surgery for prolapsed hemorrhoids which Dr. Parsons related to the laminectomy and, therefore, to claimant's industrial injury.

A Determination Order of January 19, 1976 granted claimant 16 degrees for 5% unscheduled low back disability.

On May 4, 1976 Dr. Parsons examined claimant and diagnosed S1 nerve root compression; he stated claimant now must avoid lifting excessive weights of 25 pounds or greater on a repetitive basis.

On May 13, 1976 claimant was examined by the Orthopaedic Consultants. The physicians diagnosed minimal radiculopathy on the right evidenced by hypesthesia and weakness in musculature in the right quadriceps and hip flexors. They recommended a different type of occupation for claimant within the electrical engineering field. They further found that the award granted by the Determination Order of 5% was low; the total loss of function of claimant's back was mild.

Claimant has a bachelor's degree in electrical engineering and has 17 years working experience. Claimant testified he is now precluded from overtime work; he has applied for eight other jobs with the employer but has not been accepted for any of them; and the chances for promotion in his present job (systems testing) are not as great as in the systems manufacturing in which claimant was engaged at the time of his injury. However, the latter job requires lifting of 60 pounds and frequent moving.

The sole criteria for determining unscheduled disability is loss of wage earning capacity. The Referee found that claimant has suffered a greater loss of wage earning capacity than the award granted by the Determination Order indicates and he awarded claimant an additional 48 degrees to compensate claimant for such loss.

The Board, on de novo review, affirms the Referee's order but notes that said order incorrectly grants claimant 60 degrees for 20% unscheduled disability; it is hereby corrected to award claimant 64 degrees for 20% unscheduled disability.

ORDER

The order of the Referee, dated October 7, 1976, as corrected by this order, is affirmed.

WCB CASE NO. 74-3030 MARCH 11, 1977

T. RAY GRUND, CLAIMANT
William Daw, Claimant's Atty.
Dept. of Justice, Defense Atty.
Amended Order

The Board's Order on Review in the above entitled matter dated March 3, 1977, on page 2 under the Order portion should be deleted and inserted in lieu thereof should be the following:

ORDER

The order of the Referee, dated August 15, 1975, is affirmed.

SAIF CLAIM NO. AC 131218 MARCH 11, 1977

JAMES BUTLER, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

On November 22, 1976 the Board issued its Own Motion Order remanding claimant's claim to the Fund to take the necessary steps to enroll claimant at the Disability Prevention Division for complete evaluation of his potential for vocational retraining.

Claimant was enrolled at the Disability Prevention Center on January 26, 1977. On January 27, 1977 claimant told Dr. Toon he did not want to stay there and be part of the program because it would not help his back, he did not need physical conditioning and did not need assistance to get back to work. Claimant indicated he did not need anyone's help and did not want to participate in the rehabilitation program.

On February 10, 1977 the Fund requested a determination. The Evaluation Division of the Board recommends claimant be granted no further award for permanent partial disability but that he is entitled to compensation for temporary total disability for the two days he was enrolled at the Disability Prevention Center.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 26, 1977 through January 27, 1977.

WCB CASE NO. 75-1211 MARCH 11, 1977

PHILLIP BRYANT, CLAIMANT
David Blunt, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of October 25, 1975. Claimant contends he is entitled to 240 degrees for 75% unscheduled disability.

Claimant, 23 at the time of his injury on May 7, 1974, sustained a lumbosacral strain injury. He first saw Dr. Moreno who diagnosed muscle strain, right back. X-rays taken were normal.

Claimant returned to work about May 17 and on May 20, 1974 advised his doctor that he was unable to work because of continuing back problems.

Dr. Spady examined claimant on September 10, 1974 and found his condition to be medically stationary with some residual disability.

A Determination Order of February 4, 1975 granted claimant 32 degrees for 10% unscheduled low back disability.

On June 5, 1975 Dr. Weinman examined claimant and diagnosed chronic lumbosacral sprain; he recommended physical therapy. Claimant's claim was reopened on June 13, 1975 for vocational rehabilitation. On July 22, 1975 Dr. Weinman found claimant medically stationary with minimal loss of function and his only limitation was avoidance of heavy lifting.

A Second Determination Order of October 22, 1975 granted claimant no additional award for permanent partial disability.

On March 19, 1976 claimant was examined by the Orthopaedic Consultants who diagnosed dorsal lumbar strain by history, and functional overlay; they found that no further treatment was indicated at that time. They found claimant's disability was minimal.

The Referee found that all of the medical findings were consistent. Claimant has

sustained a lumbosacral strain, mild; claimant is medically stationary and only requires conservative treatment; all of the doctors agree claimant cannot return to heavy manual labor but can perform lighter work.

The Referee concluded that the award of 32 degrees for unscheduled disability granted by the Determination Order adequately compensated claimant for his loss of wage earning capacity.

The Board, on de novo review, affirms the order of the Referee.

ORDER

The order of the Referee, dated July 12, 1976, is affirmed.

WCB CASE NO. 75-3014 MARCH 11, 1977

WILLIAM SCOTT, CLAIMANT
J. David Kryger, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests Board review of the Referee's order which granted claimant an award of 192 degrees for 60% unscheduled low back disability. Claimant contends he is permanently and totally disabled.

Claimant sustained two prior injuries; one in 1947 to his back and one in 1956 to his knee, for the latter he received an award for 10% permanent partial disability.

On January 6, 1969 claimant noted a sharp pain in his low back and was unable to straighten up. Claimant was treated by a chiropractor and missed a month's work. Claimant's claim was closed by a Determination Order in April, 1969 with no award for permanent partial disability.

On November 17, 1972 Dr. Steele examined claimant and diagnosed chronic low back strain with early degenerative arthritis of the spine. On November 27, 1973 Dr. Holm examined claimant and diagnosed herniated intervertebral disc L4-5 on the right. On January 18, 1974 Dr. Fitchett diagnosed herniated nucleous pulposis and recommended a myelogram. On February 21, 1974 the Fund denied a request to reopen claimant's claim.

On July 10, 1974 Dr. Hockey examined claimant and found the weakness in claimant's right lower extremity was hysterical; he recommended claimant return to activities that did not involve heavy lifting, jarring or repetitive bending or twisting. Claimant did not need further treatment but should lose weight.

Claimant was examined at the Disability Prevention Division on May 7, 1975 by Dr. Mason who diagnosed chronic right lumbar and lumbosacral strain, mild, little objective evidence of herniated intervertebral disc lesion, gross emotional overlay exaggeration and a claims conscience individual, obesity, obviously hypochondriacal and recommended claimant make a job change, but stated claimant's motivation was probably nil for returning to work.

On May 19, 1975 Dr. Hickman, after a psychological evaluation of claimant, found claimant should not suffer any permanent psychological disability as a result of this accident provided he returned to full time work. He found claimant needs psychotherapy and the need for such treatment was primarily chronic in nature and probably not the responsibility of the carrier.

A Determination Order of July 10, 1975 granted claimant an award of 96 degrees for 30% unscheduled low back disability.

On February 24, 1976 claimant was examined by Dr. Ackerman, a psychologist, who diagnosed, in order of importance, hysterical neurosis, conversion type, probable hysterical personality ante-dating the neurosis, and obsessive and passive aggressive features.

The Referee found that the two clinical psychologists were of opposed views. Dr. Ackerman found claimant was not intentionally exaggerating his symptoms and that he was psychoneurotic. Dr. Hickman, on the other hand, found claimant had hypochondriacal preoccupation with his symptoms. Dr. Hickman further felt that claimant's psychological problems were not permanent in nature if he returned to full time employment.

The Referee concluded he could not find that claimant suffered from permanent psychological disability attributable to the industrial injury. Dr. Ackerman makes no causal relationship to the industrial injury, while Dr. Hickman finds the industrial injury aggravated claimant's psychological problems which were not permanent in nature.

The Referee found claimant is not permanently and totally disabled but his work experience has been mostly in physical labor and claimant cannot now return to his former occupation. He found little hope for help for claimant for the Division of Vocational Rehabilitation. He found claimant's motivation is desperately lacking.

The Referee concluded, based upon the evidence presented, that claimant was entitled to an award of 192 degrees for 60% unscheduled disability to compensate him for his loss of wage earning capacity.

The Board, on de novo review, affirms the order of the Referee.

ORDER

The order of the Referee, dated August 6, 1976, is affirmed.

WCB CASE NO. 76-250 MARCH 11, 1977

MARK BURTON, CLAIMANT
Gretchen Morris, Claimant's Atty.
Daryll Klein, Defense Atty.
Amended Order on Review

On February 11, 1977 an Order on Review was issued in the above entitled matter. On page 3 thereof it was stated that there was no evidence to dispute a finding that compensation due claimant for temporary total disability had not been paid promptly as required by statute and the Board concluded that claimant was entitled to an additional compensation as a penalty. Claimant, therefore, was awarded additional compensation

as a penalty, a sum equal to 15% of compensation for temporary total disability due him for the period from the date of his injury to December 12, 1975, the date of the denial.

Upon receipt of the order the carrier, Employee Benefits Insurance, advised the Board that it had been late in making the initial payment of compensation but thereafter it had paid every two weeks until it denied the claim; photocopies of the carrier's checks were furnished which substantiated this.

Therefore the Order on Review entered in the above entitled matter on February 11, 1977 should be amended by deleting page 3 of said order in its entirety and substituting therefor the following:

"The Board, on de novo review, concurs in the conclusions reached by the Referee that claimant's claim for a compensable injury occurring on October 1, 1975 should be denied. The Board finds that claimant is entitled to receive compensation for temporary total disability from October 13, 1975, the date claimant ceased working, to December 12, 1975, the date that his claim was denied.

The Board finds that the first payment to claimant of compensation for temporary total disability was not paid until November 14, 1975 although the employer received notice of the injury on October 14, 1975, therefore, the Board concludes that claimant is entitled to additional compensation as a penalty in a sum equal to 15% of the amount of compensation for temporary total disability due claimant from October 13, 1975 to November 14, 1975, the date claimant was first paid compensation for temporary total disability. The Board further finds that the subsequent payments of compensation were promptly paid as provided by statute.

Claimant's attorney is entitled to be paid as a reasonable attorney fee a sum equal to 25% of the additional compensation due to claimant, payable out of said compensation as paid, not to exceed $500.

ORDER

The order of the Referee, dated July 14, 1976, is modified.

Claimant's claim for workmen's compensation benefits for a compensable injury occurring on October 1, 1975 is denied.

Claimant is entitled to compensation for temporary total disability from October 13, 1975 to December 12, 1975.

Claimant is awarded, in addition to the compensation for temporary total disability due him from October 13, 1975, a sum equal to 15% of that portion of the compensation due claimant from October 13, 1975 to November 14, 1975, payable as a penalty.

Claimant's attorney is awarded as a reasonable attorney fee a sum equal to 25% of the compensation due claimant, payable out of said compensation as paid, not to exceed $500."

MARY LOU HOWARD, CLAIMANT
Michael Hoffman, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review of the Referee's order which granted claimant an additional award for 15 degrees loss of left forearm and an additional 16 degrees for unscheduled left shoulder disability, giving claimant a total of 30 degrees for 20% loss of the left forearm and 32 degrees for 10% unscheduled left shoulder disability.

Claimant, 55 years old, sustained a compensable injury on January 6, 1975, fracturing the distal left radius and injuring her left shoulder.

On June 23, 1975 Dr. Nathan examined claimant and found full range of motion in both shoulders, although there was a very minimal impairment of internal rotation of the left shoulder. Dr. Nathan found claimant to be medically stationary and able to return to gainful employment. He rated claimant's total impairment of the upper extremity at 9%.

A Determination Order of July 31, 1975 granted claimant 15 degrees for 10% loss of the left forearm and 16 degrees for 5% unscheduled left shoulder disability.

On September 2, 1975 Dr. Case examined claimant and diagnosed rotator cuff tear in the left shoulder and a functional neurovascular imbalance in the left upper extremity. Claimant also had strong indication of bicipital tenosynovitis involving the left shoulder.

On February 16, 1976 Dr. Duff examined claimant and diagnosed probable bicipital tendinitis with mild shoulder-hand syndrome. On March 15, 1976 Dr. Duff again examined claimant who was then complaining of a new problem of chronic lumbar pain and relating it to her industrial injury. Dr. Duff found this condition moderately disabling.

A Second Determination Order of May 20, 1976 awarded claimant no additional permanent partial disability.

On July 16, 1976 Dr. Case found no evidence of back disability and said that claimant had been capable of returning to work since December 3, 1975.

The Referee found that except for the three months claimant worked for the employer she hasn't worked regularly or full time since World War II. Claimant's complaints concerning her low back did not surface until one year after her industrial injury. The Referee found that claimant's obesity and postural defects made it very doubtful that her minimal back disability was related to her industrial injury; he concluded it was not.

The Referee found that claimant did have a left hand that swells on occasions and her wrist becomes painful with extremes of most ranges of motion. He concluded claimant's loss of function of the left forearm was 30 degrees and the award for unscheduled disability in claimant's left shoulder should be increased to 32 degrees to adequately compensate claimant for her loss of wage earning capacity.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 27, 1976, is affirmed.

WCB CASE NO. 75-3567 MARCH 11, 1977

FOMA KULIKOV, CLAIMANT
Robert McConville, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant an award of 64 degrees for 20% unscheduled disability. Claimant contends he is entitled to additional compensation for temporary total disability and to a greater award for permanent partial disability.

Claimant sustained a compensable injury on June 13, 1974 when a tree 30 inches in diameter fell, striking claimant on the head, back and leg. Claimant was immediately taken to a hospital where the diagnosis was a one inch laceration on the head, fractured tibia and fibula and mild compression fracture at L2. Claimant came under the care of Dr. Edwards who stated on December 31, 1974 that he thought claimant could be safely employed at that time at moderately heavy work. He recommended a closing evaluation be made in about one month.

Claimant is a 30 year old Russian who was born in China and thereafter lived in Brazil until he came to the United States. His work experience consists of farming, tree thinning and work in furniture factories.

Sometime in the latter part of 1974 claimant returned to Brazil where he stayed until May, 1975 when he came back to the United States.

On June 26, 1975 Dr. Anderson examined claimant and found him medically stationary with no need for further treatment. A Determination Order of August 4, 1975 granted claimant time loss from June 13, 1974 through December 30, 1974 and for June 26, 1975 and awards of 16 degrees for 5% unscheduled low back disability and 13.5 degrees for 10% loss of left foot.

Dr. Anderson examined claimant on December 8, 1975; he indicated claimant had a job in a cabinet shop and reopening claimant's claim was unnecessary. Dr. Anderson found 3/4 of an inch shortening of the left leg compared to the right, and recommended a 3/8 inch heel lift for claimant's left shoe.

In May, 1976 claimant quit his job at the cabinet shop due to increased back and leg pain. He went to Canada for two months and upon his return he again went to work for the cabinet shop; he quit on July 27, 1976 and went to work for another cabinet shop in Beaverton where he is still employed.

The first issue is claimant's entitlement to further compensation for temporary total disability. The Determination Order had granted claimant time loss through December 30,

1974. The Referee found that at the time Dr. Edwards had not actually released claimant for regular work nor had he found claimant's condition to be medically stationary. However, the claimant had left the country before the closing evaluation recommended by Dr. Edwards could be made; claimant went to Brazil for a vacation and where he was precluded by law from working, therefore, it wasn't possible to determine his medical status for the five months he was absent. Upon claimant's return Dr. Anderson almost immediately found him medically stationary. The Referee concluded that claimant had failed to prove he was entitled to additional compensation for temporary total disability.

The Referee found claimant had been adequately compensated for the loss of function of his left foot by the award of 13.5 degrees, however, to adequately compensate claimant for his loss of wage earning capacity due to his low back disability, he awarded claimant an additional award of 48 degrees.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 8, 1976, is affirmed.

WCB CASE NO. 76-3271 MARCH 11, 1977

LAURANCE SPENCER, CLAIMANT
Frank Susak, Claimant's Atty.
Noreen Saltveit, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of June 3, 1976.

Claimant sustained a compensable injury on November 7, 1975 which crushed the pulps of the distal phalanges of the long and ring fingers of his left hand. On that date Dr. Button performed debridement and revision of the amputations. Because of slow recovery, surgery for reconstruction was performed in March, 1976. Subsequently, Dr. Button found claimant was suffering residual hypesthesia secondary to the amputations.

A Determination Order of June 3, 1976 granted claimant an award of 7.5 degrees for 5% loss of the left hand.

On August 17, 1976 Dr. Nathan examined claimant and found the left hand had good active use; full fist formation is possible; normal extrinsic extensors and normal intrinsics. Dr. Nathan rated claimant's impairment for the long finger at 3.4% of the hand and the ring finger at 1.9% of the hand, giving claimant a total loss of function of 5.3% of the hand.

The Referee found, based on the total loss of function -- the sole criterion for rating scheduled injuries -- that the Determination Order adequately compensated claimant.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated October 8, 1976, is affirmed.

WCB CASE NO. 76-4394 MARCH 11, 1977

JERRY FRITZ, CLAIMANT
Dan O'Leary, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which denied claimant's request for penalties and attorney fees.

The issue is whether the employer-carrier should be subjected to penalties and attorney fees for failure to pay medical expense on a claim ordered to be reopened and accepted and benefits paid. The employer-carrier have been paying time loss benefits pursuant to the Referee's order.

The Referee found, based upon previous Board rulings, that the carrier is not required to pay medical expenses pending appeal. The Referee denied claimant's request in his order dated November 4, 1976.

On February 14, 1977 the Court of Appeals held:

> "The clear intent of ORS 656.313 is to require the immediate payment of all compensation due by virtue of the order when the order is entered. Compensation, as defined by ORS 656.005(9), includes medical expenses of the type at issue here..." Wisherd v Paul Koch Volkswagen, Inc.

The Board, on de novo review, accepts the ruling of the Court of Appeals and the Referee's order must be reversed. However, because the previous position taken by the Board had not been overruled at the time of the hearing, the Board does not believe penalties and attorney fees are justified.

ORDER

The order of the Referee, dated November 4, 1976, is reversed.

The employer, through its carrier, Employers Insurance of Wausau, is directed to pay medical expense which claimant has incurred.

WCB CASE NO. 76-2830 MARCH 11, 1977

MICHAEL MCMAIN, CLAIMANT
Don Swink, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation, as provided by law.

Claimant is a Tri-Met bus driver who, during the course of his shift, has periodic layovers for schedule adjustments and rest. On May 12, 1976 claimant's wife rode the bus (this is prohibited by the bus company and such prohibition is posted on bulletin boards) and during a 35 minute layover while claimant and his wife were playing with a frisbee claimant fell and sustained an injury to his shoulder.

The Referee found that there was benefit to the employer by having claimant remain close to the bus during layovers. There is no evidence that claimant had ever been engaged in this activity on the job prior to May 12, 1976, and there was no prohibition of this type of utilization of the lull in work.

The Referee found there was not an abandonment of employment involved here but rather an enforced lull in work during which it was to the benefit of the employer if the employee remained close to the valuable bus he was entrusted with. He concluded that the forced period of idleness was a circumstance of claimant's employment and, therefore, claimant did sustain a compensable injury arising out of and in the course of his employment.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 27, 1976, is affirmed.

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

WCB CASE NO. 76-1905 MARCH 11, 1977

MARK J. WIRGES, CLAIMANT
Cash Perrine, Claimant's Atty.
L. Ross Brown, Defense Atty.
Order

On March 23, 1977 a request for review of the Referee's order entered in the above entitled matter on January 24, 1977 was received by the Board. The request was mailed January 22, 1977 and was made in behalf of the claimant, however, it was signed by a member of the law firm of Bryant, Erickson, Jaqua and Brown. The

Referee's order clearly shows that the employer and its carrier, not the claimant, were represented by this firm; the claimant was represented by Cash R. Perrine.

On February 25, 1977 a corrected request for review was mailed to the Board. On February 28, 1977 a motion for an order dismissing the request for review was made by the attorney for claimant on the grounds and for the reason that the request had not been filed within 30 days from the date of the Referee's order was entered in the above entitled matter.

The Board, after due consideration, finds that the error contained in the initial request for review was obvious and, furthermore, that it had been put on notice by the Referee's order served upon Mr. Perrine as attorney for the claimant and the firm of Bryant, Erickson, Jaqua and Brown as attorneys for the employer and its carrier which party was represented by which law firm, therefore the typographical error should not preclude the employer and its carrier from requesting a review of the Referee's order.

Therefore, the motion made by the claimant for an order dismissing the request for review by the employer and its carrier in the above entitled matter is hereby dismissed.

WCB CASE NO. 74-4058 MARCH 11, 1977
WCB CASE NO. 74-3318
WCB CASE NO. 75-1869

ROBERT E. EVANS, CLAIMANT
R. Ladd Lonnquist, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order Approving Stipulation and
Dismissing Request for Review

On February 6, 1976 claimant requested Board review of the Referee's order entered in the above entitled matter. On May 5, 1976 a Stipulation was entered into by all involved parties which disposes of all of the above claims in a manner more particularly set forth in said Stipulation.

The Stipulation, a copy of which is attached hereto, and, by this reference, made a part hereof, is approved and ordered executed according to its terms and the claimant's request for review is hereby dismissed.

STIPULATION

This disposition of the claims of Robert E. Evans are hereby agreed upon by Stipulation of the parties, claimant acting by and through Attorney R. Ladd Lonnquist, the employer-carrier acting by and through Attorney Kenneth Kleinsmith, and the Workmen's Compensation Board acting by and through Attorney Norman Kelley, and it appearing that this matter can be fully compromised and settled, and is, now settled, pursuant to the following agreements by the parties:

1. Claimant's October 28, 1973 injury produced an unscheduled permanent partial disability of 10%;

2. Claimant's May 30, 1974 injury was non-disabling;

3. Claimant's August 5, 1974 injury was disabling, and caused claimant to

receive time loss from August 19, 1974 to March 25, 1975, when claimant became medically stationary. Any time loss paid to claimant after August 5, 1974, should be credited to the August 5, 1974 injury;

4. Claimant is currently in an authorized Vocational Rehabilitation program on account of his being a vocationally handicapped person from the date of his August 5, 1974 injury. Claimant is entitled to continuing time loss payments while he is enrolled in said Vocational Rehabilitation program;

5. The State Accident Insurance Fund will pay time loss benefits on a reimbursable basis to claimant, pending completion of the Vocational Rehabilitation program involved herein;

6. The State Accident Insurance Fund's responsibility for time loss commenced on this basis on March 25, 1975;

7. Upon completion of the Vocational Rehabilitation program by claimant, the State Accident Insurance Fund will process the claim for the August 5, 1974 injury, as provided by law;

8. Claimant hereby voluntarily withdraws his Request for Review of the Order of Referee Page Pferdner dated December 31, 1975, and the same may be dismissed;

9. Any overpayment made by State Accident Insurance Fund pursuant to previous orders in the claims involving claimant will be offset against any future award for permanent partial disability for the August 5, 1974 injury;

10. Reimbursable time loss payments from March 25, 1975 until February 1, 1976 can be considered as paid by the permanent partial disability payments of the State Accident Insurance Fund, and that the State Accident Insurance Fund may claim reimbursement for them;

11. Claimant is entitled to $2,240.00, less any offset for overpayment, payable to claimant in a lump-sum;

12. Claimant's attorney is entitled to a reasonable fee of $500.00, to be paid from claimant's reimbursable time-loss commencing from the date of this Stipulation onward.

WCB CASE NO. 75-3960 MARCH 15, 1977

The Beneficiaries of
RICHARD MCCUSKEY, DECEASED
Benton Flaxel, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which remanded claimant's (the widow of the deceased workman) claim to it for acceptance and payment of benefits as provided by law.

The workman was a 66 year old auto mechanic at the time of his demise; he had

worked on call and approximately four days a week.

On May 12, 1975 the workman had appeared normal when he left his home in the morning and drove to work in a company pickup; he had made no complaints. When he arrived at work he and another worker began replacing torsion bars on a truck. They worked one and one half hours when the workman had indicated he needed to sit down for awhile because his chest hurt and he was not feeling well. After a short break he had proceeded working again; as they continued working the workman had had three more attacks, at approximately 11 a.m. he had had the fourth attack.

The fellow worker had advised the workman to go home, he had belched excessively, looked bad and had stated his chest hurt. The workman had had complaints of gas and chest pain but no arm pain and belching had seemed to relieve him. He had returned home around 11 a.m. and had complained to his wife of severe abdominal pains; he had looked pale and had felt damp. The workman had sat in a chair, bent over, for five minutes, then he had gone to the bathroom where his wife had later found him. He was dead.

Dr. Murray, an internist, and the family physician, had been treating the workman for chronic bronchitis, mild pulmonary disease, ulcer and arthritis. The workman had last had an electrocardiogram in December, 1974; it was normal. He had had a long standing problem with coronary arteries. Dr. Murray concluded that the work on May 12, the increased demand on the workman's heart and on the narrowed arteries had caused the heart attacks and that there was sufficient exertion to precipitate these attacks.

Dr. Harwood, who had never examined the workman, felt the exertion at work had had no effect on the workman's death; he felt death would occur within 5-10 minutes after the angina attacks, no more. Dr. Harwood felt that exertion had had no effect and that the narrowing of the workman's arteries which was a long standing, pre-existing coronary artery disease had caused angina pains. He felt there was no stress which could have caused the death.

An autopsy performed indicated the workman had died from coronary thrombosis due to coronary arteriosclerosis, pulmonary emphysema and coronary occlusion.

Dr. Hawn, a cardiovascular physician, reviewed the medical evidence and found no causal connection between the work efforts and the death, but gave no reason for his opinion.

The Referee found that the opinions of Dr. Harwood and Dr. Hawn, neither of whom had ever examined the workman, that there was no causal connection between the work activity and the workman's fatal coronary thrombosis were not as persuasive as Dr. Murray's opinion that the workman had been under sufficient physical exertion at work to precipitate the heart attacks. Dr. Murray was in a better position to judge both the extent and effect of job related stress and strain.

The Referee concluded that Dr. Murray's reasoning was the most plausible and consistent with the facts presented and that the workman had suffered a compensable coronary thrombosis. He allowed the claimant's claim.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 27, 1976, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with this Board review, the sum of $400, payable by the State Accident Insurance Fund.

WCB CASE NO. 76-2310 MARCH 15, 1977

FRED JOHNSON, CLAIMANT
Garry Kahn, Claimant's Atty.
Paul Roess, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of the Referee's order which increased the award of 16 degrees for 5% unscheduled disability granted by the Determination Order dated March 19, 1976 to 64 degrees for 20% unscheduled disability.

Claimant was a 47 year old yarder operator when he suffered a compensable injury to his low back on February 19, 1975, diagnosed as a lumbosacral strain secondary to trauma. All of claimant's treatment has been conservative, no surgery has been required, nor has any neurological deficit been noted. The claim was accepted and closed on March 19, 1976 with an award of 16 degrees.

On April 29, 1976 claimant was examined by Dr. Adams, who had previously examined and/or treated him. Claimant's primary residuals appeared to be limitation of motion in his low back and mechanical type back pain, becoming more intense with activities which require claimant to extend his back.

The Referee found that although claimant had little formal education, he did have good intellectual capabilities. He had attended Southwestern Oregon Community College where he had studied both Japanese and German languages and Elements of Supervision. Claimant has also received on-the-job training and schooling pertaining to operating the yarder.

Claimant's employment included training others in the operation of the yarder as well as operating it himself. Claimant's primary occupation has been in logging and related activities for over a period of 30 years. His only previous disability was a low back injury which he received approximately 23 years ago; when the employer hired claimant in 1963 claimant submitted to a physical examination and received a Class A rating. The Referee concluded that claimant had made a full recovery from his previous low back injury at the time of his 1975 injury and, therefore, he did not take into consideration the previous injury for the purpose of evaluation of claimant's present condition.

The Referee found that claimant did not have any apparent physical limitations regarding his job or other activities prior to the industrial injury but that now, according to his testimony, he experiences some problems engaging in activities which require prolonged riding or driving, repetitive bending or stooping, heavy lifting or pulling activities. The Referee found that claimant did not lose any time from work because of

his industrial injury. Claimant had worked overtime prior to his industrial injury and he continues to work overtime.

The Referee concluded, based upon the evidence, that claimant had proven by a preponderance of the evidence he had suffered some physical impairment, i.e., a limitation of motion of his back and chronic back pain and discomfort with occasional radiation into his left leg which was materially disabling. The Referee concluded that claimant now experiences some, but not substantial, limitations upon his ability to engage in activities which he had been able to perform prior to his injury and that such limitation adversely affected, to a certain degree, claimant's off-the-job as well as his on-the-job activities. Considering claimant's limitations and the context of the general industrial labor market and not just in relation to his present employment, the Referee concluded that claimant had sustained a prospective loss of wage earning capacity, although not great, and taking into consideration his physical impairment, age, education, and training and experience, the Referee increased claimant's award from 16 degrees to 64 degrees for his loss of wage earning capacity.

The Board, on de novo review, finds that claimant has missed absolutely no time from work as a result of the February 19, 1975 injury, he is now and has been ever since the date of that injury, employed in the same position he held prior to the accident. At the time of the accident claimant's base pay was $7.295, his present rate of pay is $8.28. Claimant puts in 13½ to 14 hours a day on a regular basis.

Claimant was hired by the employer in 1963 for the specific purpose of operating a highly sophisticated line of yarding equipment and also training others to operate such equipment and claimant continues to perform both functions for the employer.

The Board finds that, although claimant at present apparently cannot do some of the things he used to do, these were not things that he was required to do in the first place as far as his job was concerned. Claimant does, however, do everything required of him, he is still capable of training others in the operation of sophisticated machinery and he is still able to operate the yarder.

The Board concludes, therefore, that the Referee erred in reaching a conclusion that claimant had sustained a prospective loss of wage earning capacity and in granting claimant additional compensation therefor.

The Board concludes that the award of 16 degrees made by the Determination Order of March 19, 1976 adequately compensates claimant for any loss of wage earning capacity that he might possibly have sustained as a result of his industrial injury. The Referee's order must be reversed.

ORDER

The order of the Referee, dated July 29, 1976, is reversed.

The Determination Order of March 19, 1976 is affirmed.

CELIA ANN SLOAN, CLAIMANT
Peter Hansen, Claimant's Atty.
Bob Joseph, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of March 5, 1976.

Claimant, who was employed as a maid at the Hilton Hotel, sustained a compensable injury to her back in February, 1975, diagnosed as back strain. Claimant was treated conservatively.

On August 5, 1975 Dr. Davis examined claimant and his impression was minimal scoliosis. He could not make a diagnosis based on claimant's subjective complaints.

Claimant was examined by the Orthopaedic Consultants on December 16, 1975 and they diagnosed strain of the lumbar, dorsal and cervical spine by history only. At each level the discomfort appeared mild. The physicians found claimant to be medically stationary and claimant could return to her former occupation. They rated her dorsal and lumbar spine disability as minimal.

A Determination Order of March 5, 1976 granted claimant an award of 16 degrees for 5% unscheduled disability.

Claimant was seen at the Permanente Clinic and treated by Dr. Gerhardt, a psychiatrist, who concluded the pain claimant had in her back, neck and shoulders was due to muscle tightness and tension with reflex bracing and holding.

Claimant testified to low back pain which goes upward to her neck. Occasionally she uses aspirin for pain relief. Since the fall of 1975 claimant has been enrolled as a full time college student, studying art.

The Referee found that no medical treatment or physical therapy has been recommended. Claimant testified to not being able to sit or stand over $\frac{1}{2}$ hour and yet in 1975 she drove to Los Angeles. Claimant does not want to return to her former occupation as a maid although the employer offered a better job; she prefers to continue her art career. The doctors who have examined claimant cannot find objective findings for claimant's subjective complaints. Her loss of wage earning capacity as well as her physical impairment is minimal.

The Referee concluded that the award of 16 degrees for 5% unscheduled disability granted by the Determination Order was adequate.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 2, 1976, is affirmed.

A.F. TRIVETT, CLAIMANT
Maurice Engelgau, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which found claimant to be permanently and totally disabled, effective September 11, 1975.

Claimant, a 59 year old logger at the time of injury, sustained a compensable injury on May 14, 1971. Claimant underwent a laminectomy with removal of an extruded disc in June, 1971.

Claimant had been awarded 80 degrees for 25% unscheduled neck disability and 48 degrees for 25% loss of right arm by previous Determination Orders. An Opinion and Order of September 10, 1974 granted claimant an additional 80 degrees for a total of 160 degrees unscheduled neck disability. The award for the right arm was unchanged.

On February 13, 1975 claimant was examined by Dr. Campagna who diagnosed cervical spondylosis. On April 24, 1975 Dr. Campagna stated claimant's neck condition was stationary but he was unable to sustain gainful employment due to his age, obesity and vascular disease. The neck disability was moderate.

A Third Determination Order of June 2, 1975 granted claimant no additional award for permanent partial disability.

On September 11, 1975 Dr. Holbert examined claimant and diagnosed cervical arthrosis and degenerative joint disease of significant degree. Dr. Holbert felt claimant would not be able to return to gainful employment because of his injury of 1971.

On October 28, 1975 Dr. Boots examined claimant and found claimant is unable to return to gainful employment due to his age and the industrial injury. Dr. Boots, who has treated claimant since his injury in 1971, feels he has witnessed claimant going through progressive degeneration which has continued since June, 1975.

On November 26, 1975 Dr. Nelson indicated claimant was unable to work and that with the passage of time his condition will worsen.

The Referee found that claimant has established by a preponderance of the evidence, that his condition has worsened since the Determination Order of June 2, 1975, the date of the last award of compensation. The weight of the evidence indicates claimant is medically stationary and unable to work at any regular, gainful and suitable employment. The Referee concluded claimant was permanently and totally disabled.

The Board, on de novo review, finds that the medicals support a finding of permanent total disability and affirms the Referee.

ORDER

The order of the Referee, dated July 14, 1976, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with this Board review, the sum of $250, payable by the Fund.

WCB CASE NO. 76-2927 MARCH 15, 1977

LAWRENCE SCOTT, CLAIMANT
Roger Reif, Claimant's Atty.
Dept. of Justice, Defense Atty.
Supplemental Order Awarding
Attorney Fees

The Board's order on Review issued March 8, 1977 in the above entitled matter failed to include an award of a reasonable attorney fee.

ORDER

It is hereby ordered that claimant's attorney be granted as a reasonable attorney fee for his services in connection with Board review, the sum of $400, payable by the Fund.

SAIF CLAIM NO. YC 64105 MARCH 15, 1977

JOHN FITZGERALD, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant, now 60 years old, suffered a compensable low back injury on January 28, 1967. Dr. Corrigan diagnosed an acute lumbosacral strain superimposed on degenerative disc disease with right sciatica. On March 27, 1967 Dr. Corrigan found claimant to be medically stationary.

A Determination Order of April 26, 1967 granted claimant an award for 10% loss of an arm by separation for unscheduled disability. On September 12, 1967 the claim was reopened and claimant again sought treatment from Dr. Corrigan.

On March 14, 1969 Dr. Corrigan found claimant stationary with no permanent partial disability. The claim was closed by a Determination Order of March 20, 1969 with no additional award for permanent partial disability. Claimant's aggravation rights have expired.

On July 21, 1976 claimant's claim was reopened for further treatment and claimant was hospitalized for conservative care. On February 11, 1977, in his closing examination, Dr. Corrigan again found claimant medically stationary with no additional permanent partial disability.

On February 18, 1977 the State Accident Insurance Fund requested a determination. The Evaluation Division of the Board recommends compensation for temporary

total disability from July 21, 1976 through August 29, 1976 but no additional award for permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from July 21, 1976 through August 29, 1976.

WCB CASE NO. 76-1592 MARCH 16, 1977

ALDEN LEWIS, CLAIMANT
John Sidman, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an award of permanent total disability effective the date of his order, September 29, 1976.

Claimant, 53, has had prior working experience of 20 years as a roofer, five years as a carpenter and five years as a foundry worker. Claimant was a foundry worker when he sustained a compensable injury on February 20, 1971; all of his treatment has been conservative in nature. On September 10, 1971 claimant's claim was closed by a Determination Order which granted claimant no award for permanent partial disability.

On April 22, 1974 claimant experienced painful symptomatology after a lifting incident; treatment was again conservative. The Fund advised claimant they were handling the claim as an aggravation of his February, 1971 injury rather than as a new injury. Claimant did not appeal.

Dr. Pasquesi examined claimant on January 20, 1975 and they discussed a job the employer had offered claimant. Claimant stated he couldn't do the work. On February 10, 1975 a description of this job was given to Dr. Pasquesi who commented that the only duties required of claimant would be instructing and relegating other work, that claimant was not required to do physical work. Dr. Pasquesi felt the job was a "lenient" one and one which claimant should try.

A Second Determination Order of March 12, 1975 granted claimant 48 degrees for 15% unscheduled low back disability. Claimant requested a hearing, and an Opinion and Order of September 16, 1975 remanded claimant's claim to the Disability Prevention Division.

On December 12, 1975 Dr. Loomis examined claimant and diagnosed slight pulmonary fibrosis; probable chronic obstructive pulmonary disease. He found disc degeneration and narrowing at L1-2 and L4-5 and slight disc degeneration and narrowing at L3-4 on the left; marginal osteophytic spurring throughout the lumbar spine; scoliosis in thoraco-lumbar junction.

On December 12, 1975 claimant was examined at the Disability Prevention Division by Dr. Van Osdel where it was found claimant had pre-existing degenerative disc disease and osteoarthritis superimposed on strain with chronic low back discomfort for four years. He noted claimant had been asked by the employer to return for light work but claimant was reluctant and stated there was no light work for him. A job change was indicated with no lifting over 50 pounds, no repetitive lifting, stooping, bending, twisting or exposure to a dusty room.

On February 27, 1976 Dr. Robins examined claimant and found him suffering from three differing types of problems: (1) chronic depression due to his invalidism and inability to work; (2) chronic obstructive pulmonary disease which is mildly progressive; and (3) back pain which limits his working at any reasonable job.

A Determination Order of March 4, 1976 granted claimant an additional 48 degrees for 15% unscheduled disability, giving claimant a total of 96 degrees for 30% unscheduled disability.

The Referee found claimant has not worked since April, 1974. All of his job experience lies in physically demanding jobs. In 1974 the employer did offer claimant a job but the Referee doubts claimant could have performed it. The Referee found claimant to be a credible witness and concluded that claimant's physical condition was so bad that he cannot work on a regularly and sustained basis. The Fund failed to show any job claimant could gainfully and regularly perform. The Referee concluded that claimant is permanently and totally disabled.

The Board, on de novo review, finds that the medical evidence presented does not support a finding of statutory permanent total disability. Claimant does not fall into the "odd-lot" category because the employer did offer claimant a job which, based on medical opinion, claimant could physically perform but which he wouldn't even try, therefore, the burden of proving claimant is incapable of engaging in any regular, suitable and gainful occupation and, therefore, is entitled to permanent total disability remains with the claimant and claimant has failed to meet that burden.

The Board concludes that an award of 70% unscheduled disability, an increase over the prior award of 30%, would adequately compensate claimant for his loss of wage earning capacity.

ORDER

The order of the Referee, dated September 29, 1976, is modified.

Claimant is hereby granted an award of 224 degrees of a maximum 320 degrees for unscheduled disability. The Fund may apply the payments of compensation for permanent total disability heretofore made to claimant pursuant to the Referee's order ot the payment for permanent partial disability awarded by this order.

Claimant's attorney is awarded as a reasonable attorney fee for a sum equal to 25% of the compensation awarded claimant by this order payable out of said compensation as paid, not to exceed $2,000.

GEORGIA JOHANESEN, CLAIMANT
Allen Owen, Claimant's Atty.
Dept of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Moore and Phillips.

Claimant requests review of the Referee's order which denied claimant's claim for psychiatric care and affirmed the Determination Order of May 5, 1975. Claimant had contended that she was not medically stationary at the time of claim closure.

Claimant sustained a compensable injury on February 8, 1973, diagnosed as chronic lumbosacral strain. Her claim was closed on October 16, 1973 with an award of 64 degrees for 20% unscheduled disability.

Claimant's claim was reopened on April 4, 1974 for admittance to the Pain Clinic. They found claimant a poor candidate for retraining, nor could she return to any kind of stressful employment, either physically or emotionally. They diagnosed hysterical conversion reaction, mild to moderate; little motivation for returning to gainful employment, and mechanical low back pain with poor body mechanics and no evidence of nerve root compression.

On March 6, 1975 claimant was examined by the Orthopaedic Consultants who diagnosed chronic lumbosacral back sprain and rather severe psychosomatic overlay. They rated her back disability as mild.

A Second Determination Order of May 5, 1975 granted claimant no additional award for permanent partial disability.

On October 27, 1975 Dr. Paltrow examined claimant and diagnosed trauma neurosis with psychophysiological musculoskeletal symptoms stemming from the neurosis. On December 22, 1975 Dr. Paltrow stated that as a result of the injury of February, 1973 claimant sustained organic injury to her musculoskeletal system and still suffers from it.

On February 25, 1976 Dr. Fix concurred with the diagnosis of Dr. Paltrow and stated that claimant's entire disability was caused by the February, 1973 injury. On April 20, 1976 Dr. Fix indicated that as a result of the long standing disuse and result of disused atrophy claimant is now physically and permanently disabled from any gainful employment.

Claimant's contention is that she has a psychological problem -- traumatic neurosis stemming from her industrial injury. The Referee found that the psychiatrist based his opinion on the truthfulness of the history given to him by claimant, that she had developed hostility from her inability to re-enter the labor market, although the evidence indicates claimant has never attempted to find employment since her injury.

The Referee concluded, based upon the medical evidence presented, that claimant's injury neither aggravated, nor caused claimant's psychiatric problems. The Referee found more persuasive evidence that indicates claimant has an inadequate personality coupled with a desire to somatize her problems through the use of her industrial injury. He denied claimant's claim for psychiatric care and concluded that her disability

was no greater now than at the time of the Determination Order of May 5, 1975.

The majority of the Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 24, 1976, is affirmed.

DISSENT

Dissenting opinion of Board Member Kenneth V. Phillips:

The issue is the denial of psychiatric treatment. This issue dissolves down to whether or not the claimant does have a psychiatric disability and, if so, whether or not that psychiatric problem is related to her industrial injury.

The majority opinion seems to develop from the opinions expressed by orthopedic specialists.

Where the issue is one of psychiatrics it seems most appropriate to depend on the opinions of psychiatrists which in this case are unequivocal in their opinions that the lady has a psychiatric disability and that it is work related.

For that reason I respectfully dissent from the majority opinion and would reverse the order of the Referee.

/s/ Kenneth V. Phillips, Board Member

WCB CASE NO. 75-2880 MARCH 16, 1977

LORRAINE HARPER, CLAIMANT
Hugh Cole, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund requests review of the Referee's order which granted claimant an award of 240 degrees for 75% unscheduled disability.

Claimant cross appeals the Referee's order, contending her cervical condition is compensable and she is entitled to a greater award for permanent partial disability.

Claimant sustained a compensable injury on September 23, 1974 affecting her arm, hip and back.

On October 18, 1974 Dr. Young examined claimant and diagnosed lumbosacral strain which was an aggravation of a pre-existing chronic back condition related to her September 23, 1974 injury. He found some element of emotional overlay. In December, 1974 claimant commenced complaining of pain in the cervical area. This condition was denied by the Fund.

Dr. Ochs examined claimant on December 3, 1974, stating claimant has had upper back trouble for some time directly connected with her type of employment. He indicated that following the injury of September, 1974 the upper back pain completely left and has not bothered her "one bit since."

Claimant was examined at the Disability Prevention Division on February 10, 1975 by Dr. Van Osdel who diagnosed strain, left shoulder, chronic low back strain superimposed on an old compression fracture at L3 with moderate degenerative disc disease of the lumbosacral joint with sublaxation sclerosis of facets at the joint, mild depressive reaction, obesity and hypertensive cardiovascular disease chronic. On February 26, 1975, in his discharge summary, Dr. Van Osdel recommended no further orthopedic treatment and a job change for claimant with no lifting over 50 pounds, not over 20 pounds above shoulder level, no repetitive bending, stooping or twisting. Standing is limited to one hour.

A Determination Order of June 30, 1975 granted claimant an award of 160 degrees for 50% unscheduled left shoulder and back disability.

On July 16, 1975 Dr. Anderson examined claimant and found cervical spondylosis.

On September 25, 1975 Dr. Ochs indicated claimant had had many back problems primarily upper thoracic into the neck prior to her industrial injury. Dr. Ochs felt that the injury of September, 1974 materially contributed to pain and discomfort in the shoulders and neck and viewed this as an aggravation of a pre-existing condition.

The Referee found that claimant had failed to prove by a preponderance of the evidence that her cervical back condition was caused, or materially contributed to, by her industrial injury. Claimant's cervical back condition pre-existed the injury and was symptomatic preceding her injury. He upheld the denial by the Fund of claimant's cervical condition.

The Referee found that the evidence did not sustain a finding that claimant is permanently and totally disabled. Dr. Ochs, Dr. Young and the physicians at the Orthopaedic Consultants found claimant capable of returning to work. However, the evidence does indicate claimant is now limited in her ability to perform tasks which require heavy lifting, repetitive bending, stooping and prolonged standing, sitting, walking or driving, and claimant is precluded from returning to her former employment. Therefore, the Referee concluded the award of 160 degrees did not sufficiently compensate claimant for her loss of wage earning capacity and he increased the award to 240 degrees for 75% unscheduled disability.

The Board, on de novo review, concurs with the Referee's conclusion that claimant's cervical condition was not work related. However, the Board concludes, based on the medical evidence and other relevant factors, that the Determination Order of June 30, 1975 which granted claimant an award of 160 degrees for 50% unscheduled disability adequately compensates claimant for her loss of wage earning capacity. The Referee's order must be reversed.

ORDER

The order of the Referee, dated August 12, 1976, is reversed.

The Determination Order of June 30, 1975, is affirmed.

KATHLEEN BRADFIELD, CLAIMANT
Edward Daniels, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of April 15, 1976. Claimant contends she is entitled to a substantial award for permanent partial disability.

Claimant sustained a compensable injury on July 25, 1975; at the end of her shift that day, she noted discomfort in her neck and shoulders. Claimant saw Dr. Deming who diagnosed an acute cervical strain.

Claimant saw Dr. Ellison on October 6, 1975, complaining of pain in her neck, headaches and pain in the top of both shoulders. He felt claimant had no significant disability and her case could be closed.

On November 19, 1975 Dr. Snider examined claimant and stated claimant would undergo local pain upon performing any substantial amount of work and she could not return to her former occupation; he found claimant to be medically stationary.

A Determination Order of April 5, 1976 granted claimant time loss only.

On June 14, 1976 Dr. Snider advised that claimant is likely to be vulnerable to recurrent headaches, neck spasms and shoulders for some months, perhaps years.

The Referee found claimant is not presently employed nor has she sought work. In fact, claimant informed a Workmen's Compensation Board coordinator that she was not sure she wanted to work, nor did claimant make any physical complaints to her.

The Referee concluded, based on all of the facts presented in this case, that claimant had not proven she has sustained any permanent impairment. On November 6, 1975 Dr. Ellison found no significant disability and stated in December, 1975 that claimant had minimal disability but placed no job restrictions on her. Claimant lacks motivation to return to work, is not even sure she wants to return to work. Any loss of wage earning capacity claimant may have is not due to her industrial injury but the result of her own choice. He affirmed the Determination Order of April 5, 1976.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 3, 1976, is affirmed.

WCB CASE NO. 75-5585 MARCH 16, 1977

CLAUDE GIER, CLAIMANT
Stipulation and Order of Dismissal

Whereas, by Opinion and Order dated December 14, 1976, the claimant was awarded a total of 70% loss of function of the whole man for claimant's low back injury and psychological injury, as a result of injuries incurred in May and June, 1972, while employed for Albina Engine & Machine Works; and

Whereas, claimant has appealed the aforementioned award of 70% permanent partial disability to the Workmen's Compensation Board, and said appeal is now pending; and

Whereas, the parties hereto desire to settle the issue of the extent of claimant's present disability; and

Whereas, the employer/carrier has caused the claimant to undergo an updated medical examination to determine the extent of his present disability, it being the intent of the parties hereto that this Order shall reflect the claimant's disability as of the date of that examination, February 25, 1977.

Now, therefore, it is hereby stipulated by and between the parties hereto that the claimant shall be awarded a 30% increase of his permanent disability, to reflect a total permanent partial disability of 100% of the claimant's low back. It is intended that this award reflect claimant's psychological disability as well. In consideration therefor, the claimant agrees to dismiss his appeal from the Referee's order of December 14, 1976. It is agreed between the parties that the claimant and his attorneys waive any additional attorneys' fees herein and the claimant shall receive the entire award.

It is so stipulated.

Based upon the stipulation of the parties hereto, it is hereby ordered that claimant's permanent partial disability award be increased to 100%, reflecting a 30% increase, and that claimant's attorneys be awarded no attorney fees having waived any additional fees. Claimant's appeal is ordered dismissed and there shall be no further appeal from the Referee's Order of December 14, 1976.

WCB CASE NO. 75-3052 MARCH 16, 1977

SHIRLEY CLEVENGER, CLAIMANT
Stipulated Order of Settlement

Come now the claimant, Shirley Clevenger, by and through her attorney, Rolf T. Olson, and the subject employer, Stayton Canning Company Co-op, by and through its workers' compensation carrier, Industrial Indemnity Company, by and through its attorney, G. Howard Cliff, and allege as follows:

1. That on or about August 29, 1973 claimant sustained an industrial injury to the low back in the course of her employment with Stayton Canning Company Co-op. The claim for compensation was accepted by the employer/carrier and a Determination Order was thereafter entered on July 15, 1975 which did award permanent partial disability equal to 64 degrees for 20% unscheduled disability for injury to the low back.

2. That thereafter claimant requested a hearing evidencing a disagreement with the Determination Order of July 15, 1975 stating that she is disabled to a greater extent than indicated by the Determination Order.

3. That thereafter claimant was awarded an additional 30% unscheduled disability in the Opinion and Order dated September 13, 1976. Thus allowing claimant a total of 50% unscheduled disability. Claimant requested Board review of the referee's Opinion and Order.

4. The parties hereby stipulate that claimant is awarded an additional 5% unscheduled disability for a total of 55% unscheduled disability.

5. The parties agree that the amount remaining due claimant on said award shall be paid to claimant in a lump sum.

6. Claimant's attorney, Rolf Olson, is awarded a fee of 25% of the increase in compensation (25% of $1,120.00 ≡ $280.00), said fee being in addition to the fee awarded by Referee Gemmell in her Opinion and Order of September 13, 1976.

It is hereby ordered that claimant's request for Board review be and the same is hereby dismissed.

It is so stipulated and agreed.

WCB CASE NO. 76-148 MARCH 18, 1977

RAY A. WILLIAMS, CLAIMANT
Gary Galton, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order of Dismissal

The State Accident Insurance Fund on February 8, 1977 mailed to the Board a request for review of the Referee's order entered in the above entitled matter on January 7, 1977. Although the 30th day after the entry of the Referee's order was February 6, 1977 that day was a Sunday and the following day, February 7, 1977 was also a legal holiday; therefore, the request for review was timely filed pursuant to the provisions of ORS 187.010(2) and an order of dismissal entered on February 17, 1977 was vacated by an order dated February 25, 1977.

On or about March 4, 1977 claimant filed a cross request for review (the cross request for review was received by the Board on March 7, 1977). On March 10, 1977 the Fund moved to dismiss said cross request for review on the ground that it was not timely filed.

ORS 656.289(3) provides in part, that when one party requests review by the Board, the other party or parties shall have the remainder of the 30 day period and in no case less than 10 days in which to request Board review in the same manner. The 10 day requirement may carry the period of time allowed for requests for Board reviews beyond the 30th day.

In this case, the Fund used the entire 30 days; however, the claimant was entitled to an additional 10 days within which to file his cross request for review. The 10th day fell on February 18, 1977, two weeks before the cross request for review was filed.

The Board concludes that claimant's cross request for review of the Referee's order entered in the above entitled matter on January 7, 1977 was not timely filed pursuant to the provisions of ORS 656.289(3), therefore, said cross request for review should be dismissed.

It is so ordered.

WCB CASE NO. 75-4494 MARCH 22, 1977
WCB CASE NO. 75-5500
WCB CASE NO. 76-856

HARVEY LEFEVER, CLAIMANT
Rolf Olson, Claimant's Atty.
Daryll Klein, Defense Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests review of the Referee's order which reversed its denial of August 15, 1975 for claimant's low back pain. The order also affirmed the Fund's denial of August 15, 1975 for right upper extremity pain, affirmed the denial by Employee Benefits Insurance of December 18, 1975 and affirmed the Fund's denial of April 30, 1976 for aggravations of claimant's neck, right shoulder and mid-back conditions.

The claimant was employed by Modoc Lumber Company whose workmen's compensation coverage was provided by the Fund until September 30, 1975. Employee Benefits Insurance commenced coverage on October 1, 1975.

Claimant suffered a compensable hernia in August, 1970 and a lumbosacral injury in July, 1971. No permanent partial disability awards resulted. Claimant went to work for Modoc in mid-1972.

On or about January 19, 1973 claimant sustained a lumbosacral strain and was treated conservatively by Dr. Novak. The claim was closed on June 1, 1973 with no award for permanent partial disability.

On or about January 31, 1974 claimant suffered a thoracic and cervical myofasciitis and right upper extremity injury diagnosed as cervical, lumbar and right shoulder sprain. On May 16, 1974 Dr. Harwood examined claimant at the request of the Fund and found marked functional overlay. On June 21, 1974 the Fund denied responsibility for claimant's psychiatric problems connected with the January 31, 1974 injury.

The claim was closed on July 2, 1974 with an award of 5% unscheduled neck, right shoulder and mid-back disability.

On August 20, 1974 Dr. Davis reported that claimant suffered an aggravation of the January 31, 1974 injury. On September 4, 1974 the Fund denied the claim for aggravation. On September 4, 1974 Dr. Davis again indicated an aggravation and request for a hearing was filed and then withdrawn.

On July 18, 1975 claimant reported a back injury while pulling planer chain. Dr. Balme doubted if there was any connection between this condition and the January 19, 1973 injury.

On August 15, 1975 the Fund denied responsibility for neck and arm pain conditions.

On November 13, 1975 claimant alleged a back injury while driving a cat over a rought spot. On November 14, 1975 claimant was hospitalized with low back strain. On December 18, 1975 Employee Benefits Insurance denied the back claim. Dr. Laubengayer, on July 29, 1976, indicated claimant's primary problem was osteoarthritis aggravated by the injuries of July and November, 1975.

The Referee found that claimant's credibility was eroded by the evidence that he falsified employment applications regarding his back injuries and had made frequent complaints of back pain between January, 1973 and November, 1975. The Referee concluded claimant did not suffer a new injury in November, 1975 despite Dr. Laubengayer's opinion which was based on history given to him by claimant and, therefore, the denial of responsibility issued by Employee Benefits Insurance was proper.

The Referee found that claimant's late 1975 low back symptoms were traceable to the July, 1975 incident and not, according to Dr. Balme, related to the January, 1973 incident.

The Referee found no evidence relating to the 1975 right upper extremity symptoms and any on-the-job incident whatsoever, therefore, the Fund was not liable for such problems; however, the Fund was responsible for the low back problems claimant had occurring in 1975. He remanded that claim to the Fund for acceptance.

The Board, on de novo review, concurs with the findings and conclusions reached by the Referee.

ORDER

The order of the Referee, dated October 7, 1976, is affirmed.

SAIF CLAIM NO. HC 68845 MARCH 22, 1977

GERALDINE FOX, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination Upon
Request for Reconsideration

On February 18, 1977 an Own Motion Determination was entered in the above entitled matter. On February 25, 1977 claimant's counsel submitted to the Board a report from Dr. Robert G. McKillop, claimant's physician, dated February 10, 1977, and requested that the Board give consideration to this report.

The Board, after receiving Dr. McKillops's report, finds nothing therein which would justify granting claimant any compensation in addition to that awarded to her by its order of February 18, 1977.

ORDER

The Own Motion Determination entered in the above entitled matter on February 18, 1977 is hereby ratified and reaffirmed.

WCB CASE NO. 76-1652 MARCH 22, 1977
WCB CASE NO. 76-2908

KAREN FEUERSTEIN, CLAIMANT
Richard Kropp, Claimant's Atty.
Keith Skelton, Defense Atty.
Frank Moscato, Defense Atty.
Order of Dismissal

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

It is therefore ordered that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

(No Number Available) MARCH 22, 1977

WALTER FETTER, CLAIMANT
Own Motion Determination

Claimant sustained a compensable left leg injury on July 8, 1968. Claimant underwent a left medial meniscectomy on December 28, 1968 and his claim was closed on July 29, 1970 with an award of 23 degrees for 15% loss of left leg.

Claimant's leg problems persisted. On January 26, 1971 claimant underwent a pes anserinus transfer to his left knee. Determination Orders entered on November 17, 1971 and on September 4, 1973 granted claimant no further award for permanent partial disability. Claimant's aggravation rights expired on July 28, 1976.

On February 22, 1977 the carrier requested a determination. The Evaluation Division of the Board recommended that claimant be granted additional compensation for temporary total disability from November 3, 1975 through January 24, 1977 and an additional award of 30 degrees for 20% loss of left leg.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from November 3, 1975 through January 24, 1977 and an award of 30 degrees for 20% loss of left leg. This is in addition to any previous awards granted to claimant.

WCB CASE NO. 76-2154 MARCH 22, 1977

ROBERT DURFEE, CLAIMANT
Alan Scott, Claimant's Atty.
Richard Hunt, Defense Atty.
Order

On February 22, 1977 the Board received a request from Northwest Natural Gas Company, the employer in the above entitled matter, that it be allowed to file a brief in support of the State Accident Insurance Fund's request for review of the Referee's order, and also that it be furnished a copy of the transcript of the hearing before the Referee for which it would pay.

On February 23, 1977 the attorney for the claimant responded in opposition to the employer's request, stating that the employer had been represented by the Fund at the hearing and that the Fund had timely filed a request for review, therefore, intervention by the employer should not be allowed when requested for the first time at Board level. Additionally, claimant's counsel contends that the request should be summarily denied because the employer's request for review was not mailed within 30 days after the Referee's order of December 17, 1976.

The Board, after due consideration, finds that the employer, Northwest Natural Gas Company, is a "party in interest" within the meaning of ORS 656.289 and the Board is unaware of any statute, rule or regulation, which would prevent it from allowing the employer to file a brief in support of a request for review made by the Fund.

ORDER

The request made by the employer, Northwest Natural Gas Company, that it be allowed, as a party in interest, to file a brief in support of the request for review by the Fund in the above entitled matter is granted.

The employer is allowed 20 days after receipt of the transcript of the proceedings before the Referee within which to file its brief.

SAIF CLAIM NO. TC 44582 MARCH 22, 1977

BILL DAVIS, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his back on September 23, 1966. In October, 1966 claimant underwent a laminectomy with herniated disc. The claim was initially closed by a Determination Order in 1967 with an award of 38.4 degrees for 20% unscheduled low back disability.

In 1969, while claimant was in Texas, a second laminectomy with a fusion was performed and claimant had staphylococcus infection. The claim was closed again on March 19, 1971 with an additional award of 29 degrees for 15% unscheduled low back disability.

Claimant, while living in the state of Washington, has had myelograms in 1968, 1972 and 1973 with evidence of scarring. On January 6, 1975 a Third Determination

Order granted claimant no additional award for permanent partial disability.

On February 11, 1976 claimant underwent a third lumbar laminectomy with a fusion.

On February 14, 1977 the Fund requested a determination. The Evaluation Division of the Board recommends that claimant be granted additional compensation for temporary total disability from February 10, 1976 through February 2, 1977 and an additional award of 19.2 degrees for 10% unscheduled disability.

The Board concurs with the recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from February 10, 1976 through February 2, 1977 and to an award of 19.2 degrees for 10% unscheduled disability. This is in addition to all previous awards of compensation granted claimant.

WCB CASE NO. 76-6158 MARCH 22, 1977

The Beneficiaries of
WILBUR CASTEEL, DECEASED
Sam Hall, Jr., Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

On February 18, 1977 the beneficiaries of Wilbur Casteel, deceased, requested Board review of the Referee's Order on Motion entered in the above entitled matter on February 1, 1977.

On March 7, 1977 the Fund filed a motion for an order dismissing claimant's request for review on the grounds and for the reason that the Board did not have any jurisdiction to allow the claimant to proceed with a Board review.

On March 10, 1977 the Board received a motion memorandum in opposition to the Fund's motion to dismiss.

The Board, after due consideration, concludes that it does not have jurisdiction in this case. The only rights that the beneficiaries of Wilbur Casteel have are derivitive and he had elected, prior to his death, to proceed under the law in effect at the time of his injury on January 13, 1955. ORS 656.284(6), in effect at the time of the injury, provided that an application for rehearing is deemed denied by the commission unless it has been acted upon by final order within 60 days from the date of filing; provided that the commission may, in its discretion, extend the time within which it may act upon application, not exceeding 30 days. Claimant, a beneficiary of the deceased workman, did not comply with the requirements of the statute.

ORDER

The motion to dismiss filed by the Fund in the above entitled matter is hereby granted and the request for review of the Referee's Order on Motion made on February 18, 1977 by the beneficiaries of Wilbur Casteel, deceased, is hereby dismissed.

WCB CASE NO. 75-4973 MARCH 23, 1977

CARL A. VAN BUSKIRK, CLAIMANT
Lyle Velure, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order of Dismissal

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

It is therefore ordered that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 72-388 MARCH 23, 1977

RICHARD UHING, CLAIMANT
Joseph Penna, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On February 14, 1977 the Board received a request from claimant to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an injury suffered on September 13, 1968. Claimant's claim had been closed on February 19, 1969 and his aggravation rights have expired.

On December 15, 1976 claimant had previously requested the Board to exercise its own motion jurisdiction and reopen his claim, however, at that time the medical evidence was not sufficient to justify a reopening and the Board on January 19, 1977 denied claimant's request. Subsequent to the entry of that order, medical reports were received from Dr. Grewe, who had first examined claimant on November 29, 1976, which indicate, among other things, that claimant has causalgic pain, secondary to his old nerve injury and that he was hospitalized and underwent a lumbar sympathectomy on February 12, 1977. Dr. Grewe furnished the Board with copies of pain evaluation tests, differential spine block, lumbar paravertebral sympathetic block, electromyelogram, panopaque myelogram, psychological consultation, hospital summary, a letter from Dr. Grewe, dated December 3, 1976, addressed to the Public Welfare Division at Lebanon, Oregon and a letter from Dr. Grewe, dated December 17, 1976, addressed "to whom it may concern." Dr. Grewe believes that claimant's present condition must be construed as a worsening of his condition resulting from the industrial injury.

The Board, having given full consideration to the additional medical reports received from Dr. Grewe, concludes that, at this time, claimant's request that his claim for the September 13, 1968 industrial injury be reopened should be allowed.

ORDER

Claimant's claim for an industrial injury suffered on September 13, 1968 is remanded to the Fund for acceptance and payment of compensation, as provided by law, commencing November 29, 1976 and until the claim is closed pursuant to the provisions of ORS 656.278.

MAGGIE TERRY, CLAIMANT
Dwight Gerber, Claimant's Atty.
Roger Luedtke, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the Referee's order which set aside the employer's denial of claimant's claim for aggravation and directed it to pay claimant compensation for permanent total disability from and after September 21, 1976.

Claimant suffered a compensable injury on April 15, 1972; the claim was closed by a Determination Order mailed November 6, 1973 which granted claimant an award for permanent total disability as of October 10, 1973.

The employer requested a hearing on the extent of claimant's permanent disability.

On October 7, 1974 an Amended Stipulation and Order of Dismissal was approved whereby claimant was awarded 320 degrees for 100% unscheduled disability. The award amounted to $22,400 and was in lieu of the award granted by the Determination Order of November 6, 1973.

On January 23, 1975 claimant requested approval of payment of 50% of the award in a lump sum; this request was approved on March 25, 1975 and claimant received a net amount, after discount, of $9,980.89 and the remaining 50% of the award was to be paid to claimant in installments at the rate of $184.88 per month. On June 3, 1975 the claimant advised the Board that she could not "get along" on this amount, and on the same date the carrier requested the Board to increase the monthly payments to $369.75. The carrier was advised on June 11, 1975 that this could not be done; ORS 656.230 provides that payments are to be reduced in the percent of lump sum requested.

In June, 1976 claimant, through her attorney, filed a claim for aggravation, the claim was accompanied by a letter from Dr. Cohen to claimant's attorney, dated June 25, 1976. On July 2, 1976 the carrier denied the claim for aggravation, stating that the medical evidence did not indicate that there had been any worsening of claimant's condition due to the industrial injury of April 15, 1972 and further stating that the carrier was continuing to pay claimant permanent partial disability benefits subsequent to the stipulated settlement of 100% permanent partial disability. Claimant requested a hearing on this denial.

The Referee found that there were different medical opinions expressed with respect to claimant's alleged aggravation. Dr. McKillop's opinion was that the falls which claimant had had in recent years probably resulted because of weak knees affected with arthritis and were not a result of her low back condition, he also felt that claimant's present worsening condition was due to natural progression of her disease plus the fact that claimant has had multiple falls since October, 1975. Dr. McKillop said he would expect the degree of arthritis in claimant to eventually cause significant symptoms whether claimant had suffered an injury or not.

On the other hand, Dr. Cohen found considerable amount of low back pain due to degenerative arthritis which was no doubt aggravated by strains and he rated the degree

of aggravation of claimant's condition since October 7, 1975 at 10%. In his report of June 25, 1976 Dr. Cohen refers to an incident in October, 1975 when claimant fell at home and he states that claimant's condition has worsened since that incident in 1975.

The Referee found Dr. Cohen's opinion that claimant's difficulty with her lower extremities was due partly to her compensable injury and that the falls claimant had been having were considered in his current opinion that her symptoms have been aggravated since October, 1975 was the most reasonable analysis and the most persuasive.

The Referee concluded that claimant's condition had become aggravated since October 9, 1974, that there was nothing in the record indicating a specific curative care contemplated for claimant and that claimant's condition would probably, if it changed at all, continue to worsen. The Referee found it appropriate to conclude that claimant was permanently and totally disabled as of the date of his order.

The Board, on de novo review, affirms the order of the Referee. However, the Board does not believe that claimant should be entitled to retain the lump sum and also receive payments of compensation for permanent total disability pursuant to the Referee's order.

ORS 656.368(3) provides for situations where the Board may make "necessary adjustments in compensation." There are situations where equity requires such adjustments; a workman should not be permitted to retain that to which he is not equitably entitled. In the Matter of the Compensation of Hilda Horn, WCB Case No. 74-3110, Order on Review, entered November 23, 1976.

Short of withdrawing the privilege of allowing a lump sum payment it is beholden upon the Board to promulgate an expansion of the procedures of granting lump sum payments to accomodate the repayment in the event of changing the award from a sum certain to a pension. In the Matter of the Compensation of Donald Pittman, WCB Case No. 75-3160, Order on Review, entered on November 30, 1976. In Pittman the claimant had applied for and received a lump sum payment on an award for permanent partial disability; subsequently, she was found to be permanently and totally disabled and the carrier unilaterally offset the amount it had paid claimant under the lump sum award against the award for permanent total disability. The Board concluded that the carrier should be allowed to offset the overpayment of compensation but that it could not do so unilaterally; the carrier must first secure authority from the Board to deduct from the periodic payments on claimant's award for permanent total disability and the deduction should be at no greater rate than 10% of the monthly payment, otherwise, the result would be a severe depletion in claimant's monthly payments.

In the case presently before the Board claimant has received nearly $10,000 as a result of the 50% lump sum award and she has now been found to be permanently and totally disabled; unless some equitable adjustment can be made claimant will have received more compensation than that to which she is entitled.

ORDER

The order of the Referee, dated September 21, 1976, is affirmed.

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

The attorney for the claimant and the attorney for the employer's carrier are

hereby directed to prepare and submit to the Board no later than 30 days from the date of this order, an appropriate and mutual arrangement whereby the carrier may offset against the payments of compensation for permanent total disability which commenced on September 21, 1976 the lump sum it has paid to claimant pursuant to the request for advanced payment which was approved by the Board on March 25, 1975, said arrangement shall be subject to approval by the Board.

WCB CASE NO. 76-1809 MARCH 23, 1977

JOE ROSENBERRY, CLAIMANT
Alan Scott, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

Employer requests review by the Board of the Referee's order which remanded claimant's claim to the Disability Prevention Division for evaluation of his vocational handicap, with commencement of temporary total disability payments at the time of enrollment.

Claimant, a warehouseman, sustained a compensable injury on July 21, 1975, diagnosed as spondylolisthesis superimposed on a low back strain. Claimant was treated conservatively. On March 29, 1976 a Determination Order granted claimant time loss only.

The concensus of medical opinion is that claimant should no longer engage in heavy type labor work.

Claimant's father is a realtor and claimant enrolled at Clackamas Community College where he completed a course in, and acquired a license for, selling real estate.

Claimant made contact with a service coordinator at the Disability Prevention Division who concluded that claimant had a license to sell real estate which is a vocational skill which can be exploited and, therefore, claimant was not vocationally handicapped.

Claimant testified that he had worked for his father for three or four months and had made only one sale.

The Referee found that claimant's making only one sale in three or four months did not constitute a vocation but was more properly considered as a hobby. Claimant expressed an interest in learning to become a real estate appraiser; the Referee felt this was a realistic goal.

The Referee concluded claimant should be referred to the Disability Prevention Division for evaluation of claimant's vocational handicap and ordered payment of temporary total disability to commence upon claimant's enrollment at the Disability Prevention Division.

The Board, on de novo review, finds that the service coordinator's finding that claimant was not vocationally handicapped was correct. Furthermore, the Referee has no authority to remand a workman to the Disability Prevention Division for vocational

training program, especially when claimant had already been found ineligible for such a program. Only the Board, through its Disability Prevention Division can determine a workman's eligibility for vocational rehabilitation programs. The Board concludes claimant does not now have a vocational handicap and, therefore, is not eligible for any vocational rehabilitation program pursuant to ORS 656.728.

The Board finds, however, that claimant is entitled to additional compensation for permanent partial disability and awards him 64 degrees for 20% unscheduled disability to compensate him for his loss of wage earning capacity.

ORDER

The order of the Referee, dated June 30, 1976, is reversed.

Claimant is hereby granted 64 degrees for 20% unscheduled disability of a maximum of 320 degrees.

Claimant's attorney is hereby granted as a reasonable attorney fee, a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed $2,000.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with this Board review, the sum of $300, payable by the employer.

WCB CASE NO. 76-1487 MARCH 23, 1977

JOHN PACHECO, CLAIMANT
Don Swink, Claimant's Atty.
Merlin Miller, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the employer's denial of claimant's claim for hypertension and thrombophlebitis and its denial of claimant's claim for aggravation.

Claimant, 39, sustained a compensable injury on April 28, 1972, diagnosed as cerebral concussion with contusion of the skull, acute cervical strain and contusion of the opthalmic branch of the 5th nerve.

Over the next four years claimant's symptoms included, anxiety and depression, weakness, numbness and weakness in both arms, dizziness, weakness in both legs, nausea and vomiting, numbness and tingling of the right side of his face, upper and lower back pain, shaking, jerking in the legs, soreness all over, sore joints, head pressure, thrombophlebitis, all of which Dr. Winkler, claimant's treating physician, relates to claimant's April 28, 1972 industrial injury.

Claimant has received every method of conservative treatment known by his doctor but contends his symptoms now are the same as, or worse than, at the time of his injury.

In 1973 Dr. Winkler stated claimant's hyptertension was related to his injury

because he was under a lot of stress related to his injury and this causes hypertension.

Dr. Seres felt the hypertension was in no way related to claimant's injury.

In 1975 Dr. Winkler felt claimant should have some disability benefits and should be retrained for a job paying wages comparable to what he was earning before the injury.

On June 18, 1975 claimant had received an award of 160 degrees for 50% unscheduled disability by an Opinion and Order which was later affirmed by the Board on December 6, 1975.

The Referee felt Dr. Winkler's compassion for claimant had overcome his medical objectivity; however, Dr. Seres had not seen claimant since he was admitted to the Portland Pain Clinic, therefore, the Referee concluded there was no persuasive medical evidence either way and inasmuch as the claimant has the burden of proof, which he has not met, the employer's denial for claimant's hypertension condition must be affirmed.

There was no medical evidence to support a finding that the condition of thrombophlebitis, which Dr. Winkler attributes to claimant's inactivity, was related, directly or indirectly, to claimant's industrial injury. The Referee concluded that the employer's denial of this condition was proper.

The Referee further found that the medical evidence does not support a finding of a worsened condition since the date of the last award or arrangement of compensation on June 18, 1975; claimant has failed to establish that his condition has become aggravated. He affirmed the denial of the claim for aggravation.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 10, 1976, is affirmed.

SAIF CLAIM NO. C 205196 MARCH 23, 1977

ANDREW OWENS, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable right foot injury on September 12, 1969 which required a transmetatarsal amputation involving all five metatarsals at the mid-shaft level. Claimant was fitted with a prosthesis. The claim was initially closed by a Determination Order on May 18, 1970 which granted claimant an award for 60% loss of the right foot.

On June 8, 1976 claimant was examined by Dr. Wilson for increased pain and tenderness. Claimant was hospitalized on June 27, 1976 and, on June 28, 1976, underwent surgery for resection of additional bone from the 3rd and 4th metatarsals. Claimant returned to work on September 8, 1976.

On February 14, 1977 the Fund requested a determination. It was the recommendation of the Evaluation Division of the Board, based upon claimant's prior award of 60% and his excellent results from surgery, that claimant had been adequately

compensated for the loss of his right foot. However, claimant was entitled to additional compensation for temporary total disability from June 27, 1976 through September 7, 1976.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted additional compensation for temporary total disability from June 27, 1976 through September 7, 1976.

WCB CASE NO. 76-51 MARCH 23, 1977

MELVIN LAMKEY, CLAIMANT
Samuel Blair, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which remanded to it claimant's claim for a compensable injury.

Claimant alleges he suffered a compensable industrial injury in August, 1973 while nailing up drywall. Claimant testified the work was faster than usual and after a week he developed pain in the right elbow. Claimant saw Dr. Stanford and was given a cortisone injection. Claimant continued to work.

Pain symptoms did not recur for two or three months and then only after stressful activity.

Claimant filed his workmen's compensation claim in September, 1975; his medical expenses had been paid by off-the-job insurance but when this insurance carrier denied further benefits claimant filed his claim for workmen's compensation.

A question arises as to whether this was a claim for injury or occupational disease. The Referee found that the pain symptoms did develop rather rapidly and were not a development of symptoms inherent in that activity performed by claimant. He concluded claimant sustained an injury on the basis of repeated trauma.

On the issue of timeliness, claimant alleges he told his foreman that his elbow was sore because of his work activity and he was to see a doctor for it; after seeing the doctor, claimant told his foreman that he had had a shot. The foreman, upon being deposed, did not recall claimant sustaining an injury nor complaining of such; he did testify it was possible claimant had told him of such an event. Claimant further alleged he also told the employer, but this is contradicted by the claim form. The Referee concluded claimant has not established that he gave notice of an injury to his employer prior to the filing of his claim.

The Fund contended it had been prejudiced, that the passage of two years had hindered its investigation. The Referee found claimant had named two people in support of his giving claim notice; both available after the claim was filed and they helped,

rather than hindered, the Fund's case. The Referee concluded the Fund had failed to prove prejudice and the claim was not barred for late filing.

On the issue of compensability, the Referee found it was undisputed that claimant was symptom free before August, 1973 and there was no contradictory evidence of Dr. Stanford's assumption that claimant's problems resulted from the August, 1973 activity. Furthermore, claimant promptly sought medical attention for an activity caused pain by more demanding work than was usual on his job.

The Board, on de novo review, finds claimant sustained an occupational disease rather than an injury; claimant's symptoms had developed gradually. The Board concurs with the other conclusions reached by the Referee.

ORDER

The order of the Referee, dated August 30, 1976, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with this Board review, the sum of $350, payable by the Fund.

WCB CASE NO. 76-1512 MARCH 23, 1977
WCB CASE NO. 76-2820B

STEPHEN GOETZ, CLAIMANT
Paul Boland, Claimant's Atty.
Daryll Klein, Defense Atty.
James Huegli, Defense Atty.
Dept. of Justice, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer, J.J. Newberry Company, requests Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation, as provided by law, and ordered it to reimburse Lipman Wolfe & Company for all monies the latter had expended pursuant to the order of June 7, 1976 designating Lipman's as the paying agent.

Claimant sustained a compensable injury to his left arm on September 4, 1973 while employed at Newberry's. He was released to return to work on October 10, 1973 and his claim was closed with no award for permanent partial disability, based upon Dr. Pasquesi's closing examination in March, 1974.

In April, 1974 claimant commenced working for Lipman's and continued to work for them until September 25, 1975. During that period of time claimant, while working as a janitor, strained his arm and shoulder moving a file cabinet. This caused claimant some pain for a period of time and then apparently resolved. On September 25, 1975 claimant went to work for John's Landing and worked there for approximately one month. On the second day of his employment with John's Landing claimant was seen by Dr. Howell who diagnosed a left shoulder bursitis and indicated that this condition had been present for several weeks, thus placing the onset of the problem during the latter weeks claimant worked at Lipman's.

Claimant filed a claim for aggravation which was denied on February 9, 1976 by the carrier for Newberry's. On April 13, 1976 Newberry requested that Lipman's and John's Landing be joined in a hearing for determination of a responsible party, stating if they were joined then they would request the Board to issue an order, pursuant to ORS 656.307, designating a paying agent pending a determination of the responsible party. On May 26, 1976 the Compliance Division of the Board said it could not issue such an order because a claim had not been filed against Lipman's. Two days later a claim for an occupational disease was filed by claimant against Lipman's which was denied by them on June 9, 1976. On May 21, 1976 the Fund, which furnished workmen's compensation coverage for John's Landing, also denied this claim. (Newberry's carrier is Continental Casualty Company and Lipman's carrier is Employer's Self Insurance Service). On June 7, 1976 the Compliance Division issued an order, pursuant to ORS 656.307, designating Lipman's as a paying agent pending determination of the responsible party and directed that a hearing be set.

On July 20, 1976 the counsel for Lipman's requested the Board to withdraw its order issued pursuant to ORS 656.307, contending that claimant had not appealed from Lipman's denial of June 9, 1976 and that the injection of the order would assist claimant's efforts to show that good cause existed for not appealing from the denial order within 60 days.

The Referee found that claimant had great difficulty in articulating his complaints and that there was some conflicts in his testimony; he noted that claimant appeared to be under severe emotional stress which was not related to any of the compensable incidents; however, in spite of this the Referee stated that he was satisfied that claimant was credible and testifying to the best of his ability.

The Referee found paucity of medical information; the only testimony that was really worth the consideration was that given by the claimant at the hearing. Based upon the record as such, the Referee concluded claimant had sustained an aggravation of the right arm biceps tendonitis, he also concluded that there was no medical causation relating the subacromial bursitis or subdeltoid bursitis to the work activity with either Lipman's or John's Landing.

The Referee, having found that claimant had sustained an aggravation of the left arm bicep tendonitis only, remanded the claim to Newberry and directed it to reimburse Lipman's for all monies Lipman's had expended pursuant to the order issued on June 7, 1976.

The Board, on de novo review, finds that following the industrial injury of September 4, 1973 claimant was symptom free and had been released to return to work in October of that year; that claimant's symptoms to his arms started again approximately in August, 1975, 22 months following the initial injury.

The Board, based upon the medical evidence of record, concludes that claimant not only failed to prove by a preponderance of the evidence that he had suffered an aggravation of his September 4, 1973 injury but also failed to prove that he had suffered any permanent partial disability as a result of incidents which occurred while employed by Newberry's, by Lipman's or by John's Landing. Therefore, the denial made by each employer was a proper one.

With respect to the issuance of the order pursuant to ORS 656.307, the Board finds that the issuance was proper inasmuch as the claim had been denied as a claim

for aggravation by Newberry and also denied by Lipman's and by the Fund as an occupational disease.

Claimant has suffered neither an aggravation of an old injury nor a new compensable injury and the Board concludes that Lipman's, which was the designated paying agent by order issued on June 7, 1976, should be reimbursed from the Direct Responsibility Employers Adjustment Reserve for all compensation which it has paid to claimant pursuant to said order.

ORDER

The order of the Referee, dated September 30, 1976, is reversed.

The denial by J.J. Newberry Company on February 9, 1976 of claimant's claim for aggravation is affirmed.

The denial by Lipman Wolfe & Company on June 9, 1976 of claimant's claim for an occupational disease is affirmed as is the denial of said claim by the Fund on May 21, 1976.

Employer's Self Insurance Service, the carrier for Lipman Wolfe & Company, shall be reimbursed from the Direct Responsibility Employer's Adjustment Reserve for all compensation which it has paid to claimant pursuant to the order issued on June 7, 1976 under the provisions of ORS 656.307.

WCB CASE NO. 69-1801 MARCH 23, 1977

EUGENE E. FIELDS, CLAIMANT
Charles Seagraves, Claimant's Atty.
Dept. of Justice, Defense Atty.
Amended Own Motion Order

On February 24, 1977 an Own Motion Order was entered in the above entitled matter which denied claimant's request that the Board exercise its own motion jurisdiction and review claimant's claim for compensation for a heart attack which was initially denied, after consideration on the merits, by an order of the Board entered July 17, 1970.

The order entered on February 24, 1977 correctly states the history of the case; however, in the last paragraph of said order the Board states that no additional evidence had been furnished to it since initial petition to reconsider. Subsequent to the entry of this order a letter was received from claimant's counsel which called to the Board's attention deposition testimony of Dr. Buck, a pathologist, and deposition testimony of Referee Baker which had been furnished to the Board in May, 1974. At the time the Board considered claimant's request and entered its order of February 24, 1977 neither of these depositions had been found in the files; after receiving the letter from claimant's counsel a thorough search was made of all of the files relating to this matter and the two depositions were discovered.

The Board, now having thoroughly reviewed the testimony of Dr. Buck and Referee Baker, concludes that there is sufficient evidence to justify remanding claimant's claim for a heart attack suffered on April 30, 1969 to the Fund to be accepted and for the payment of compensation.

ORDER

The Own Motion Order entered in the above entitled matter on February 24, 1977 is amended by deleting after the third complete paragraph of said order the remainder thereof.

Claimant's claim for a heart attack suffered on April 30, 1969 is remanded to the Fund for acceptance and payment of compensation, as provided by law, until the claim is closed pursuant to the provisions of ORS 656.278.

Claimant's attorney is awarded as a reasonable attorney fee a sum equal to 25% of any compensation claimant may receive as a result of this order, payable out of said compensation as paid, to a maximum of $2,300.

WCB CASE NO. 75-3845 MARCH 23, 1977

JOHN BOWERS, CLAIMANT
J. David Kryger, Claimant's Atty.
Phillip Mongrain, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of September 4, 1975.

Claimant sustained a compensable injury on July 7, 1971, diagnosed as lumbosacral strain. Claimant was treated conservatively and released for work on August 12, 1971; he worked only three days. According to Dr. Denker, claimant went to work on October 22, 1971 for a short duration and again on December 7, 1971 and continued working until July, 1972 when claimant sustained a hand injury and also had alleged back pain.

Upon claimant's return to work from his hand injury he only worked two days and terminated on August 10, 1972.

On December 27, 1972 Dr. Anderson performed a partial laminectomy at L4-5 and L5-S1 with excision of herniated nucleus pulposis.

Claimant was examined by Dr. Chuinard on November 21, 1973 who found claimant had a "frozen back" and recommended conservative treatment. Claimant was hospitalized by Dr. Chuinard on July 1, 1974 for traction and physical therapy and later put in a rehabilitation unit; claimant insisted on going home and signed his own release.

Claimant was examined at the Disability Prevention Division on October 31, 1974 by Dr. Mason who found subjective complaints of low back pain and leg pain, bilaterally, and marked emotional overlay exaggeration with numerous discrepancies during examination. Dr. Mason recommended a job change for claimant with avoidance of lifting, bending and twisting stresses. On February 28, 1975 Dr. Mason found claimant to be medically stationary with no need for further medical treatment.

A Determination Order of September 4, 1975 granted claimant an award of 64 degrees for 20% unscheduled low back disability.

Claimant was examined by the Orthopaedic Consultants on December 23, 1975 who felt claimant could work with restrictions of no excessive heavy lifting, with 50 pounds being the maximum.

On January 6, 1976 Dr. Parvaresh examined claimant and he found claimant had always had some psychological problems during times of stress but he found no evidence of any permanent psychological problems associated with his industrial injury. A psychological evaluation by Dr. Fleming revealed claimant's intellectual ability to be superior; claimant was experiencing moderately severe anxiety tension reaction with depression.

The Referee found that all of the medical and psychological reports indicated claimant has a mild permanent disability of chronic low back pain and moderately severe psychopathology as a direct result of his industrial injury. Claimant has sought no lighter employment and is now undertaking vocational rehabilitation with progress.

However, claimant's credibility is suspect in regards to his testimony on receipts of payments made to him. Claimant received off-the-job insurance by saying workmen's compensation benefits were denied to him when, in fact, a payment had been made by the workmen's compensation carrier; also claimant's credibility is questionable with the report of Dr. Chuinard indicating claimant's refusal to participate in rehabilitation and failure of claimant to keep his appointments. Furthermore, claimant admitted an ability to bend, lifting 50 pounds once and 35-40 pounds repetitively. He can drive, walk, climb stairs, fish and work on his car.

The Referee concluded, considering all relevant factors together with claimant's doubtful credibility which could taint the medical and psychological reports, that the award of 64 degrees for 20% unscheduled disability was adequate and proper.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 5, 1976, is affirmed.

WCB CASE NO. 75-4205 MARCH 25, 1977

BRYAN CARDWELL, CLAIMANT
Alan Scott, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's supplemental order, dated September 13, 1976 which affirmed the Determination Order of September 5, 1975.

Claimant contends he is permanently and totally disabled.

Claimant sustained a compensable injury on October 6, 1971, diagnosed as acute lumbar strain with possible disc syndrome. Between November 29, 1971 and June 6, 1972 claimant underwent two lumbar laminectomies. On June 12, 1972 Dr. Kiefer, claimant's treating physician, indicated claimant was not making a quick recovery and

had headaches and multiple complaints. On October 6, 1972 he rated claimant's disability at 50%.

On February 15, 1973 Dr. Kiefer performed surgery for disc herniation and posterior rhizotomy of a nerve root.

On January 14, 1974 Dr. Taylor recommended a rigid back brace for claimant to wear.

On July 10, 1974 claimant was examined at the Disability Prevention Division by Dr. Halferty who diagnosed chronic lumbosacral degenerative disc disease and mild functional overlay.

On May 5, 1975 Dr. Kiefer found that claimant was medically stationary and could now return to some type of sedentary occupation; subsequently, he recommended claimant be referred for vocational rehabilitation.

A Determination Order of September 9, 1975 granted claimant an award of 240 degrees for 75% unscheduled low back disability.

On November 7, 1975 Dr. Cherry examined claimant and indicated claimant had been to vocational rehabilitation and was told he could not be retrained. Dr. Cherry opined that claimant could probably not perform the lighter work which Dr. Kiefer indicated claimant could do because of claimant's inability to sit or stand for long periods. Dr. Cherry stated claimant has permanent and severe back disability and is now unable to do any job that he has training for or experience in; claimant cannot be retrained and his condition is permanently and totally disabled.

On December 10, 1975 claimant underwent a psychological evaluation by Dr. Hickman who found no serious emotional problems. Claimant has a responsible work record and Dr. Hickman reported claimant does have some very constructive intellectual and personality resources which can be utilized in his restoration and rehabilitation. Claimant's psychopathology is largely related to his industrial injury. Dr. Hickman concluded claimant showed no evidence of exaggerating his symptoms but claimant feels he can do absolutely nothing. Dr. Hickman recommended some program of psycho-therapy is needed for claimant.

On August 5, 1976 claimant was examined by the Orthopaedic Consultants who diagnosed residuals of ruptured disc L5, functional overlay and anxiety state and radiculopathy of the right lower extremity, mild. The physicians recommended a new back brace for claimant and found him to be medically stationary. Claimant could not return to his former occupation of welder but could perform light or sedentary activities. They further recommended continued psychological care under Dr. Hickman. Total loss of function of claimant's back due to the injury was moderately severe.

The Referee found, based upon the medical evidence, that claimant had failed to establish that he was permanently and totally disabled. The Referee remanded claimant's claim to the carrier for the purpose of enrolling claimant at the Psychology Center for the psycho-therapy program recommended by Dr. Hickman and continued the case for further consideration.

On September 23, 1975, after receiving and reviewing additional evidence, the Referee concluded that the Determination Order of September 9, 1975 should be affirmed and he entered the supplemental order from which claimant appeals.

The Board, on de novo review, affirms the order of the Referee.

ORDER

The order of the Referee, dated February 11, 1976 and the supplemental order dated September 23, 1976 are affirmed.

WCB CASE NO. 75-4937 MARCH 28, 1977

BARBARA TAVENNER, CLAIMANT
Richard Kropp, Claimant's Atty.
Jack Mattison, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer requests review of the Referee's order which granted claimant an award of 160 degrees for 50% unscheduled disability.

Claimant sustained a compensable right shoulder injury on June 20, 1974. Dr. Neuman, claimant's treating physician, diagnosed subacromial bursitis and tendinitis of the right shoulder, secondary to right shoulder and arm sprain. Claimant was treated conservatively. On June 4, 1975 Dr. Neuman indicated claimant could return to work on June 9, but should be limited to modified work. On July 2, 1975 Dr. Neuman reported claimant had not completely recovered from her bursitis problem but that the shoulder condition had greatly improved and he released claimant for work as of July 14, 1975.

A Determination Order of October 31, 1975 granted claimant 32 degrees for 10% unscheduled right shoulder disability.

On April 15, 1976 Dr. Scheinberg examined claimant and diagnosed mild separation of the right acromial clavicular joint, he thought claimant might have associated minimal degeneration of the right rotator cuff. He recommended no specific treatment.

The Referee found Dr. Neuman had recommended claimant be referred for vocational rehabilitation, however, the Disability Prevention Division had found claimant did not have a vocational handicap and, therefore, did not approve a Board authorized program for claimant. Claimant testified she would be willing and ready to undergo a rehabilitation program.

A service coordinator for the Workmen's Compensation Board felt claimant possessed sufficient skills to return to the labor market; she also questioned claimant's motivation to return to work.

Claimant has an 8th grade education and no other formal education or training. Claimant's past working experience includes motel maintenance and maid work, bartending and waitress work.

The Referee further found claimant has not worked since May, 1975. Claimant is now precluded from returning to her former occupation (working on a big machine). Claimant testified she feels she could do light work.

The Referee concluded, based upon all of the evidence presented, that claimant had failed to prove by a preponderance of the evidence that she is vocationally handicapped within the meaning of the Workmen's Compensation Board's Administrative Order No. 4-1975 in existence at the time of the hearing. Further, claimant has failed to prove, based upon the evidence presented, that she has suffered any scheduled disability. Both Drs. Neuman and Scheinberg refer to claimant's shoulder condition not to her arm.

The Referee concluded claimant had established by a preponderance of the evidence that she was entitled to an additional award of 128 degrees, giving her a total award of 160 degrees for 50% unscheduled disability to compensate her for her loss of wage earning capacity because she is now precluded from returning to her regular occupation and to many other occupations.

The Board, on de novo review, finds that the medical evidence presented indicates claimant sustained a shoulder sprain and bursitis; no surgery was required and the only limitations placed on claimant relate to heavy physical labor. In April, 1976 Dr. Scheinberg found no further treatment was indicated or necessary. The Board concludes that an award of 80 degrees for 25% unscheduled disability compensates claimant for her loss of wage earning capacity.

However, the Board suggests that the Disability Prevention Division reassess claimant's eligibility for vocational rehabilitation to determine if claimant can be assisted in returning to some form of suitable and gainful employment within her physical capabilities.

ORDER

The order of the Referee, dated August 16, 1976, is modified.

Claimant is hereby granted an award of 80 degrees of a maximum 320 degrees for unscheduled shoulder disability. This is in lieu of the award made by the Referee's order of August 16, 1976.

WCB CASE NO. 75-3906 MARCH 28, 1977

ALBERT TAYLOR, CLAIMANT
Lynn Moore, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests review by the Board of the Referee's order which granted claimant an award for permanent total disability.

Claimant sustained a compensable back injury on July 8, 1974 and was treated conservatively by Dr. Hockey. On September 4, 1974 Dr. Golden hospitalized claimant for a myelogram but didn't want to perform further surgery. Dr. Golden indicated claimant had had two prior laminectomies and presently showed signs of functional overlay.

On January 15, 1975 claimant was examined at the Disability Prevention Division by Dr. Thurlow who diagnosed aggravation of pre-existing osteoarthritic changes and aggravation of prior laminectomies; chronic pulmonary disease, onychomycosis of fingers

and toes, bilateral, severe. On January 22, 1975 claimant underwent a psychological evaluation which indicated claimant has a wide variety of skills; he has moderately severe psychophysiological reaction with moderately severe anxiety about his condition. The moderately severe psychopathology is largely attributable to the injuries. On January 30, 1975 Dr. Thurlow's discharge summary found loss of function moderately severe and due to this injury mildly moderate.

A Determination Order of April 9, 1975 granted claimant an award of 112 degrees for 35% unscheduled low back disability.

On September 3, 1975 Dr. Golden found claimant permanently disabled and did not expect claimant would return to work.

The Referee found claimant had had prior injuries and in the period up to 1972 had not been working due to physical disability condition. He returned to work as a jitney driver in 1972. Claimant has an 8th grade education and his main occupation has been as a physical laborer. Dr. Adolph, a clinical psychologist, testified claimant would be capable of light sedentary work.

The Referee concluded that claimant, even with prior injuries and pre-existing conditions, had been able to work prior to this injury. The evidence indicated claimant can no longer work regularly and gainfully and, therefore, is permanently and totally disabled.

The Board, on de novo review, finds that Dr. Adolph indicated claimant can perform sedentary work; the Disability Prevention Division rated claimant's disability due to this injury as mildly moderate. Therefore, the medical evidence does not support a finding that claimant is permanently and totally disabled.

The Board concludes claimant is entitled to an award of 224 degrees for 70% unscheduled disability to adequately compensate him for his loss of wage earning capacity as a result of this industrial injury.

ORDER

The order of the Referee, dated August 9, 1976, is modified.

Claimant is hereby awarded 224 degrees of a maximum 320 degrees for unscheduled low back disability. This is in lieu of the award made by the Determination Order dated April 9, 1975, and the award of permanent total disability made by the Referee's order of August 9, 1976.

SAIF CLAIM NO. C 24841 MARCH 28, 1977

JAMES STACEY, CLAIMANT
J. David Kryger, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On September 24, 1976 claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a compensable injury sustained on July 10, 1966. The request was supported by medical reports from Dr. Cottrell.

On October 7, 1976 the Fund, after being furnished with these medical reports, responded, stating it had authorized treatment and home traction on June 23, 1976 and recommended referral of claimant to the Disability Prevention Division but refused to reopen claimant's claim for the payments of time loss.

The Board, lacking sufficient medical evidence to give full consideration to the request, referred the matter to the Hearings Division with instructions to hold a hearing and take evidence on the issue of whether or not claimant's present condition had worsened since his last award or arrangement of compensation on April 15, 1975 and, if so, whether the worsened condition was related to the July, 1966 injury.

On February 14, 1977, pursuant to the Board's order, a hearing was held before Referee Nathan Ail and, based upon the evidence introduced at said hearing, Referee Ail submitted his recommendation that the Board not reopen claimant's claim for aggravation.

The Board, after de novo review of the transcript and a study of the Referee's recommendation, adopts as its own the findings and conclusion set forth in the Referee's recommendation, a copy of which is attached hereto, and by this reference, made a part hereof.

ORDER

Claimant's request for the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an aggravation of his July 10, 1966 compensable injury is hereby denied.

WCB CASE NO. 76-517 MARCH 28, 1977

LUCY MORRISON, CLAIMANT
Nikolaus Albrecht, Claimant's Atty.
Douglas Gordon, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the denial on January 19, 1976 for claimant's claim for an alleged injury of November, 1975 and denied claimant's claim that she suffered any permanent partial disability as a result of the December, 1975 injury.

Claimant commenced working for the employer on November 8, 1975; she spent the first four days of employment on tours of the plant. Claimant contends that during one of the tours she went into an area where glass was in molten state, that it was exceedingly hot and she felt she was smothering. From that time on claimant alleges she has had problems with her throat.

On November 20, 1975 claimant saw the plant physician who diagnosed cough-chest congestion; claimant is a smoker. On November 25, 1975 the physician diagnosed acute laryngitis. The plant physician referred claimant to Dr. Delorit, a throat specialist, who diagnosed chronic hyperplastic laryngitis. Claimant's claim was denied on January 19, 1976.

The Referee found the claimant offered no evidence that the chemicals she inhaled were beyond reasonable limits. Claimant breathed hot air and there were no pollutants in the air.

Dr. Delorit stated, after claimant had surgery for removal of leukoplakia from her vocal cords, that claimant's smoking was the most likely cause of claimant's disease process; but it was possible that irritants at claimant's place of employment may have contributed to the disease process.

The Referee concluded that claimant's condition for which surgery was performed was not causally related to her employment.

On December 5, 1975 claimant sustained an injury to her left shoulder and neck. Claimant was treated and her claim was closed with time loss through December 10, 1975. Claimant terminated her employment on December 17, 1975.

The Referee found there was no medical evidence to indicate claimant has suffered any permanent disability to her shoulder or neck as a result of her December, 1975 injury. Furthermore, claimant was paid compensation for temporary total disability for the appropriate amount of time and was not entitled to further compensation or to penalties.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated October 8, 1976, is affirmed.

WCB CASE NO. 75-5272 MARCH 28, 1977

ROBERT COLLVER, CLAIMANT
Don Atchison, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant compensation for temporary total disability from June 2, 1975 to January 30, 1976, less time worked, subject to offsets for amounts already paid for this period between January 6, 1976 and January 30, 1976, and granted claimant an award of 16 degrees for 5% unscheduled dorsal disability. In an Order on Reconsideration, dated July 27, 1976, the Referee reaffirmed the award of 16 degrees for 5% unscheduled disability but affirmed the Determination Order which granted claimant time loss only from April 28, 1975 through June 2, 1975, less time worked, and allowed the carrier an offset for any overpayments of temporary total disability that might have been made.

Claimant sustained a compensable injury on April 28, 1975 resulting in a strain of his dorsal spine, which is aggravated by stooping, and lifting. Claimant has never returned to the employer; he had tendered his resignation prior to his injury to take another job which never became available to him.

On June 3, 1975 Dr. Bell released claimant to modified work and found claimant to be medically stationary with no permanent disability. Claimant, thereafter, began looking for work.

Between November 24, 1975 and February 5, 1976 claimant was employed as a car shagger, rather light work, but his symptoms returned and he sought treatment from Dr. Ho. On January 27, 1975 Dr. Ho found claimant medically stationary with no permanent disability.

Dr. Bell had indicated claimant's back instability precludes him from lifting over 75 pounds.

On June 3, 1975 Dr. Bell released claimant for work and the record fails to show why the Determination Order, granting claimant compensation for time loss only, was not issued until January 30, 1976.

The Referee found the Determination Order correctly shows claimant's entitlement to temporary total disability, less time worked, i.e., from April 28 to June 2, 1975, but meanwhile the employer was obligated to pay temporary total disability until the claim was closed by the Board on January 30, 1976; subject to offsets for days claimant was actually working.

The Referee concluded claimant had a very minimal disability and granted him 16 degrees for 5% unscheduled disability and compensation for temporary total disability from June 2, 1975 to January 30, 1976.

On July 27, 1976 the Referee issued an Order on Reconsideration which affirmed the Determination Order of January 30, 1976 in all respects, again granted claimant an award of 16 degrees for 5% unscheduled disability and allowed the carrier to offset any overpayments it may have made.

The Board, on de novo review, concurs with the conclusions reached by the Referee.

ORDER

The Order on Reconsideration of the Referee, dated July 27, 1976 is affirmed.

WCB CASE NO. 75-1658 MARCH 28, 1977

RONALD HOLLENBECK, CLAIMANT
David Vandenberg, Claimant's Atty.
Michael Hoffman, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer requests review by the Board of the Referee's order which granted claimant an award of permanent total disability.

Claimant sustained a compensable injury on January 8, 1973 and that day saw Dr. Lilly who diagnosed low back contusion and spasm. On January 15, 1976 Dr. Lilly re-examined claimant and diagnosed a fracture of the transverse process L1 on the left. Claimant also complained of numbness of the right hand and headaches behind his left eye.

On January 21, 1973 Dr. Campagna examined claimant who was complaining of headaches, nausea, dizziness, blackout spells and pain in the left hip and left leg.

Dr. Campagna diagnosed lumbar sprain and post-concussion syndrome.

Dr. Bervan had examined claimant and found peripheral vascular disease related to frostbite and probably related to vibratory trauma of the hands.

Claimant returned to work in April, 1973. On May 18, while he was sawing a log, a tree broke and caused claimant and his saw to fall six feet, jerking claimant's neck and right arm. Claimant consulted Dr. Campagna who diagnosed a stretch injury to the right brachial plexus, related to the May 18 incident. Claimant returned to work and, due to blackouts and headaches, was later placed in a lighter job. Around July 20, 1973 claimant terminated.

On July 5, 1973 Dr. Bervan stated claimant's primary physical problem was Raynaud's disease, causing constriction of vessels of the hands and feet upon exposure to cold.

On August 18, 1973 claimant was referred to the VA hospital where the diagnoses were probable Raynaud's disease, carpal tunnel syndrome, headaches, and degenerative arthritis right knee. The dizzy spells and headaches were apparently related to the original injury.

On January 18, 1974 Dr. Campagna indicated claimant had had surgery at the VA hospital for Raynaud's phenomena of the right hand and presently claimant's right thumb was numb. He diagnosed Raynaud's disease with moderate functional overlay.

Claimant was hospitalized between February 25, 1974 and April 5, 1974 by Dr. Bervan for nausea, vomiting, forgetfulness and dizziness.

On May 3, 1974 Dr. Campagna found claimant to be medically stationary with midly moderate disability of head and low back as a result of the injury of January 8, 1973.

A Determination Order of June 11, 1974 granted claimant compensation for time loss only.

On July 8, 1974 Dr. Koutsky, a psychiatrist, examined claimant and diagnosed schizophrenia. Claimant believed he saw spaceships in the sky. On August 14, 1974 Dr. Bervan felt claimant's primary problem was depression.

On December 11, 1974 Dr. Bervan indicated claimant's Raynaud's disease was worsening and precluded claimant from any outdoor work. Also claimant's headaches and loss of memory preclude him from working. He concluded claimant was incapacitated on a permanent basis due both to the Raynaud's disease and the chronic headaches and claimant's difficulties with thought processes, etc.

On February 10, 1975 Dr. Bervan said that claimant's headaches and difficulties with thought processes were not conditions related to his industrial injury nor was claimant's Raynaud's disease. The only aggravation would be an underlying Raynaud's disease resulting from claimant's use of a chain saw.

On March 7, 1975 Dr. Koutsky again evaluated claimant and found claimant had delusions, depression and evidence of psychosis including hallucinatory experiences. Dr. Koutsky rated claimant's degree of function of impairment as total.

Dr. Luce examined claimant on September 3, 1975 and diagnosed lumbosacral

sprain, cervical sprain, stretching injury, neurosis, aggravated by both injuries; and Raynaud's disease, unrelated. Permanent partial disability was mildly moderate with the psychological elements moderately severe which are an aggravation of a pre-existing condition.

On November 3, 1975 Dr. Quan, a psychiatrist, evaluated claimant and concluded that his psychoneurosis with anxiety, depression and disassociative episodes was a pre-existing condition aggravated by the injury.

On April 15, 1976 Dr. Luce testified, by deposition, that claimant had a pre-existing psychological disorder but had been able to work and earn a living prior to his accidents and, based upon medical probability, the injury aggravated claimant's psychological condition.

The Referee found, based upon all of the medical and lay testimony, that claimant's low back, neck and shoulder conditions, headaches and psychological problems were all related to the injuries of January 8, 1973 and May 18, 1973.

Therefore, based on claimant's age, education, work experience, mental capacity, pre-existing conditions, she concluded that claimant is now precluded from any gainful and suitable occupation and falls within the odd-lot category and the employer failed to show that some kind of suitable work was available to claimant on a regular basis. She found claimant to be permanently and totally disabled as of July 20, 1973.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 14, 1976, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with this Board review, the sum of $450, payable by the employer.

WCB CASE NO. 76-1120 MARCH 31, 1977

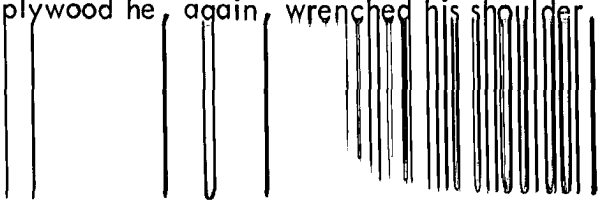
MOUIN SALLOUM, CLAIMANT
Marshall Cheney, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Moore and Phillips.

Claimant requests review by the Board of the Referee's order which granted claimant an award of 48 degrees for 15% unscheduled disability. Claimant contends this award is inadequate.

Claimant was born in Lebanon and raised in that country. When he was 21 he [illegible] United States and is now a citizen. Claimant has spent his working life in

to be given lighter work, however, he was put back on his regular job. While carrying some plywood he, again, wrenched his shoulder.



On October 11, 1974 Dr. Wade examined claimant and diagnosed cervical sprain on the left. Dr. Wade recommended claimant return to work and if he was unable to perform his job claimant should be considered for physical therapy or vocational rehabilitation. On October 18, 1974 Dr. Harder diagnosed stretching or sprain of the shoulder, probably both scapular and rhomboid areas and rotator cuff.

On December 12, 1974 Dr. Berselli felt claimant had significant functional overlay to his complaints.

On February 13, 1975 claimant was examined at the Disability Prevention Division by Dr. Thurlow who found that the cause for claimant's left shoulder pain was undetermined.

On March 9, 1975 Dr. Johnson examined claimant and diagnosed C6-7 nerve root irritation, left and ruled out herniated intervertebral disc. On March 10, 1975 a myelogram was performed.

A Determination Order of May 27, 1975 granted claimant no award for permanent partial disability.

Claimant's claim was reopened for conservative treatment and closed by a Determination Order on February 26, 1976 which granted claimant additional compensation for temporary total disability but no award for permanent partial disability.

The Referee found that Dr. Berselli had recommended retraining claimant for lighter work. Claimant's wife testified that prior to this injury claimant had had no physical problems. Claimant's wife was a credible witness.

Claimant contends that his lack of education and total absence of any skills or abilities make his loss of wage earning capacity substantial.

The defendant contends, based on the medical evidence and claimant's lack of motivation, that there is no support for a finding of permanent partial disability.

The Referee concluded that claimant has carried his burden of proof that he has suffered some permanent partial disability. All of the doctors had found claimant suffered pain and difficulties with his left shoulder. The Referee felt claimant lacked motivation but, after considering claimant's disability, age, education and work background, concluded that claimant was entitled to an award of 48 degrees for 15% unscheduled disability to compensate him for his loss of wage earning capacity.

The Board, on de novo review, affirms the Referee's order. The Board strongly urges that all of the facilities of the Disability Prevention Division be made available to claimant and every effort be made to enable claimant, through vocational assistance

WCB CASE NO. 76-2389 MARCH 31, 1977

WILLIAM PUGH, CLAIMANT
Jan Baisch, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of April 23, 1976.

Claimant, a 27 year old warehouseman, sustained a compensable injury on May 28, 1975 to his left ankle. On that date claimant underwent surgery for open reducation and internal fixation and casting. Claimant was recovering when, on September 22, 1975, he tripped and refractured his medical malleolus. A new cast was applied.

In March, 1976 claimant returned to his regular job and has continued to work by modifying his work through the aid of his co-workers, eliminating the heavier duties.

On March 8, 1976 Dr. Gripekoven indicated claimant has residual pain, intermittant swelling and a loss of 10 degrees to 15 degrees dorsiflexion. Dr. Gripekoven found claimant's permanent disability was mild.

A Determination Order of April 23, 1976 granted claimant 20.25 degrees for 15% loss of the left foot.

The Referee found that the Determination Order adequately compensated claimant for the loss of function of his left foot.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 28, 1976, is affirmed.

WCB CASE NO. 76-2205 MARCH 31, 1977
WCB CASE NO. 76-3231

BILLY MCBRIDE, CLAIMANT
Brian Welch, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On March 7, 1977 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and refer claimant's claim for hearing to permit claimant to contest a denial issued by the Fund on December 24, 1974 on the grounds that they were not responsible for claimant's total hip replacement.

Claimant, on his own behalf, requested a hearing protesting this denial by the

On April 8, 1975 Referee Leahy issued an Order of Dismissal which was never appealed, therefore, the order became final by operation of law.

The Board, after giving full consideration to this matter, concludes that the Order of Dismissal was final by operation of law and claimant's request for the Board to refer his claim for a hearing should be denied.

It is so ordered.

WCB CASE NO. 75-4494 MARCH 31, 1977
WCB CASE NO. 75-5500
WCB CASE NO. 76-856

HARVEY LEFEVER, CLAIMANT
Rolf Olson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order Awarding Attorney Fees

The Board's Order on Review issued on March 22, 1977 in the above entitled matter failed to include an award of a reasonable attorney fee.

ORDER

It is hereby ordered that claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with Board review, the sum of $400, payable by the State Accident Insurance Fund.

WCB CASE NO. 76-1199 MARCH 31, 1977

PERCY JELLUM, CLAIMANT
Bernard Jolles, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which granted claimant an award of 160 degrees for 50% unscheduled disability. Claimant contends he is permanently and totally disabled.

Claimant is 69 years of age, his principle occupation has been in the asphalt construction business and he has suffered back and leg problems for years. Claimant has marked scoliosis on the right at L1. In May, 1972 claimant underwent a laminectomy and in January, 1973 claimant retired.

Claimant's son now owns the asphalt paving business and, in September, 1974, asked claimant to help him. On September 23rd the claimant

On September 27, while claimant was using a torch, his pants caught fire and dropped to the floor starting a fire in some oil. At this point there was an explosion and claimant was engulfed in flames; he started down a ladder, missed a rung, and pitched forward ten feet to the floor. A co-worker put out the fire. Claimant suffered first, second and third degree burns. Skin graft surgeries were performed by Dr. Knowles.

In February, 1975 claimant was examined by Dr. Raaf who found, besides scoliosis, a marked degree of arthritis and recommended conservative treatment.

In November, 1975 claimant was examined by Dr. Corbett who concluded claimant's residual disability was minimal.

A Determination Order of February 12, 1976 granted claimant an award of 48 degrees for 15% unscheduled back and burn disability.

In August, 1976 Dr. Cohen examined claimant, who had complaints of back pain on the right side, pain in the right shoulder and pain in both legs. Dr. Cohen found pain and swelling and limitation of motion of the left knee which he believed was an aggravation of the pre-existing arthritis with the aggravation occurring at the time of the industrial injury. Dr. Cohen found claimant to be permanently and totally disabled.

The Referee found some discrepancies in Dr. Cohen's conclusions and was not certain how much weight should be given to his opinion that claimant was permanently and totally disabled. Claimant indicated he was not sure of the details of what occurred when his pants caught fire, but Dr. Cohen records claimant relating to him that he reached out and grabbed something with his right arm. In other documented evidence claimant indicated he fell on to his knees, then his right shoulder and then the right side of his head.

There is evidence that claimant suffered back and leg pain prior to the injury, however, there is no mention of leg or shoulder pain until August, 1976, even though claimant had undergone thorough examination prior to that date.

The Referee found the evidence was insufficient to show the disability to claimant's knees was a result of his industrial injury. However, claimant's back condition was aggravated by the industrial injury.

After considering claimant's age, education, work experience, the Referee concluded claimant was entitled to an award of 160 degrees for 50% unscheduled disability to compensate him for his loss of wage earning capacity.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated October 1, 1976, is affirmed.

SAIF CLAIM NO. BC 288182 MARCH 31, 1977

LEO GILTNER, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Order

On February 17, 1977 claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an industrial injury suffered on February 2, 1971. In support of his request claimant furnished medical reports from Drs. Miller and Corrigan which state claimant has a protruding disc at L5-S1 level on the right, compressing the S1 nerve root and surgery is indicated. This condition is a direct result of claimant's industrial injury.

The Board submitted copies of claimant's request and the attached medical reports to the State Accident Insurance Fund giving it 20 days to respond and state its position. On March 21, 1977 the Fund denied claimant's request.

The Board, after giving full consideration to the medical reports submitted, concludes that claimant's request to reopen his claim should be granted for the surgery recommended by Dr. Miller and Dr. Corrigan.

ORDER

Claimant's claim is hereby remanded to the Fund to be accepted and for the payment of compensation, as provided by law, commencing upon claimant's admission to the hospital and until closure is authorized pursuant to ORS 656.278.

SAIF CLAIM NO. EC 142578 MARCH 31, 1977

GUST CLEYS, CLAIMANT
Brian Welch, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On December 22, 1975 claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an injury sustained on August 23, 1968.

On January 21, 1976 the Fund denied that claimant's present condition was related to his industrial injury.

The Board, not having sufficient evidence before it at that time to determine the merits of claimant's request, referred the matter to the Hearings Division by an order issued on February 4, 1976 with instructions to hold a hearing and take evidence on the issue of whether claimant's present condition was related to his industrial injury of August, 1968 and represents an aggravation.

On December 2, 1976, pursuant to the Board's order, a hearing was held before Referee James Leahy and, based upon the evidence introduced at said hearing, Referee Leahy submitted to the Board his recommendation that the aggravation claim was not adequately supported by the medical evidence and the claim, therefore, should be denied.

The Board, after de novo review of the transcript and a study of the Referee's recommendation, adopts as its own the findings and conclusion of the Referee as set forth in his recommendation, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

The request made by claimant on December 22, 1975 that the Board reopen his claim for an industrial injury suffered on August 23, 1968 is hereby denied.

SAIF CLAIM NO. NC 129139 MARCH 31, 1977

JOHN TULL, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on May 8, 1968 to his right knee. On August 7, 1968 Dr. Slocum performed an arthrotomy and excision of lateral and medial meniscus of the right knee. A Determination Order of July 17, 1969 granted claimant an award of 15% loss of the right leg.

Claimant's problems persisted and on May 11, 1971 surgery was performed for post-traumatic arthritis right knee with removal of a posterolateral meniscus remnant and an arthritic flabella.

On April 8, 1972 claimant again underwent surgery for comminuted fracture medical aspect of upper end of the tibia.

A Second Determination Order of October 9, 1973 granted claimant an additional 10% loss of the right leg. Claimant's aggravation rights have expired.

The Fund voluntarily reopened claimant's claim on July 2, 1976 for physical therapy and vocational rehabilitation.

On February 8, 1977 the Fund requested a determination. The Evaluation Division of the Board recommended additional compensation for temporary total disability to claimant from June 30, 1976 through February 8, 1977 and an additional award of 37.5 degrees for 25% loss of the right leg, giving claimant a total award of 50% loss of the right leg.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from June 30, 1976 through February 8, 1977 and 37.5 degrees of a maximum 150 degrees loss of the right leg. This award is in addition to awards previously granted claimant.

WCB CASE NO. 76-3461 MARCH 31, 1977

WILMER T. PARKER, CLAIMANT
Nick Nylander, Claimant's Atty.
Jack Mattison, Defense Atty.
Order of Dismissal

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

It is therefore ordered that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

SAIF CLAIM NO. SC 287931 MARCH 31, 1977

RAYMOND PRESNELL, CLAIMANT
Donald Kelley, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On January 27, 1977 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen claimant's claim for an injury sustained on January 29, 1971 for further medical care and additional compensation as an aggravation of his pre-existing condition. In support of claimant's request a report from Dr. Streitz, dated November 5, 1976, was submitted to the Board and to the State Accident Insurance Fund.

Dr. Streitz' medical report indicates claimant's status is a post-laminectomy with moderate aggravation of pre-existing condition with possible herniated nucleus pulposis at L3-4 and L4-5 interspaces. It was his opinion that claimant's claim should be reopened "in that this is either an aggravation of his pre-existing injury or related to that injury."

The Board, after giving full consideration to this matter and the Fund's failure to reply, concludes that claimant's request should be granted based on the report of Dr. Streitz indicating claimant has suffered an aggravation of his January, 1971 injury.

ORDER

Claimant's claim is remanded to the State Accident Insurance Fund for acceptance and payment of compensation, as provided by law, until closure is authorized pursuant to ORS 656.278.

Claimant's attorney is granted, as a reasonable attorney fee, 25% of any compensation granted by this order, payable out of said compensation as paid, not to exceed the sum of $2,000.

(No Number Available) MARCH 31, 1977

RICHARD J. WHITE, CLAIMANT
Ann Morgenstern, Claimant's Atty.
Noreen Saltveit, Defense Atty.
Own Motion Order

Claimant, on November 24, 1976, had requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered on December 28, 1967; the request was accompanied by medical reports. The carrier responded in opposition to the request and also furnished medical reports.

An Own Motion Order, dated January 19, 1977, denied claimant's request.

On February 14, 1977 Dr. Ruggeri indicated claimant has a chronic lumbosacral strain with degenerative arthritis of the lumbar spine. It was his opinion that claimant's recent injury was related to his original injury and that claimant could never return to heavy physical labor and should be retrained.

Dr. Ruggeri's report was submitted to the carrier who responded on March 16, 1977, indicating its position was still the same, that claimant's present condition changed nothing. Claimant's claim was initially closed with no award for permanent partial disability; since the original injury claimant has worked for several employers and has always held hard labor jobs.

The carrier contended that over the years claimant's back condition had progressively deteriorated partly due to his heavy labor work, and partly due to claimant's own makeup; also, claimant had an injury in 1976 which is most likely responsible for his current problems. He also had an off-the-job injury.

The Board, after giving full consideration to this matter, concludes that claimant's request to reopen his claim should be denied. The Board suggests that Dr. Ruggeri's recommendation that claimant be vocationally retrained should be accepted and acted upon by claimant.

ORDER

The claimant's request that the Board reopen his December 28, 1967 claim is denied.

WCB CASE NO. 74-3030 MARCH 31, 1977

T. RAY GRUND, CLAIMANT
William Daw, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On March 21, 1977 the employer, by and through its attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and remand the above

The Board, after giving full consideration to the employer's request, concludes that the employer has not shown sufficient cause to remand this matter to the Hearings Division and his request should be denied.

It is so ordered.

SAIF CLAIM NO. ZC 112155 MARCH 31, 1977
SAIF CLAIM NO. ZC 88072

W.B. GROSSNICKLE, CLAIMANT
Gerald Grossnickle, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On February 23, 1977 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an industrial injury suffered on August 9, 1967.

On February 22, 1977 Dr. Kimberley submitted a report which indicated claimant's neck condition is in the lower limits of moderately severe disability (60-65% of the maximum allowable). A copy of claimant's request and Dr. Kimberley's report was submitted to the Fund.

On March 22, 1977 the Fund responded, stating that claimant had been awarded 80 degrees for his cervical disability and Dr. Kimberley had rated claimant's upper back condition at 192 degrees. Therefore, it felt it was reasonable to allow claimant an award for the difference, namely, an additional 112 degrees.

The Board, after giving full consideration to the evidence presented, agrees that claimant should be granted an additional award of 112 degrees. Claimant's condition was found to be medically stationary by Dr. Kimberley.

ORDER

Claimant is hereby granted an award of 112 degrees for 35% unscheduled cervical disability. This is in addition to any previous awards granted to claimant.

Dr. Kimberley's fill for an examination of claimant on February 22, 1977 is remanded to the Fund for payment.

Claimant's attorney is granted as a reasonable attorney fee, 25% of the increased compensation granted by this order payable out of said compensation as paid, not to exceed the sum of $2,000.

WCB CASE NO. 75-4758 MARCH 31, 1977

GARY R. MERRIFIELD, CLAIMANT
Jerome Bischoff, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order of Dismissal

A request for review of the Referee's Opinion and Order entered May 18, 1976 was duly filed with the Workmen's Compensation Board in the above entitled matter by the State Accident Insurance Fund; however, subsequent to said Opinion and Order claimant was referred to Vocational Rehabilitation and on February 3, 1977 a Determination Order closed the claim with an award of 48 degrees for 15% unscheduled disability. Therefore, the request for review now pending before the Board is moot and should be dismissed.

It is so ordered.

WCB CASE NO. 72-1450 MARCH 31, 1977

In the Matter of the Distribution of
Proceeds of a Third Party Action
Between the Claimant and the
Paying Agency,
RICHARD HARDING, CLAIMANT
Richard H. Renn, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe,
Defense Attys.
Order

This matter comes before the Board upon application of the claimant's attorney for the purpose of resolving a dispute as to the distribution of the proceeds of a third party action at law.

Claimant sustained a compensable injury and was awarded temporary total disability benefits and medical expenses in the amount of $21,990.82. By the Opinion and Order of 9-21-72, the Referee awarded an additional 20 percent unscheduled disability from which the employer/insurance company appealed. The award was affirmed by the Workmen's Compensation Board and Linn County Circuit Court which awarded claimant a total of $425.00 in attorney's fees for successfully defending the appeals. ORS 656.382(2).

The claimant successfully maintained a cause of action against a third party with a net after attorney's fees and costs of $40,765.68.

All funds payable to the employer and insurance company as their lien have been paid except the sum of $425.00. The dispute is whether or not the insurance company, the paying agency, should be reimbursed this $425.00.

ORS 656.593 prescribes the lien of the paying agency on proceeds from third party action. After the attorney's fees and costs of the third party action is paid and the workman or his beneficiaries receive at least 25% of the balance then "the paying agency shall be paid and retain the balance of the recovery, but only to the extent that it is compensated for its expenditures for compensation, first aid and other medical, surgical or

hospital service, and for the present value of its reasonably to be expected future expenditures for compensation and other costs of the workman's claim..." (Emphasis Added)

The Board finds that attorney's fees assessed pursuant to ORS 656.382(2), which the paying agency was required to pay to claimant's attorney to defend the unsuccessful appeal initiated by the paying agency in an attempt to reduce the amount of permanent partial disability award are not "just and proper" other costs to which the paying agency is entitled from the third party action at law.

ORDER

The paying agency is not entitled to reimbursement from the third party action proceeds for attorney's fees in the amount of $425.00 which the paying agency was required to pay to claimant's attorney for services in defending the paying agent's unsuccessful appeal attempting to reduce the permanent partial disability award of claimant.

WCB CASE NO. 75-4766-E MARCH 31, 1977

WELDON MCFARLAND, CLAIMANT
Donald Wilson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests review of the Referee's order which remanded claimant's claim to it for acceptance in accordance with the Board's Own Motion Order which found a causal relationship between claimant's disability and his industrial injury of October 12, 1965 and for payment of compensation for temporary total disability from May 22, 1974 until closure under ORS 656.278 (sic); ordered the Fund to pay a sum equal to 25% of compensation for temporary total disability between October 14, 1975 and the date of his order (July 13, 1976) as a penalty, and to pay claimant's attorney a fee of $1500, pursuant to ORS 656.382(1) and a fee of $1500, pursuant to ORS 656.382(2).

Claimant, 58 years old, sustained a compensable injury on October 12, 1965 while employed as a carpenter. In January, 1966 a laminectomy at L3-4, L4-5, L5-S1 on the left with decompression of nerve roots and removal of protruded intervertebral disc L4-5, left was performed by Dr. Grewe. Dr. Grewe considered doing a spinal fusion but didn't due to marked osteoporosis.

Claimant's claim was closed by a Determination Order of July 19, 1968 which granted claimant an award for 60% loss function of an arm for unscheduled disability.

In late 1968 claimant became a cleanup man but continued having difficulties. He remained on that job until December 24, 1972. From May until November, 1973 claimant worked as a bricklayer foreman. Since December, 1973 claimant has led a very sedentary life.

Dr. Grewe hospitalized claimant in May, 1974 and diagnosed claimant as having an idiopathic form of osteoporosis. On November 26, 1974 Dr. Logan causally related

this condition to claimant's disuse of his back as a result of his industrial injury. Again on January 14, 1975 Dr. Logan reiterated his opinion of a connection. Claimant requested Board's own motion relief.

The Fund called Dr. Kimberley who testified that osteoporosis could not be due to disuse. Disuse could cause bone atrophy or decalcification but the degree of disuse had to be "quite extreme."

Dr. Logan testified that this case was unusual because of the degree of osteoporosis both by way of claimant's age and because it was unusual for a man to develop osteoporosis of this magnitude.

The Board issued its Own Motion Order on October 14, 1975 ordering the Fund to pay medical expenses and compensation for temporary total disability, effective the date of the order.

As of the date of the hearing, February 26, 1976, the Fund had made no payments pursuant to the Board's order. Claimant's attorney made appropriate motion and the Referee issued an Interim Order on March 25, 1976 directing the Fund to comply with the Board's order. The Interim Order was also not complied with.

The Referee ruled against the motion raised by the Fund at the hearing concerning procedural due process to the Fund with a finding that questions of constitutionality are not within the realm of an agency operating thereunder to decide.

The Referee found that ORS 656.278 gives the Board continuing authority to alter earlier action on a claim. The Referee concluded that the Board, under its own motion jurisdiction, can modify an award and the employer may request a hearing on an Own Motion Order which increases claimant's award or grants additional medical treatment or hospitalization. Therefore, ORS 656.278 does not require the Board to hear from both parties prior to assuming its own motion jurisdiction and modifying an award.

The Referee concluded that the Board's Own Motion Order, dated October 14, 1975, was binding upon the Fund and because of its failure to comply with that order, it was liable for penalties and attorney fees.

Dr. Kimberley conceded he had only had the medical reports to evaluate in this claimant's case. Dr. Logan, who treated claimant since 1965, found a causal connection of claimant's physical condition to his industrial injury and his reasoning appears the most sound to this Referee.

The Referee found that the Fund had failed to meet its burden of proof to sustain its contention that claimant's physical disability was not causally related to his industrial injury.

The Fund initiated the hearing and failed to prevail, therefore, the Referee awarded attorney fees pursuant to ORS 656.382(2). He also found the Fund's actions amounted to unreasonable resistance and ordered the Fund to also pay penalties and attorney fees pursuant to ORS 656.262(8) and 656.382(1).

The Board, on de novo review, concurs with the findings and conclusions reached by the Referee. However, the claim must be closed pursuant to ORS 656.278 rather than 656.268.

ORDER

The order of the Referee, dated July 13, 1976, is affirmed, in all respects except that the claim shall be closed pursuant to the provisions of ORS 656.278.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with this Board review, the sum of $450, payable by the Fund.

WCB CASE NO. 75-5222 APRIL 4, 1977

GUNNER DAVIDSON, CLAIMANT
Paul Jolma, Claimant's Atty.
Merlin Miller, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer requests review by the Board of the Referee's order which granted an award for permanent total disability.

Claimant is now 67 years old and retired on social security. On February 19, 1970 several pieces of lumber fell on him, causing multiple facial lacerations, multiple contusions and abrasions about the body, fracture of the neck of the right femur and fracture-dislocation of the left foot. Claimant was on crutches for quite some time. Claimant's left foot healed with marked valgus deformity.

A Determination Order of May 2, 1973 granted claimant an award of 50% loss of the right leg and 30% loss of the left foot. Claimant appealed, however, subsequently a medical report indicated claimant's left femur condition was not stationary and the claim was reopened. The claim was again closed on July 31, 1974 with no further award for permanent partial disability.

Claimant continued to have hip problems and on April 10, 1975, after claim reopening, claimant underwent surgery for total hip replacement. Within four days claimant was ambulatory. In November, 1975 Dr. Cottrell indicated claimant was permanently and totally disabled although his hip was better and not painful. Claimant's age and his inability to return to his regular occupation as a mill worker because of his hip replacement and the pain in claimant's knees were the basis for Dr. Cottrell's opinion.

On October 30, 1975 a Third Determination Order granted claimant an additional 22.5 degrees for 15% loss of the right leg, making a total of 65% loss of the right leg and 30% loss of the left foot. The issue before the Referee was whether claimant has any disability to an unscheduled area.

The Referee found that claimant's fractured femur caused damage to the hip socket and because of this claimant underwent a total hip replacement and the replacement being on the pelvic side of the hip, therefore, the injury was to an unscheduled part of the body. In the Matter of the Compensation of Mildred Way, WCB Case No. 74-3192 Order on Review, September 17, 1975.

The Referee found claimant is 67 years old with a 10th grade education. All of claimant's working experience has been in hard physical laboring jobs, he has had no experience in light duty work and his age precludes rehabilitation.

The Referee concluded, based on claimant's age, education, work experience, rehabilitation potential and his physical impairment, that claimant is permanently and totally disabled as of October 16, 1975. He allowed the carrier to make appropriate adjustments for payment of compensation for permanent partial disability made pursuant to the Determination Order of October 30, 1975.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated October 6, 1976, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with this Board review, the sum of $400, payable by the employer.

WCB CASE NO. 76-489 APRIL 4, 1977

JAMES HOOTS, CLAIMANT
Joel Reeder, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an award of 256 degrees for 80% unscheduled disability.

Claimant sustained a compensable left shoulder injury on May 15, 1975 while employed as a carpenter. Claimant was initially seen by Dr. Sammons who diagnosed traumatic myositis.

On June 5, 1975 Dr. Dunn, who thought claimant had a herniated nucleus pulposis at L4-5 together with a ruptured disc at L2, performed a lumbar laminectomy L4 with L4-5 foraminotomy and discectomy and exploration of L4 nerve root.

On June 30, 1975 Dr. Dunn indicated claimant's back and leg symptoms are directly related to claimant's industrial injury within a reasonable medical probability. On August 7, 1975 Dr. Dunn limited claimant's lifting to 20 pounds and recommended vocational rehabilitation. On December 15, 1975 claimant was found to be medically stationary.

A Determination Order of January 14, 1976 granted claimant an award of 22.5 degrees for 15% loss of the right leg and 128 degrees for 40% unscheduled low back disability.

Claimant was examined at the Disability Prevention Division on April 12, 1976 by Dr. Mason who found no residual nerve root compression, no emotional overlay upon examination, severe disc degeneration at L5-S1 level and probable cervical spine disc degeneration and/or osteoarthritis. Dr. Mason recommended a job change or modification.

Claimant underwent a psychological evaluation by Dr. Vizzard on May 4, 1976 which indicated claimant is very cautious about his physical condition and, therefore, is reluctant to return to work. Considering claimant's age, it appears claimant is preparing himself for retirement rather than taking a chance on working and possibly reinjuring himself.

Claimant was examined by the Back Evaluation Clinic on May 14, 1975 with complaints of right low back pain and hip discomfort, some neck pain and intermittent numbness of the left hand. The physicians diagnosed mild cervical spondylosis and moderately severe osteoarthritis with degenerative disc disease particularly at L5-S1 level. They recommended a weight reduction program for claimant. Claimant cannot return to his carpenter work and he would like to be a building inspector. Total loss of function to claimant's back was moderate and loss of function due to the injury was mild. The loss of function of the neck was minimal.

Claimant has a 9th grade education and he has been a carpenter for 45 years. Claimant has not worked since the injury of May 15, 1975 but has applied at both the city and county for jobs as a building inspector.

Claimant currently takes no medication and is not under a doctor's care.

The Referee concluded, based upon all of the evidence, that claimant is not permanently and totally disabled; there are jobs in the labor market which claimant could perform. Based upon claimant's age, work experience and physical limitations, the Referee concluded claimant has sustained a substantial loss of wage earning capacity and awarded claimant 256 degrees for 80% unscheduled disability.

The Board, on de novo review, finds that claimant has moderate back disability and neck disability is minimal. The Board concludes that the award granted by the Determination Order of 128 degrees for 40% unscheduled low back disability adequately compensates claimant for his loss of wage earning capacity. The award granted of 22.5 degrees for loss of right leg was proper. Therefore, the order of the Referee must be reversed.

ORDER

The order of the Referee, dated July 28, 1976, is reversed.

The Determination Order of January 14, 1976 is affirmed in its entirety.

WCB CASE NO. 75-3041 APRIL 4, 1977

RODNEY MAPES, CLAIMANT
Ryan Lawrence, Claimant's Atty.
Michael Hoffman, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests review of the Referee's order which remanded claimant's claim for aggravation to it, ordered it to pay all outstanding medical costs, granted claimant an award of permanent total disability, effective the date of his order, and an attorney fee of $850 payable by the employer.

Claimant cross appeals asking for additional compensation for temporary total disability from January 11, 1974, the date claimant was last employed and for penalties for unreasonable refusal to pay compensation and unreasonable delay in accepting or denying the claim.

Claimant sustained a compensable injury on December 16, 1969, causing a crushing and twisting injury to his left arm. Extensive medical and surgical procedures to save the arm failed and on December 20, 1969 the arm was amputated.

Claimant was provided extensive aid in adapting to his physical problems. He appeared well motivated to return to his occupation and was fitted with a prosthesis and given therapy in the use of it. During this time claimant experienced considerable pain in the remainder of his arm and in his shoulder. On August 19, 1970 claimant returned to work.

A Determination Order of November 6, 1970 granted claimant an award of 173 degrees for 90% loss of the left arm.

On May 4, 1972 claimant, while lowering a fire extinguisher, had muscular pains which were treated as a non-disabling injury.

Claimant worked steadily with no time loss from August 19, 1970 to January 11, 1974. On that date claimant experienced a sudden onset of severe chest pain.

Claimant testified that prior to January 11, 1974 he had experienced similar pain in the chest and neck areas but not as severe. Because of neuroma and increasing shoulder tenderness claimant had ceased using his prosthesis and had been working without it.

Claimant's treating physician, Dr. Hathaway, testified at the hearing, and the Referee found him to be a credible and concerned witness. Dr. Hathaway ruled out cardiovascular problems; he further concluded, based on observation, treatment, testing and consultation with specialists in neurology and cardiology that claimant's difficulties were related to his industrial injury.

Claimant testified he could do almost anything of a physical nature for short duration, but his pain is constant and there is little he can do on a continuous basis.

The Referee found claimant had suffered an aggravation of his 1969 industrial injury but that no further curative treatment was indicated; present treatment is palliative only. The Referee found claimant had filed a claim for aggravation which was neither accepted or denied by the carrier until the hearing and, therefore, the carrier's appearance at the hearing was a de facto denial. The Referee awarded an attorney fee payable by the employer.

The Referee concluded, based upon the medical reports and the testimony of Dr. Hathaway, that claimant was permanently and totally disabled; he found it unnecessary to give any consideration to the "odd-lot" doctrine.

The Board, on de novo review, concurs with the conclusions reached by the Referee. The Board strongly urges, however, that claimant be given psychiatric consultation which can be done under the provisions of ORS 656.245.

ORDER

The order of the Referee, dated July 27, 1976, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with this Board review, the sum of $350, payable by the employer.

WCB CASE NO. 76-1852 APRIL 4, 1977

RICHARD SMITH, CLAIMANT
William Mansfield, Claimant's Atty.
Jack Mattison, Defense Atty.
Order of Dismissal

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

It is therefore ordered that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

WCB CASE NO. 75-4480-E APRIL 4, 1977

JAMES P. YOCKEY, CLAIMANT
Ladd Lonnquist, Claimant's Atty.
Fred Eason, Defense Atty.
Dept. of Justice, Defense Atty.
Order of Dismissal

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

It is therefore ordered that the request for review now pending before the Board is hereby dismissed and the order of the Referee is final by operation of law.

SAIF CLAIM NO. 80795 APRIL 5, 1977

JAMES HUTCHINSON, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on June 6, 1967 diagnosed as a sacro-iliac strain with possible lumbar disc. A Determination Order of October 4, 1968 granted claimant an award of 10% loss of an arm for an unscheduled disability.

On June 7, 1969 claimant underwent a laminectomy and a Second Determination Order of January 18, 1971 granted claimant an additional award of 10% unscheduled disability and 10% for loss of wage earning capacity. On July 31, 1974, pursuant to a stipulation, claimant was granted an additional 8 degrees, making a total of approximately 35%.

Claimant sustained another injury on September 14, 1975 which was closed by a Determination Order on December 9, 1975 with no award for permanent partial disability.

Claimant has come into contact with the Division of Vocational Rehabilitation on a number of occasions and received his GED under their auspices. Claimant has been described as poorly educated, poorly motivated and functionally illiterate.

On July 2, 1976 both claims, by stipulation, were reopened and an apportionment of responsibility for payments of compensation for temporary total disability was set forth therein. The 1975 claim was closed by a Determination Order which ordered no additional compensation for permanent partial disability.

On February 8, 1977 the Fund requested a determination. The Evaluation Division of the Board recommended no further award for permanent partial disability but payment of compensation for temporary total disability from December 30, 1975 through January 7, 1977, less the compensation for temporary total disability paid on the 1975 claim per the stipulation of July 2, 1976.

The Board concurs with this recommendation.

It is so ordered.

WCB CASE NO. 75-4558 APRIL 5, 1977

EDWIN E. KUNKEL, CLAIMANT
Gary Galton, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order on Remand

On March 2, 1977 the Board received from claimant a request for review of the Referee's order entered in the above entitled matter on January 31, 1977. The claimant requested that the Board, pursuant to ORS 656.295(5), remand the case to Referee St. Martin to allow claimant to continue to implement the Referee's rulings at the hearing that the admission of Dr. Griswold's medical reports of December 8, 1975 and January 26, 1976 would be subject to claimant's right to procure rebuttal evidence since no cross examination was possible.

Claimant's counsel, by affidavit, alleges that before he was able to obtain such rebuttal evidence the Referee published his order without prior notice to any party and, therefore, claimant has effectively been deprived of the right granted to him at the hearing by the Referee.

The Board, after full consideration of the motion and the supporting affidavit and cases cited, concludes that the matter has been improperly, incompletely and insufficiently developed at the hearing and, therefore, should be remanded to the Hearings Division, and more particularly, to Referee Joseph D. St. Martin for the taking of further evidence, namely, medical evidence and/or testimony offered as rebuttal to the reports of Dr. Griswold.

ORDER

The above entitled matter is hereby referred to Referee Joseph D. St. Martin with directions to receive such medical testimony and/or evidence as claimant desires to offer in rebuttal to the medical reports of Dr. Griswold which were admitted subject to claimant's right to procure rebuttal evidence.

WCB CASE NO. 76-4209 APRIL 5, 1977

ALFRED MERRITT, CLAIMANT
Darrell Cornelius, Claimant's Atty.
Philip Mongrain, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks review by the Board of the Referee's order which denied claimant's request for penalties and attorney fees.

Claimant's claim was originally denied. After a hearing on May 7, 1976 claimant's claim was remanded to the employer for acceptance and payment of compensation, as provided by law. The employer requested Board review of the Referee's order. No payment was made for the medical expenses and hospital bill pending this appeal.

The Referee found that the action of the employer was not unreasonable, basing his finding upon previous Board rulings that an employer is not required by ORS 656.313 to pay medical or hospital expenses pending appeal. The Referee denied claimant's request for penalties and attorney fees.

The Board, on de novo review, adopts the holding of the Court of Appeals in Wisherd v Paul Koch Volkswagen, Inc., (February 14, 1977) that the clear intent of ORS 656.313 is to require the immediate payment of all compensation due and compensation, pursuant to ORS 656.005(9), includes medical and hospital expenses. However, at the time of the Referee's order the court had not so ruled and the Referee was following the policy of the Board, therefore, the Board concludes that penalties and attorney fees are not justified.

ORDER

The order of the Referee, dated October 8, 1976, is modified.

The employer is hereby ordered to pay all medical and hospital expenses incurred by claimant related to his industrial injury.

WCB CASE NO. 75-1760 APRIL 5, 1977

CLIFFORD NOLLEN, CLAIMANT
J. David Kryger, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of April 25, 1975.

Claimant sustained a compensable injury on May 28, 1969 and was subsequently hospitalized by Dr. Endicott who diagnosed acute, severe sprain of his left elbow. Claimant returned to work in July, 1969 but after three weeks quit due to elbow and shoulder pain.

A Determination Order of April 30, 1970 granted claimant time loss but indicated claimant's permanent partial disability could not be rated as he had failed to keep the appointment for a closing evaluation.

On November 24, 1971 claimant was examined by Dr. Ellison who diagnosed ulnar nerve lesion, exact site unknown.

On January 17, 1972 Dr. Tsai performed surgery for C5-6 and C6-7 discoidectomies with anterior interbody fusion from bone to right ilium. Claimant's claim was reopened.

On June 29, 1972 Dr. Tsai indicated claimant has residual muscle spasm confined to the trapezii. He released claimant for work on July 15, 1972, with lifting limitation of 50 pounds below the shoulder level.

A Second Determination Order of July 14, 1972 granted claimant an award of 64 degrees for 20% unscheduled neck disability.

Dr. Lees, an ophthalmologist, examined claimant on September 19, 1972 and found blurred vision and enlargement of visual field blind spots. Dr. Lee concluded this condition is "an emotional reaction (functional) to his injury" and related thereto.

On December 13, 1973 Dr. Ellison performed surgery for slot graft C6-7 and, on December 14, a re-insertion of a new graft from left iliac crest to C6-7.

On April 23, 1974 Dr. Ellison concluded that claimant's fusion at C6-7 level was never solid and no new injury had occurred.

In May, 1974 claimant filed a claim for aggravation which was denied by the Fund on August 27, 1974. An Opinion and Order entered November 20, 1974, after a hearing, remanded claimant's claim to the Fund.

On February 27, 1975 claimant was examined by Dr. Throop who found claimant's complaints out of proportion for any type of physical disability which claimant had sustained. On March 11, 1975 Dr. Ellison found claimant to be medically stationary with limitations on claimant's lifting of heavy objects weighing from 15-20 pounds above shoulder level and no activity which would require prolonged position in flexion of the head or neck. Dr. Ellison recommended claimant be referred to the Division of Vocational Rehabilitation.

A Third Determination Order of April 25, 1975 granted claimant an additional award of 32 degrees for 10% unscheduled neck disability, giving claimant a total award for 30% unscheduled disability.

The Referee found claimant was 37 years old with a 10th grade education, his work experience all has been in farming or canneries. Claimant worked off and on for three months in late 1975; he has looked for employment with no success.

Claimant contacted vocational rehabilitation but no program was ever set up for him, primarily, because claimant moved briefly to Portland. The Referee found claimant to be a credible witness and diligent in his efforts to find employment.

The Referee concluded claimant has a loss of wage earning capacity due to the limitations on him by his doctor but has been adequately compensated for that loss by

the awards he has received. The Referee urged claimant to contact the Disability Prevention Division and the Division of Vocational Rehabilitation to seek assistance in job placement.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 13, 1976, is affirmed.

WCB CASE NO. 76-1489 APRIL 5, 1977

SUSAN PARK, CLAIMANT
Robert Bennett, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of February 5, 1976.

Claimant, a 23 year old hop picker, sustained a compensable injury to her low back, legs and the base of her neck on August 23, 1975. She finished her shift, began the next night's shift but could not continue and quit. Claimant saw Dr. Peterson who diagnosed bruise of the coccyx. Dr. Peterson released claimant for work on December 15, 1975.

The Disability Prevention Division contacted claimant for possible referral to the Division of Vocational Rehabilitation but claimant declined and indicated she did not contemplate returning to work. A Determination Order of February 5, 1976 granted claimant temporary total disability only.

On May 4, 1976 claimant was examined by Dr. Coletti who felt claimant had a possible thoracic disc syndrome and referred her to Dr. Nash.

On May 10, 1976 Dr. Nash indicated claimant has multiple level paraspinous myofascial injury as a result of her industrial injury.

Claimant feels her condition has worsened since Dr. Peterson's treatment. She now has nausea, headaches, backaches which go into her shoulder and the base of her neck.

The Referee found claimant's treating physician, Dr. Peterson, had released claimant for work on December 15, 1975 with no permanent impairment. Claimant contends her physical problems prevent her from working. However, claimant has not sought any work, has rejected the services of the Division of Vocational Rehabilitation and declared she was not considering returning to work.

The Referee concluded that the medical evidence does not support a finding that claimant has suffered any permanent partial disability from her industrial injury.

The Board, on de novo review, affirms the Referee's order.

ORDER

The order of the Referee, dated October 26, 1976 is affirmed.

WCB CASE NO. 75-863 APRIL 6, 1977

E. WAYNE COONS, CLAIMANT
Rick McCormick, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which granted claimant an award of 96 degrees, giving claimant a total award of 256 degrees for 80% unscheduled neck and back disability. Claimant contends he is permanently and totally disabled.

Claimant, a 58 year old choker setter, sustained a compensable injury on August 8, 1973, resulting in multiple bodily injuries.

On November 2, 1973 Dr. Glaede found severe degenerative disease at C5-6-7 and moderate degenerative disease in the lumbosacral spine. Dr. Glaede felt claimant would have residuals of pain due to his severe pre-existing condition of arthritis and, due to this, could not return to the woods or to truck driving. On December 3, 1973 Dr. Maley found claimant's degenerative arthritis had preceeded claimant's injury but prior to the industrial injury claimant had had no pain in his low back and only minimal stiffness in his neck. Dr. Glaede further indicated that claimant's multiple injuries to the head, neck, body and limbs would result in substantial permanent residuals because they were superimposed on his pre-existing arthritic condition.

Claimant was examined at the Disability Prevention Division on June 12, 1974 by Dr. Gantenbein who diagnosed strain, cervical, dorsal, lumbar spine, superimposed on pre-existing degenerative changes, hypertension was mild; he recommended a job change. After a psychological evaluation, it was recommended claimant get in touch with a Workmen's Compensation Board service coordinator or with vocational rehabilitation.

On October 31, 1974 Dr. Schroeder, after examining claimant, believed claimant had moderately far-advanced degenerative changes of cervical and lumbar spine and his age really precluded any attempt to retrain him for lighter employment. Dr. Schroeder recommended claim closure; claimant has permanent residuals which prevent claimant from returning to work.

A Determination Order of January 8, 1975 granted claimant an award of 160 degrees for 50% unscheduled neck and back disability.

The Referee found claimant is 61 years old and has a high school education. Since his injury, and on his own initiative, claimant has completed a correspondence course in small appliance repair and also real estate salesmanship. Claimant found he could not repair the appliances because he could not lift them. After passing the real estate

examination, claimant became associated with a real estate office where he is able to set his own hours. However, selling real estate involves physical difficulties in walking around farms, etc. Therefore, his real estate ability is rather limited. Claimant has good intellectual resources and has good motivation, but he is now precluded from doing any type of work he had previously done.

The Referee concluded that the medical evidence indicated claimant has permanent residual consequences from his industrial injury of August 8, 1973 which physically prevent claimant from engaging in work requiring repetitive physical activities but the evidence presented does not establish that claimant is permanently incapacitated from regularly performing gainful employment. He has not made a prima facie case of being in the "odd-lot" category, however, the Referee concluded claimant was entitled to an award of 256 degrees for 80% unscheduled disability and to an award for 30 degrees for 20% loss of the right leg.

The Board, on de novo review, based on the medical and lay evidence, claimant's age, work experience and physical limitations, concludes that claimant has made a prima facie case that he falls within the odd-lot category, therefore, the burden shifts to the Fund to show jobs which claimant now could perform regularly and gainfully; it has failed to make such a showing and claimant must be considered as being permanently and totally disabled.

ORDER

The order of the Referee, dated May 7, 1976, is modified.

Claimant is hereby granted an award for permanent total disability, effective the date of this order.

Claimant's attorney is granted as a reasonable attorney fee, a sum equal to 25% of the increased compensation granted by this order, payable out of said increased compensation as paid, not to exceed the sum of $2,300.

WCB CASE NO. 76-3640 APRIL 6, 1977

TED DENNIS, CLAIMANT
Keith Tichenor, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of July 2, 1976.

Claimant sustained a compensable injury on August 7, 1975 to his low back and consulted Dr. Duff who treated him conservatively, after a diagnosis of acute low back strain.

On August 13, 1975 Dr. Duff found claimant had considerably more muscle spasm and diffuse tenderness of the paravertebral muscles, particularly on the left; on October 14, 1975 he said claimant was fit for light work but claimant continued to have intermittent problems.

On December 17, 1975 claimant underwent a psychological evaluation which indicated claimant was hostile and suspicious towards his employer and felt betrayed by his doctors. Claimant accepts his physical problems with bland indifference. The diagnosis was neurosis, conversion type.

In December, 1975 claimant returned to work for two weeks with increasing symptomatology after each shift. Dr. Duff found no good evidence for any diagnosis beyond that of diffuse muscle pain in his back.

On March 3, 1976 claimant was examined by Dr. Cottrell who stated it was not reasonable that claimant's injury could account for all of claimant's subjective complaints; but the doctor felt claimant was genuine in his complaints. He recommended further conservative treatment.

On May 11, 1976 claimant was evaluated by the Orthopaedic Consultants who diagnosed chronic lumbar strain, by history, with negative objective findings and hysterical conversion reaction. The physicians opined claimant was now medically stationary, X-rays were normal and claimant could return to his regular occupation with some temporary sheltering. Total loss of function due to the injury was minimal.

A Determination Order of July 2, 1976 granted claimant an award of 16 degrees for 5% unscheduled low back disability.

The Referee found there was no evidence offered to establish that claimant's psychological problems were caused by his injury, but there was evidence presented to establish that claimant's psychological problems caused him to develop physical symptoms to obtain secondary gains. The medical evidence indicates only minimal physical disability. The Referee concluded that claimant had been adequately compensated by the Determination Order of July 2, 1976.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated October 15, 1976, is affirmed.

WCB CASE NO. 76-938 APRIL 6, 1977

RICHARD KIGER, CLAIMANT
Kenneth Colley, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson, Moore and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation as provided by law.

Claimant, a 52 year old auto mechanic, alleged he suffered an injury through an injury or exposure on March 12, 1974. On February 27, 1976 the Fund denied claimant's claim on the grounds that claimant suffered from Raynaud's phenomena not caused or aggravated by his work activity.

Claimant had had rather minor difficulties with his hands prior to March, 1974 for which Dr. de Meules had treated him. Claimant testified he first was aware of severe numbness in his hands in 1974 when he was exposed to a temperature of 40 degrees F. His hands became white and numb. Claimant puts his hands in hot water and massages them and after about 20 minutes they return to a normal state.

On March 12, 1974 Dr. Kliewer diagnosed Raynaud's phenomenon which possibly could be associated with claimant's psoriasis. In July and again in September, 1975 claimant was complaining of fatigue, and weakness and thought he was having malaria attacks; at this time the doctor diagnosed anxiety tension state.

On December 31, 1975 Dr. Kliewer felt that claimant's problems were manifested primarily as disabling numbness, pallor and discomfort in his hands when exposed to cold. It was recommended that claimant avoid cold environments, quit smoking and find another occupation where his hands were not exposed to cold.

On March 10, 1976 Dr. Snider, after examining claimant, believed claimant could perform his regular job if certain conditions could be met, such as a warm environment in which claimant could work. He further indicated that claimant's work in its usual environment exacerbated claimant's tendency towards his symptoms, likewise his heavy smoking might also contribute.

By deposition, Dr. Kleiwer testified that claimant's Raynaud's phenomena was a pre-existing condition and working in the cold brought on the symptoms. The only treatment for claimant's condition was to warm his hands and continue to take the medication he had prescribed.

The Referee concluded that the work-induced symptomatic response was a compensable condition if it caused claimant to terminate his employment pursuant to a medical recommendation. The Referee found that it had and had resulted in claimant's losing some of his wage earning capacity.

The Board, on de novo review, finds that the medical evidence does not establish a relationship of claimant's condition to his work. Claimant's Raynaud's phenomena was pre-existing and his work merely caused a problem which continues only until claimant can warm his hands; claimant misses no time from work nor is any medical treatment required. Therefore, the Board concludes that claimant has not established by a preponderance of the evidence that his condition is job related and the Referee's order must be reversed.

ORDER

The order of the Referee, dated July 8, 1976, is reversed.

JAMES MATCHETT, CLAIMANT
William Purdy, Claimant's Atty.
Craig Iverson, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which granted claimant an award of 128 degrees for 40% unscheduled disability. Claimant contends he is odd-lot permanently and totally disabled.

The employer cross appeals contending claimant is not entitled to any award for permanent partial disability.

Claimant, a 59 year old truck driver, sustained a compensable injury on August 15, 1975. His claim was accepted as a non-disabling injury. Claimant continued to work, exacerbating his back condition. On August 18 claimant's condition was diagnosed as severe acute lumbosacral strain syndrome. Claimant was released for regular work on August 21.

On November 21, 1975 Dr. Blandino examined claimant and indicated claimant had been terminated from his employment because of diabetes. Upon examination on December 10, Dr. Blandino diagnosed severe lumbosacral strain, sciatic involvement and limited range of motion and on December 30, 1975 he indicated claimant could not return to his work as a truck driver, but could return to mild employment or be rehabilitated. Dr. Blandino found no permanent disability, however, stressful activities exacerbated claimant's condition.

On March 10, 1976 Dr. McIntosh examined claimant and found degenerative lumbar disc disease, mild, with a certain amount of overlay. Dr. McIntosh stated claimant's inability to return to work was due to his diabetes.

On March 24, 1976 Dr. Campagna examined claimant and diagnosed chronic low back strain, diabetes, obesity, generalized arteriosclerosis and headaches of undetermined etiology.

A Determination Order of June 4, 1976 granted claimant 48 degrees for 15% unscheduled low back disability.

The Referee found claimant has a 6th grade education and had acquired a GED in 1945. Claimant's primary occupation has been truck driving. Claimant testified his early retirement was brought about by both his diabetes and his back condition.

The Referee concluded claimant's injury of August 15, 1975 was a disabling injury and that claimant's back condition was a material factor in claimant's inability to work. However, claimant has failed to establish a prima facie case that he is odd-lot permanently and totally disabled. The Referee found claimant's loss of wage earning capacity, based on his physical limitations, entitles him to an award of 128 degrees for 40% unscheduled disability.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 18, 1976, is affirmed.

WCB CASE NO. 75-3811 APRIL 6, 1977

ELOISE TANNER ROLLINS, CLAIMANT
R. Ladd Lonnquist, Claimant's Atty.
Roger Luedtke, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of November 6, 1975.

Claimant sustained a compensable injury on March 31, 1969 to her neck and right upper back. Claimant was treated by a multitude of doctors and her claim was finally closed by a Determination Order dated July 22, 1970 with an award of 32 degrees for 10% unscheduled disability.

By stipulation the claim was reopened in May, 1975.

On July 28, 1975 claimant was examined by Dr. McHolick; claimant was complaining of pain at the base of her neck and right shoulder. He indicated claimant had been examined by Drs. Davis, Reinhart, Strummie, Rosenbaum and Smith (the latter had performed an anterior cervical fusion). Claimant also suffers from occipital headaches. Dr. McHolick could find no explanation for claimant's complaints which were vague and intermingled with many functional complaints. He found no physical reason claimant shouldn't be working.

On October 9, 1975 Dr. Smith examined claimant and stated claimant has continuing back, neck-shoulder-arm pain with little or no objective physical findings to support her complaints of pain. (Claimant talked at considerable lengths about her marital problems).

A Determination Order of November 6, 1975 granted claimant an additional 32 degrees for 10% unscheduled disability.

The Referee found that both claimant's testimony and the medical evidence implies a psychogenic dysfunction unrelated to the injury. There was no medical evidence linking claimant's lumbar arachnoiditis to the industrial injury.

The Referee concluded, that the Determination Order had adequately compensated claimant for the residuals of her compensable injury.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 14, 1976, is affirmed.

JOE ROSENBERRY, CLAIMANT
Alan Scott, Claimant's Atty.
Darryl Klein, Defense Atty.
Order

On June 30, 1976 a Referee, after a hearing requested by the claimant on the adequacy of the Determination Order entered March 29, 1976 whereby claimant received 16 degrees for 5% unscheduled low back disability, entered an order remanding the entire matter to the Disability Prevention Division of the Workmen's Compensation Board for evaluation of claimant's vocational handicap and commencing payment of compensation for temporary total disability on the date of claimant's enrollment at the Disability Prevention Division and to continue until terminated pursuant to ORS 656.268.

On March 23, 1977 the Board, after de novo review, reversed the order of the Referee, stating that the Referee had no authority to remand a workman to the Disability Prevention Division for vocational training program. However, the Board did find that claimant was entitled to additional compensation for permanent partial disability and awarded 64 degrees, an increase of 48 degrees over the award made by the Determination Order.

On March 30, 1977 the Board was advised for the first time that the Disability Prevention Division, acting upon the remand by the Referee, re-evaluated claimant. (Prior to the hearing claimant had been in contact with a service coordinator at the Disability Prevention Division who had concluded that claimant, having a license to sell real estate, had a vocational skill which could be exploited and, therefore, claimant did not have a vocational handicap). Claimant was found to have a vocational handicap and vocational rehabilitation for claimant appeared to be feasible. On October 25, 1976 the Disability Prevention Division referred claimant to an authorized vocational rehabilitation program. Claimant was enrolled in this program in January, 1977, said program consisting of eighteen months training in accounting.

Based upon the foregoing, the Board concludes that the Order on Review entered March 23, 1977 in the above entitled matter must be set aside because prior to its entry a program of vocational rehabilitation had been authorized and the carrier required to reopen the claim and pay temporary total disability compensation pursuant to subsections 1 and 2 of section 61-052 commencing on the date the Disability Prevention Division referred claimant for vocational rehabilitation. Upon completion or termination of the authorized program the claim must be closed pursuant to ORS 656.268. OAR 436-61-050(4).

The need to issue this order is a result of a Referee exceeding his authority and the Disability Prevention Division assuming that it was bound by the Referee's order. The Board wishes to make it explicitly clear that only the Disability Prevention Division has the authority to determine eligibility of a workman for referral to an authorized program of vocational rehabilitation. If, in the future, a Referee should order a workman to the Disability Prevention Division for determination of said workmen's eligibility for enrollment in an authorized program of vocational rehabilitation the Disability Prevention Division shall take notice of this directive and the applicable Administrative Rules promulgated pursuant to ORS 656.728 which specifically places the determination of a workman's eligibility within its province.

ORDER

The Order on Review entered in the above entitled matter on March 23, 1977 is hereby vacated and set aside.

WCB CASE NO. 75-2845 APRIL 6, 1977

ODEN WALTON, CLAIMANT
Benton Flaxel, Claimant's Atty.
Robert Walberg, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation as provided by law.

On or about March 24, 1976 claimant was working as a hook tender, acting as foreman over a rigging crew in the woods; he alleges that when he got out of the bus he stepped in a hole and experienced sharp pain in his low back. Claimant testified he went down to the landing and informed the crew that he had hurt his back. Claimant's foreman subsequently arrived and claimant testified he told him he hurt his back getting out of the bus. Claimant continued working. Two days later claimant consulted Dr. Gurney and later was referred to Dr. Holbert. Claimant testified he had told his foreman about the two trips to see Dr. Gurney.

Claimant first saw Dr. Holbert on April 8, 1976, giving a history that his back caught on him while getting out of a crummy. Dr. Holbert diagnosed lumbosacral sprain and indicated it was caused by an industrial injury.

On April 28, 1976 claimant filed a Form 801, stating he hurt his back getting out of the bus. Claimant testified he did not file the claim earlier because he had had back problems before and thought he would be back at work in two or three days, but when, on April 28, 1976, Dr. Holbert informed claimant that his problems did not stem from an old injury but from a new injury, he immediately filed the claim with his employer.

On May 3, 1976 the employer issued a check to claimant and on May 7, 1976 denied claimant's claim and stopped the payment of the check.

On June 16, 1976 Dr. Holbert said claimant's condition was an aggravation of a pre-existing industrial back problem, but on June 24, 1976, upon request for clarification, he indicated claimant's problem represented a new injury "an injury he was more vulnerable to because of his old problem."

Claimant had had a prior industrial injury in 1964 which required an L4-5 left laminectomy and L5 to the sacral fusion. The surgery was done by Dr. Holbert. Following this surgery claimant testified he had had no further back problems worse than any other logger.

Claimant was released, and did go back to work for the employer, on July 12, 1976.

Claimant's son testified he was working for the employer when claimant was hurt and on that day claimant came to the landing and told the crew he had hurt his back.

A private investigator, hired by the employer, testified that on May 6, 1976 he observed claimant operating a cat continuously for four hours. Claimant rebutted this testimony by stating he did not operate the cat for four consecutive hours but was on and off it and ran it for different periods throughout the afternoon.

Claimant's foreman testified that on March 24 claimant told him he got out of the crummy and couldn't straighten up, he didn't mention stepping in a hole. The foreman further testified he had asked claimant if he should make out an accident report and claimant stated he had put it on OPS. Claimant denied this.

The Referee on the first issue of whether the claim was barred for late filing, found that both claimant and his foreman had testified that claimant had hurt his back getting out of a crummy. On April 14, 1976 the employer received Dr. Holbert's report indicating where and how claimant hurt his back. Therefore, the evidence is uncontroverted that the employer had prior notice of the injury. Furthermore, the employer failed to show he had been prejudiced by the late filing. Claimant's claim is not barred.

On the remaining issue of compensability of claimant's injury, the evidence was uncontroverted that claimant hurt his back getting out of a crummy and reported such to his crew. Therefore, claimant's injury of March 24, 1976 was a compensable injury arising out of and in the course of his employment.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 13, 1976, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with this Board review, the sum of $200, payable by the employer.

428-C-01297 (Great American) APRIL 7, 1977
05-X-025591 (Argonaut)

KENNETH LARSON, CLAIMANT
Allan Coons, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Charles Paulson, Defense Atty.
Own Motion Order Referred for Hearing

On November 22, 1966 claimant, while employed by International Paper Company, whose workmen's compensation coverage was furnished by Great American Insurance Company, suffered an industrial injury to his left knee. The claim was accepted and closed, initially, by a Determination Order dated August 30, 1967 which awarded claimant permanent partial disability equal to 10% loss of use of the left leg. Claimant's aggravation rights have expired.

On December 16, 1976 claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and make an adjustment of his permanent disability awards and refer claimant to the Division of Vocational Rehabilitation,

designating claimant to be a vocationally handicapped worker entitled to benefits while attending an authorized program of rehabilitation. The request was accompanied by three medical reports from Dr. Brooke. Copies of the request and medical reports were furnished to Great American Insurance Company.

On January 17, 1977 the claimant requested a hearing on the denial by Argonaut Insurance Company of claimant's claim for an injury suffered on December 20, 1976 while in the employ of Cabax Mills, whose workmen's compensation coverage is furnished by Argonaut. A hearing was set for April 8, 1977.

The Board concludes the issue of whether claimant's present condition is the result of the December 20, 1976 injury or an aggravation of the November 22, 1966 injury could be properly raised at the hearing on April 8, 1977 and then it would be necessary, based upon the evidence presented, for the Referee to determine which carrier is responsible for claimant's present condition.

Therefore, the Board hereby refers claimant's own motion request of December 16, 1976 to the Hearings Division to be heard in conjunction with the hearing on the denial of the December 20, 1976 claim presently scheduled to be heard before Referee Raymond Danner in Eugene on Friday, April 8, 1977.

Upon conclusion of that hearing the Referee, if he finds that claimant's present condition is related to the 1966 injury and represents a worsened condition since the last award or arrangement of compensation for that injury, shall cause to be prepared a transcript of said proceedings and submit it to the Board together with his recommendations on that issue.

If the Referee determines that claimant suffered a compensable injury on December 20, 1976 then he shall enter an Opinion and Order which may be appealed under the provisions of ORS 656.289.

WCB CASE NO. 76-1463 APRIL 8, 1977

KENNETH FORTY, CLAIMANT
Brian Welch, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of March 2, 1976.

Claimant, a truck scaler, sustained a compensable injury on April 9, 1975; he felt a pop in his low back and experienced immediate pain in his left leg. On March 2, 1976 the claim was closed by a Determination Order awarding claimant 16 degrees for 5% unscheduled disability.

Claimant had had prior industrial injuries and had permanent disability resulting from a back injury in 1966 which required a left L5-S1 laminectomy.

Claimant's injury of April 9, 1975 was diagnosed as left L5 nerve root compression due to traumatic herniation of nucleus pulposis L4-5. He subsequently underwent

an L4-5 laminectomy, neurolysis and discectomy. When claimant returned to work he was a truck scaler and later moved on to bay scaling, the easiest of the scaling jobs that claimant can perform.

Claimant is 39 years old with an 11th grade education. Claimant does have office skills acquired while he was a Yeoman in the Navy. The only time loss claimant had due to the 1975 injury was to keep doctor appointments.

The Referee found that claimant's prior disability had impaired claimant's ability to perform some types of work in log scaling, therefore, the disability from the 1975 injury must be segregated from the disabling effects of the first injury. The evidence reflects some additional disability from the 1975 injury, e.g., claimant is now slower and more cautious in performing his job, but he does do the job. Claimant's loss of wage earning capacity has been only slightly diminished by the 1975 injury and the Referee concluded that claimant has been adequately compensated for this slight loss by the award of 16 degrees.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 9, 1976, is affirmed.

WCB CASE NO. 76-936 APRIL 8, 1977

J.K. GRAHAM, CLAIMANT
James Lynch, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which directed the Fund to pay claimant compensation for temporary total disability from June 30, 1975 to July 8, 1975. Claimant contends he is entitled to compensation for temporary total disability from July 26, 1973 to July 8, 1975 or, in the alternative, temporary total disability prior to June 30, 1975.

Claimant, 67 years old, was a heavy equipment operator, self employed, who sustained a compensable injury in July, 1971. Dr. Serbu performed a laminectomy at L4; claimant, at that time, also had severe multiple arthritic deformities. The claim was closed on August 16, 1973 with an award of 48 degrees for 15% unscheduled disability and compensation for temporary total disability to July 26, 1973.

Four to six months after his surgery claimant's condition worsened. In August, 1973 claimant had suffered a heart attack from which he recovered two months later without any great problems. Claimant never appealed the Determination Order.

Claimant's condition continued to worsen until April, 1975. Dr. Serbu, at that time, indicated claimant's present problems were not related to the industrial injury; claimant had diffuse arthritic problems. Dr. Serbu felt claimant was unemployable on the basis of arthritis rather than his herniated disc.

Claimant saw Dr. Miller, a neurologist, who hospitalized him on June 30, 1975 and, after a myelogram, diagnosed marked spondylosis in the lumbar spine. Dr. Miller performed surgery and, on August 10, 1975, stated the surgery was a result of claimant's 1971 industrial injury. The Fund accepted claimant's claim as an aggravation and started compensation for temporary total disability on July 8, 1974, the date claimant was hospitalized for surgery.

Claimant contends he has had continuing problems since his surgery in 1973. The evidence indicates claimant never again operated heavy equipment after his industrial injury.

The Referee found claimant's condition definitely did aggravate, however, the evidence was insufficient to justify compensation for temporary total disability prior to Dr. Miller's hospitalization of claimant.

The Referee concluded compensation for temporary total disability should have commenced on June 30, 1975, when claimant was hospitalized for a myelogram. The medical evidence substantuates that claimant was entitled to compensation for temporary total disability at that time because claimant could not work after that date. There was no evidence presented to show that claimant was entitled to compensation for temporary total disability prior to June 30, 1975.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 10, 1975, is affirmed.

WCB CASE NO. 76-381 APRIL 8, 1977

LINDA SUE HALL, CLAIMANT
John Svoboda, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant requests review by the Board of the Referee's order which granted her 48 degrees for 15% unscheduled psychiatric disability. Claimant contends she is entitled to an award of 35% unscheduled physical disability and 20% psychiatric disability for 176 degrees for 55% unscheduled disability.

The Fund cross appeals contending the award granted by the Referee should be reduced.

Claimant sustained a compensable injury on December 6, 1974, diagnosed as a soft tissue strain. Claimant was referred to Dr. Haffner who examined her on March 3, 1975, and found claimant's inability to return to work was due to subjective signs. On April 4, 1975 Dr. Haffner found claimant had been medically stationary for some time. A Determination Order of April 17, 1975 granted claimant compensation for time loss only.

Claimant was examined by Dr. Myers on May 2, 1975 who found cervical, thoracic

and lumbar strain resulting from the industrial injury. Claimant's primary problem, however, was in her neck.

Claimant underwent a psychological evaluation on November 19, 1975 which indicated claimant has hypochondriacal neurosis, she overly focuses on physical problems and exaggerates their importance, with pain increasing as a result. It was found claimant has secretarial skills and is a fair candidate for re-employment. Dr. Perkins recommended professional counseling for claimant.

On November 26, 1975 the Orthopaedic Consultants examined claimant and diagnosed conversion reaction bordering upon hysteria. They recommended referral for job placement. They found no loss of function due to the industrial injury.

A Second Determination Order of March 5, 1976 granted claimant additional time loss.

Dr. Holland, a psychiatrist, examined claimant on September 14, 1976. He was unable to differentiate between claimant's malingering and hysterical conversion neurosis. Claimant's "florid demonstration of her symptoms and obvious secondary gain for her impairment favors a diagnosis of malingering," but if claimant does have hysterical conversion neurosis it is causally related to her injury. Dr. Holland rated claimant's psychiatric disability at 20%.

The Referee found claimant has lost some wage earning capacity as a result of this injury. He believed that claimant was not consciously malingering, but her motivation was limited. He granted claimant an award of 48 degrees for 15% psychiatric disability solely because of her neurosis but found no evidence of any physical impairment.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated October 21, 1976, is affirmed.

WCB CASE NO. 76-4936 APRIL 8, 1977

NEIL HARRIS, CLAIMANT
O.W. Goakey, Claimant's Atty.
Dean Phillips, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the employer's denial of claimant's claim for an industrial injury.

Claimant was hired on July 23, 1976 as a shovel operator. On July 26, 1976 claimant was operating the shovel loader when he noticed a man signaling him to come down from the cab. Claimant alleges that as he stepped from the machines track he experienced sharp back pain when his left foot hit the ground. At this time the man who had signaled informed claimant that claimant was unable to handle the loader and to find some way to leave the job site; claimant mentioned nothing about back pain to him. Claimant located a truck driver who drove claimant to his car; claimant did not

mention his back problems to him. Claimant did testify that when he alighted from the truck his back was sore.

Claimant proceeded to the personnel manager and complained that he hadn't been given a fair chance to see if he could operate the loader. Claimant mentioned nothing about his back to the personnel manager.

Claimant testified that the next day he couldn't get out of bed and on July 28 saw Dr. Mang who diagnosed protrusion of L4-5 disc with associated right grade two sciatica and started claimant on chiropractic treatments. Claimant filed a claim on July 28 which was denied by the carrier.

Both the truck driver and the man who signaled claimant out of the cab testified at the hearing that they did not notice claimant having any physical problems nor did he make any complaint to them of hurting his back.

The Referee found the primary problem in this case of determining if the incident was compensable lies with claimant's failure to tell anyone connected with the employer of his alleged injury until two days after it allegedly happened. The Referee concluded the denial was proper.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated November 29, 1976, is affirmed.

WCB CASE NO. 76-2468 APRIL 8, 1977

WAYNE HAYES, CLAIMANT
Edward Daniels, Claimant's Atty.
Charles Paulson, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of April 29, 1976.

Claimant, a 45 year old truck driver for the past 25 years, sustained a fracture of the distal left radius of his left arm on August 5, 1975. Claimant was examined at the hospital emergency room by Dr. Martens and a short arm cast was applied. On September 9, 1975 the cast was removed and there was still some slight swelling and restricted motion of the wrist. Claimant returned to work on September 16, 1975.

Claimant continued to work but noted only slight improvement of his wrist. Dr. Martens felt surgery might be necessary for possible traumatic arthritis. Claimant worked until December 18, 1975.

Upon examination of February 11, 1976 Dr. Martens found claimant to be medically stationary with some permanent disability. He indicated that claimant lacks complete motion of the left wrist and has pain upon strenuous use. He recommended no surgery at that time.

A Determination Order of April 29, 1976 granted claimant an award of 30 degrees for 20% loss of left forearm.

Claimant returned to work as a log truck driver on April 12, 1976.

The Referee found the medical evidence indicates claimant has permanent disability because of lack of complete motion of the left wrist and pain brought on by strenuous use; however, there is evidence that claimant presently works a 9-12 hour day in a strenuous profession and does not use a wrist brace.

The Referee concluded that the award of 20% loss of the left forearm granted by the Determination Order adequately compensates claimant for the loss of function of that forearm.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 16, 1976, is affirmed.

SAIF CLAIM NO. GC 91028 APRIL 8, 1977

GEORGE KOSTER, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant has a long history of industrial and non-industrial injuries, including surgeries for his shoulders, elbows and both knees.

Claimant sustained a compensable low back strain injury on September 11, 1967. On October 2, 1967 claimant underwent a laminectomy and on January 16, 1969 a laminectomy and fusion at L-S. Claimant went through a Division of Vocational Rehabilitation sponsored program and obtained a teaching position in industrial education; claimant subsequently went to work for the Oregon Correctional Institute, teaching body and fender repair.

A Determination Order of August 28, 1970 granted claimant 35% unscheduled disability and no loss of wage earning capacity.

Claimant's claim was reopened for further surgery (a laminectomy) on February 12, 1976. A closing evaluation was performed by the Orthopaedic Consultants on November 11, 1976 which stated that claimant felt the surgery had not helped him and they found claimant was now precluded from returning to his regular occupation even with limitations.

On February 2, 1977 the Fund requested a determination. The Evaluation Division of the Board determined that claimant's disability resulting from the September 11, 1967 injury when coupled with all of claimant's pre-existing disabilities precluded him from returning to any suitable and gainful occupation and they recommended he be granted compensation for temporary total disability commencing from February 8, 1976 to the date of this order and be considered as permanently and totally disabled thereafter.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from February 8, 1976 through April 8, 1977 and shall be considered as permanently and totally disabled as of the date of this order.

SAIF CLAIM NO. C 51408 APRIL 8, 1977

EVELYN MIDWOOD, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Order

On February 25, 1977 claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen her claim for an injury suffered on November 2, 1966. She stated that she had had continuous trouble with her back since that time and had twice requested the Fund to reopen her claim but it refused to do so.

On February 28, 1977 claimant was advised by the Board that before it could consider reopening her claim it would need a current medical report, preferably from one of claimant's treating doctors, establishing the fact that her current physical condition has worsened since the last claim closure and that the worsening was attributable to her industrial injury. A copy of this letter was sent to Dr. Darrell T. Weinman, claimant's most recent treating physician.

On March 18, 1977 the Board received from Dr. Weinman the copy of the Board's letter upon which he had noted in his own handwriting that he had told claimant her condition was not related to her old injury; her old injury was to the L5-S1 area of the spine and her present condition indicates problems at L4-5 which are, in his opinion, no way work related.

In addition to this information received from Dr. Weinman the Board received a response from the Fund stating that it had denied further responsibility on two occasions since the claim was closed because claimant has had off the job injuries both prior and subsequent to the 1966 injury and it felt no additional responsibility. Dr. Yamodis' report did not indicate any relationship; he stated the medical reports were sent to the Fund solely because claimant had requested him to do so.

The Board, after due consideration of all of the medical evidence, concludes that claimant's request for her claim to be reopened should be denied.

It is so ordered.

DANIEL STAHL, CLAIMANT
Eldon Rosenthal, Claimant's Atty.
Scott Kelley, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of March 19, 1976.

Claimant was involved in an off-the-job auto accident on March 16, 1974, suffering a mild concussion, head laceration, and contusion of the left shoulder.

On November 26, 1974 claimant sustained a compensable back and left shoulder injury; he was treated by Dr. Cherry who diagnosed neck and upper thoracic back strain and left shoulder strain.

On July 1, 1975 Dr. Abele examined claimant and diagnosed acromioclavicular separation, left shoulder, minimal and lumbosacral sprain, nearly healed.

On September 29, 1975 Dr. Bachhuber performed an excision of lateral clavicle. In his report of October 21, 1975 Dr. Bachhuber indicated his diagnosis of acromioclavicular separation was caused by claimant's auto accident. Claimant's injury in November, 1974 was a temporary aggravation of the pre-existing condition. Claimant was released for work on November 3, 1975.

On February 12, 1976 Dr. Bachhuber stated claimant has minimal impairment as a result of the acromioclavicular separation and attributed claimant's back symptoms to the congenital anomalies of the lumbosacral joint and there was no permanent impairment of claimant's low back as a result of the industrial injury.

A Determination Order of March 19, 1976 granted claimant an award of 32 degrees for 10% unscheduled left shoulder disability.

Dr. Wright, a chiropractor, indicated on September 23, 1976 that claimant would have permanent impairment of his low back and left shoulder which would have permanent impairment of his low back and left shoulder which would preclude him from heavy lifting.

The Referee found that claimant had failed to prove he had additional permanent partial disability. Dr. Abele could not determine what portion of claimant's symptoms in 1975 were due to the car accident and what portion to the industrial injury. The incomplete AC separation was related to the auto accident and claimant had left shoulder symptoms prior to the November, 1974 industrial injury.

The Referee concluded claimant failed to prove he had suffered any greater permanent loss of wage earning capacity as a result of the industrial injury than that for which he had been compensated by the Determination Order of March 19, 1976.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated November 1, 1976 is affirmed.

WCB CASE NO. 75-1435 APRIL 8, 1977

The Beneficiaries of
FLOYD THOMAS, DECEASED
James Bernstein, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The beneficiaries of Floyd Thomas, deceased, hereinafter referred to as claimant, request review by the Board of the Referee's order which granted claimant 192 degrees for 60% unscheduled low back disability. Claimant contends the workman was permanently and totally disabled at the time of his death which occurred before the claim was closed on March 31, 1975 with an award of 64 degrees for 20% unscheduled disability and 15 degrees for 10% loss of the right leg.

On July 9, 1974 Thomas had sustained a compensable injury to his low back; treatment included traction, myelography and physical therapy.

Dr. Cooke, Thomas' treating physician, last examined him in February, 1975 and thought his days of bending and lifting were over and he should retire early due to his disability or be retrained; he felt that retirement rather than retraining was preferable because of Thomas' age and education.

On February 17, 1975 Thomas had been examined by the Orthopaedic Consultants who had found him medically stationary with mildly moderate loss of function of his back.

Thomas had suffered a myocardial infarction in 1973 but returned to work in early 1974. On March 7, 1975 he suffered his fatal heart attack.

The Referee found that up to the date of his death, the employer had left Thomas' job available to him and Thomas had been aware of this. The Referee concluded that had Thomas survived the last heart attack he would have returned to his old job and, therefore, he could not be considered to have been permanently and totally disabled prior to his demise. However, Thomas did suffer a substantial loss of wage earning capacity due to the physical residuals of his injury and the award of 64 degrees granted posthumously did not adequately compensate for this loss. The Referee, therefore, increased this award to 192 degrees for 60% unscheduled disability and affirmed the balance of the Determination Order dated March 31, 1975.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated August 31, 1976, is affirmed.

THOMAS TOMOVICK, CLAIMANT
Bernard Jolles, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which awarded 112 degrees for 35% unscheduled disability.

Claimant sustained a compensable injury to his back on July 13, 1971. He came under the care of Dr. Lisac who treated claimant conservatively and then referred him to Dr. Hill. On December 14, 1971 Dr. Hill performed a lumbar hemilaminectomy with resection of a herniated L4-5 disc.

In August, 1972 claimant was examined at the Mayo Clinic in Minnesota. The doctors found claimant's back pain was a mechanical problem and recommended no surgery. On October 9, 1972 Dr. Hill indicated claimant should not return to his former employment but was medically stationary; and on November 21, 1972 Dr. Lisac rated claimant's back disability between mild and moderate.

A Determination Order of January 9, 1973 granted claimant an award of 48 degrees for 15% unscheduled disability.

Claimant continued to have difficulties and on April 25, 1973 a myelogram was performed and on August 8, 1973 Dr. Kloos performed a bilateral lumbar laminotomy and decompression of nerve roots and removal of herniated disc.

Claimant was examined at the Disability Prevention Division on April 5, 1974 by Dr. Van Osdel who found low back instability with intermittent nerve root irritation at L5-S1 on the left on occasion.

A stipulation approved on May 6, 1974 reopened claimant's claim.

On July 22, 1974 the Back Evaluation Clinic examined claimant and found evidence of a partial drop foot weakness on the left as well as diminution of pin prick sensation in the L5 nerve root. Claimant is able to return to some other type of employment but not to his regular job. Total loss of function due to the injury was moderate.

A Second Determination of July 10, 1975 claimant was granted an additional 32 degrees for 10% unscheduled disability.

Claimant is 26 years old with a high school education and some college courses in general studies. Claimant's prior work experience includes being a bus boy and a dishwasher; operating a chemical mixer, doing some farming and working in a bowling alley. At the time of the injury claimant was doing pre-welding fabrication and earning $4.85 an hour. The same job now pays over $6 an hour. Claimant is presently attending Linn-Benton Community College and is in his second year of training as a metallurgical technician. That type of work currently pays a wage between $3.50 and $5.10 an hour. With two additional years of college claimant could obtain a Bachelor's degree.

The Referee found, based on claimant's age, education, physical limitations,

training, that he has lost 35% of his wage earning capacity, she increased his former awards by granting him an additional 10%.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 20, 1976, is affirmed.

WCB CASE NO. 76-1371 APRIL 11, 1977

WILL ASHBURN, CLAIMANT
James Phelps, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Fund's denial of March 19, 1976.

Claimant alleges he sustained a compensable injury on January 5, 1976; he said he told his foreman about it as he walked by and his foreman responded by telling him to take it easy.

Claimant continued working but had constant back pain and headaches and consulted Dr. Waldmann, his family physician, on January 30, 1976.

Claimant's foreman testified that he did not recall claimant mentioning that he had been hurt but he was accustomed to employees complaining of aches and pains and didn't pay much attention to such comments. He further testified that if claimant did inform him then he believed it because claimant is honest and trustworthy.

A co-worker of claimant testified that claimant said he had to see a doctor about his back, but he didn't recall when this was. He also noticed nothing unusual about claimant's work performance during January, 1976.

The employer disputes claimant's testimony because claimant waited a month to file his claim. The Form 801 noted the date of injury as January 1, 1976 when the shop was closed and the hour of the injury as 10 a.m. which is the period for "coffee breaks."

Claimant testified that January 1 was used because it was not until later after he had seen his doctor that he needed a specific date of injury and that he merely agreed with the date put down on the claim form by the Fund's representative.

Claimant contends he was hurt the first working day in January, 1976. The physicians initial report also shows the date of injury as January 1, 1976 and the Fund's representative was not responsible for this entry.

The Referee found no medical evidence indicating claimant's condition was work-related. Nor did claimant satisfactorily explain his delay in seeing his doctor or filing his claim. Claimant had had prior back problems which have caused him periodic discomfort.

The Referee concluded claimant had not established by a preponderance of the evidence that his alleged injury arose out of and in the course of his employment. The denial was affirmed.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated July 27, 1976, is affirmed.

WCB CASE NO. 76-3133 APRIL 11, 1977

RON CARTER, CLAIMANT
Allan Lee, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests review by the Board of the Referee's order which granted him an award of 54 degrees for 40% loss of the right foot.

Claimant sustained a compensable injury on July 15, 1971 when the rim blew off a truck tire and struck claimant in the right lower leg, causing a fracture. Claimant saw Dr. Vinyard who performed an open reduction, internal fixation surgery. Claimant continued with conservative management but a year and a half later it proved unsatisfactory and a local bone grafting procedure was performed.

On February 7 and March 4, 1974 claimant was seen by Dr. Hazel and Dr. Matthews, respectively. Both doctors recommended further surgery and on March 20, 1974 Dr. Vinyard performed an open reduction and internal fixation and bone graft to the right tibia.

A Determination Order of December 30, 1974 granted claimant an award of 27 degrees for 20% loss of the right foot.

On March 25, 1975 Dr. Lilly (Dr. Vinyard had retired) performed surgery to remove the plate. On September 16, 1975 Dr. Lilly felt another surgery was necessary and, subsequently, Dr. Carter did a reattachment of the peroneal sheath to the tip of the lateral malleolus. This surgery also was necessitated by the industrial injury.

On April 6, 1976 Dr. Lilly felt claimant's condition was stationary with no residual disability. A Second Determination Order granted claimant no additional award for permanent partial disability.

On August 26, 1976 Dr. Matthews examined claimant and felt claimant was limited in standing and walking activities. Dr. Matthews hoped claimant could return to truck driving but felt that claimant's ankle condition was laterally unstable. Claimant's left foot has been partly amputated due to a pre-existing prior industrial injury.

Claimant quit work as a truck driver and is presently working at a moulding plant. Claimant testified that his ankle sprains quite easily and reacts severely to cold weather.

The Referee found that claimant has a long history of frequent operations and

problems with his injured ankle. The actual loss of movement in the ankle may only be 20%, however, claimant's ankle does sprain frequently and does limit claimant's activities. It is almost impossible for claimant to work when the ankle is sprained. The Referee concluded that claimant was entitled to an award of 54 degrees based upon a loss of function of his right foot.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated October 8, 1976, is affirmed.

SAIF CLAIM NO. YC 75094 APRIL 11, 1977

DAVE CORBIN, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on May 13, 1967 and his claim was subsequently closed on July 3, 1968 with an award of 3 degrees for 3% loss of vision in the left eye. Claimant's claim was reopened in June, 1969 and he was hospitalized for retinal detachment and underwent corrective surgery. The results were good but left claimant with some loss of vision. The claim was again closed on June 30, 1970 with an additional 11 degrees. Claimant's aggravation rights have expired.

The Fund voluntarily reopened claimant's claim on June 18, 1976 when claimant was hospitalized for cataract surgery. Claimant was subsequently fitted with a soft contact lens and his vision is now 20/40 at distance and Jaeger 6 at close range; visual fields were normal. Claimant does have an aphakic eye with some changes in the macula secondary to the retinal detachment.

On March 21, 1977 the Fund requested a determination. It was the recommendation of the Evaluation Division of the Board that claimant be granted compensation for temporary total disability from June 18, 1976 through August 30, 1976 and an additional award of 53 degrees.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from June 18, 1976 through August 30, 1976 and an award of 53 degrees of a maximum of 100 degrees for loss of vision of the left eye; this award is in addition to all previous awards.

WCB CASE NO. 76-2156 APRIL 11, 1977

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

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of March 16, 1976.

Claimant, a 47 year old roofer, sustained a compensable injury on March 5, 1974. The initial diagnosis was fracture of the left olecranon process, fracture of the left 5th metacarpal and lower back contusion. On March 7, 1974 Dr. Hoda performed an open reduction and screw fixation surgery on the left elbow.

A myelogram performed in April, 1974 revealed a herniated disc at L4-5 and compression fracture of L2. On May 7, 1974 Dr. Hoda performed a hemilaminectomy L4 on the left, and excision of herniated L4-5 disc. In October, 1975 claimant was examined due to loss of bowel and bladder control; post-traumatic arachnoiditis was diagnosed.

In January, 1975 claimant was referred to the Division of Vocational Rehabilitation but in November or December, 1975 claimant apparently lost motivation and interest in the program. In February, 1976 claimant was enrolled at the Disability Prevention Division but decided he didn't want to participate and was discharged.

A Determination Order of March 16, 1976 granted claimant 160 degrees for 50% unscheduled low back disability and 28.8 degrees for 15% loss of his left arm.

In January, 1975 Dr. Hoda expressed his opinion that claimant had suffered permanent partial disability of 25% to the body and 25% to the left upper extremity. The Orthopaedic Consultants found claimant was precluded from heavy physical labor but could do sedentary type occupations.

The Referee found no evidence which would indicate that claimant is permanently and totally disabled. The doctors all agree claimant cannot return to his job as a roofer, however, none of the physicians felt he could not work in some other occupation.

The Referee further found that the bladder and bowel problems have lessened and are now fairly well controlled.

The Referee concluded that claimant was capable of succeeding in other occupations which would be within his physical limitations and that the Determination Order had adequately awarded claimant for his loss of wage earning capacity.

The Board, on de novo review, concurs with the findings and conclusions reached by the Referee primarily because of claimant's obvious lack of interest in any vocational rehabilitation program which possibly could enable him to return to the labor market at a suitable and gainful occupation.

ORDER

The order of the Referee, dated November 15, 1976, is affirmed.

IGNACIO MORALES, CLAIMANT
Harold Adams, Claimant's Atty.
Owen Blank, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests review by the Board of the Referee's order which remanded claimant's claim to it for payment of compensation, as provided by law, commencing May 7, 1976 until closure is authorized pursuant to ORS 656.268.

Claimant sustained an injury on May 9, 1974; the claim therefor was accepted as non-disabling and claimant continued to work. Claimant later was examined by Dr. Schultz who diagnosed epididimytis. Claimant claims he suffered both a low back injury and a straining injury.

Claimant worked until July 24, 1974 when he entered the Oregon National Guard. While at camp claimant underwent a hernia repair. Claimant alleges that this condition arose from the May, 1974 accident.

Claimant returned to work for the employer at the end of his camp training and in November, 1975 claimant suffered a back strain at work while lifting. He advised his foreman of this and was taken off work temporarily.

On May 7, 1976 claimant was examined for his back by Dr. Schmidt, a chiropractor. Dr. Schmidt's report of May 14, 1976 caused the denial by the carrier on June 30, 1976.

It was the carrier's contention that claimant had engaged in several off duty activities which caused or contributed to the back condition, i.e., loading manure onto a truck and the activity of rappelling at boot camp.

The Referee found claimant's testimony to be credible and consistent. Claimant had complained of continued back discomfort since the May, 1974 incident, with exacerbation upon strenuous activity.

Claimant's foreman testified that claimant complained of a back injury in November, 1975 and confirmed the fact that work activities, which involved lifting tote boxes, was extremely heavy work. However, he did not recall the actual date of May, 1974 accident.

The Referee found no evidence that claimant sustained any injury while loading manure nor while at National Guard camp. If he did suffer back discomfort after these activities they would be aggravations of a condition already existing. The physicians indicated that the treatment now required is related to the accident.

The Referee concluded claimant is entitled to have his claim reopened for further treatment and, if necessary, payment for time loss. He remanded the claim to the employer.

The Board, on de novo review, affirms the Referee's order. However, the Board finds that the carrier is responsible only for the low back condition. They have no responsibility whatsoever for the epididimytis or the hernia conditions.

ORDER

The order of the Referee, dated October 4, 1976, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with this Board review, the sum of $400, payable by the employer.

WCB CASE NO. 75-5371 APRIL 11, 1977

IRA SMITH, CLAIMANT
Gerald Doblie, Claimant's Atty.
James Huegli, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson, Moore.

The employer requests review by the Board of the Referee's order which granted claimant an award of 15 degrees for 10% loss of the right forearm and 7.5 degrees for 5% loss of the left forearm and ordered the employer to pay for claimant's examination, including nerve conduction studies, by Dr. Nathan and his medical report of May 15, 1976.

Claimant, 61 years of age, sustained a compensable injury on October 18, 1974. Claimant continued to work but had continuing problems with both arms. On April 14, 1975 Dr. Stanford performed a bilateral carpal tunnel release. On September 5, 1975 Dr. Stanford stated claimant has so much in the way of subjective complaints that he didn't feel free to send claimant back to work although objective findings were quite good.

On October 10, 1975 Dr. Nathan, after examining claimant, rated the disability of his right wrist at 5%; he found no objective findings present in the right wrist but, based on nerve conduction findings of slight abnormal delay in the right median nerve, believed such studies justified his rating. He found no objective findings of any impairment in the left wrist but, based solely on the statements of claimant that both wrists were sore, rated the impairment of the left wrist at 2%.

A Determination Order of November 20, 1975 granted claimant an award of 7.5 degrees for 5% loss of the right forearm.

On February 23, 1976 Dr. Rosenbaum indicated claimant had normal wrists; he had previously diagnosed degenerative arthritis of the cervical spine, unrelated to the injury.

On March 15, 1976 Dr. Nathan indicated that on March 1 claimant's counsel requested another nerve conduction study which was performed on March 5 and revealed normal latencies and velocities in the median and unlar nerves of both upper extremities. Dr. Nathan further concluded claimant could work with no difficulties holding tools.

The Referee found claimant to be a credible witness whose subjective complaints were not supported by objective medical findings; however, Dr. Nathan did find ratable permanent disability in both wrists which he believed to be real despite lack of any objective findings. Therefore, the Referee concluded claimant was entitled to an additional award of 7.5 degrees for loss of the right forearm and an award of 7.5 degrees

for loss of the left forearm; she also ordered the defendant to pay for the nerve conduction study performed by Dr. Nathan and his report of March 15, 1976.

The Board, on de novo review, finds that Dr. Nathan found 5% loss of the right forearm and only 2% loss of the left forearm primarily based on the history related by claimant.

The Board concludes that the award made by the Determination Order very generously compensated claimant for the slight loss of function of his right forearm and that claimant is not entitled to any award for the left forearm because he has not lost any appreciable function thereof. The Board further finds that claimant's counsel requested the last nerve conduction study, therefore, the carrier is not liable for payment of that study nor for Dr. Nathan's medical report based upon that study.

ORDER

The order of the Referee, dated August 24, 1976, is reversed.

The Determination Order of November 20, 1975 is affirmed in its entirety.

WCB CASE NO. 72-225 APRIL 11, 1977

WALTER SORENSON, CLAIMANT
Colin Lamb, Claimant's Atty.
Scott Gilman, Defense Atty.
Own Motion Order Referred for Hearing

On March 11, 1977 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for his industrial injury of April 8, 1971. A copy of a medical report from Dr. Johnson accompanied claimant's request.

On March 15, 1977 the Board advised the carrier that it had 20 days within which to state its position. On April 1, 1977 the carrier responded, stating it opposed any modification of claimant's original award but requested the Board to decide whether a causal relationship between claimant's industrial injury of April 8, 1971 and claimant's hospitalization in February, 1977 was established.

The Board, after due consideration, finds that the evidence presently before it is insufficient for it to make a determination. Therefore, the matter should be referred to the Hearings Division with instructions to hold a hearing and take evidence on the issues of whether claimant's present condition is related to his April 8, 1971 injury and represents a worsening thereof and whether there is a causal relationship between claimant's injury of April 8, 1971 and his hospitalization in February, 1977. Upon conclusion of the hearing, the Referee shall cause to be prepared a transcript of the proceedings to be submitted to the Board together with his recommendations on these issues.

It is so ordered.

LLOYD R. JOHNSON, CLAIMANT
John Hilts, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which directed it to pay claimant compensation for permanent total disability effective January 23, 1976.

Claimant suffered a compensable cervical injury on June 15, 1972; on December 14, 1972 claimant received another compensable injury to his neck, thoracic and lumbar spine.

On March 9, 1976 a Third Determination Order awarded claimant 80 degrees for 25% unscheduled low back disability resulting from his December 14, 1972 injury; in addition to this award, claimant at the time of the hearing, had received 32 degrees for his June 15, 1972 injury. Claimant requested a hearing on the adequacy of the award for his December 14, 1972 injury.

Following the second reopening of his claim, claimant underwent a fusion and laminectomy and following the March 9, 1976 Determination Order claimant was examined by Dr. Dunn, a neurosurgeon, who indicated it was possible that claimant could develop occipital neuralgia.

Claimant was examined by the Orthopaedic Consultants on May 26, 1976, they found chronic low back and cervical strains, post-laminectomy fusion, times two. The physicians felt that claimant could return to the same occupation with limitations; that he had no increase in the permanent disability to his back. They indicated that the neck disability was minimal and pre-dated the December 14, 1972 injury.

In June, 1976 claimant was seen by Dr. Matthews, an orthopedist, at that time he was complaining of headaches and increasing low back pain. Dr. Matthews felt claimant's problems was a chronic muscle strain probably related to chronic tension. He suggested continuing medications and wearing a brace, together with "low back school" and rehabilitation.

Claimant is 45 years old, he has an 8th grade education and most of his adult working life has been in logging and construction work. He has no special skills although he started a drafting course at Lane Community College but because of his inability to sit or stand was forced to terminate.

In 1963 claimant had suffered a compensable back injury for which he received a total of 60% unscheduled disability.

The Referee found that claimant's complaints and disabilities were corroborated by credible testimony of other witnesses and there appeared to be no reason to question claimant's credibility or motivation.

The Referee concluded that claimant was not "odd-lot" status because the medical evidence together with the claimant's age and other factors did not establish such, but

he did conclude that claimant was unable to work gainfully, suitably and regularly because of the residuals of the December 14, 1972 injury and taking into consideration the residuals of his prior injuries.

The Board, after de novo review, agrees with the Referee's conclusion that claimant is permanently and totally disabled but finds that claimant has made a prima facie case that he falls within the "odd-lot" category.

Although the medical evidence may not be completely persuasive that claimant is permanently and totally disabled, after considering claimant's age, education, work background and physical condition and also giving consideration to the fact that claimant has undergone five surgeries, the Board concludes that the evidence is sufficient to indicate that claimant, at the present time, is completely "worn out." Although claimant might be able to do some odd type jobs, nevertheless, in the absence of any showing by the Fund that there is available to claimant, in his present condition, gainful and suitable work on a regular basis, claimant must be considered as being permanently and totally disabled. Claimant made his prima facie case, therefore, the burden shifts to the Fund and it failed to meet it. The Board concludes that claimant is permanently and totally disabled and that the Referee's order should be affirmed.

ORDER

The order of the Referee, dated July 27, 1976, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with this Board review, the sum of $400, payable by the Fund.

WCB CASE NO. 75-5212 APRIL 12, 1977

JACK KINDY, CLAIMANT
Rolf Olson, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests review by the Board of the Referee's order which granted him additional temporary total disability benefits from May 31, 1975 to September 9, 1975, less time worked, and remanded the claim for closure pursuant to ORS 656.268. Claimant contends he is entitled to compensation for temporary total disability from September 10, 1975 to December 29, 1975, inclusive.

Claimant sustained a compensable injury on October 21, 1974 to his pelvic area, low back, left knee, and left leg. The diagnosis was acute compressive fracture of L5. A special Determination Order of December 11, 1975 granted claimant compensation for temporary total disability from October 21, 1974 to April 3, 1975 and temporary partial disability from April 4, 1975 to May 30, 1975.

On May 6, 1975 Dr. Fax reported claimant could return to work as a crane operator as of April 3, 1975. However, he advised that Dr. Newton should approve claimant's release. Claimant had physical restrictions on heavy lifting, bending and stooping.

On July 8, 1975 Dr. Newton indicated claimant was released to work as of May 30,

1975. However, in a later report, dated January 14, 1976, Dr. Newton indicated claimant was unable to return to his occupation until December 29, 1975, and he then again released claimant for work. Dr. Newton's later opinion that claimant was unable to return to work until December 29, 1975 was based primarily on claimant's subjective complaints.

Claimant was examined by the Orthopaedic Consultants on September 9, 1975 and found him to be medically stationary. Dr. Fax concurred with this medical opinion but continued to believe that claimant could have returned to work on April 3, 1975. Dr. Becker also concurred with the medical findings of the Orthopaedic Consultants.

Claimant testified that he has not been employed since the injury of October 21, 1974. Claimant's last blackout spell occurred during September, 1975 and his conservative treatment continued until December 11, 1975, the date of claim closure.

The Referee found, based upon the evidence presented, that claimant was proven by a preponderance of the evidence that he was not medically stationary on either April 3, 1975 or May 30, 1975, but claimant was medically stationary on September 9, 1975. This was supported by the findings of the Orthopaedic Consultants, Dr. Fax and Dr. Becker.

The Referee concluded that any medical treatment rendered after September 9, 1975 was palliative in nature and was covered by the provisions of ORS 656.245. The Referee granted claimant additional time loss from May 31, 1975 to September 9, 1975 and remanded his claim for closure.

The Board, on de novo review, concurs with the conclusions reached by the Referee.

ORDER

The order of the Referee, dated February 20, 1976, is affirmed.

WCB CASE NO. 76-2203 APRIL 12, 1977

CAROL KNAPP, CLAIMANT
Garry Kahn, Claimant's Atty.
Paul Roess, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests review by the Board of the Referee's order which remanded claimant's claim as of August 26, 1976 for the payment of medical care and treatment and for payment of compensation for temporary total disability commencing the date claimant is hospitalized for the surgery recommended by Dr. Gill and until closure is authorized pursuant to ORS 656.268.

Claimant contends her claim was prematurely closed and compensation for temporary total disability should be paid from February 20, 1976 or, in the alternative, from July 9, 1976, the date of Dr. Gill's examination.

The employer cross-appeals, contending the award made by the Determination Order was too great.

Claimant sustained a compensable injury to her left elbow, left wrist and hand on September 8, 1973. She saw Dr. Johnson on that day and he removed a large splinter from claimant's left elbow area and sutured the laceration. Claimant returned to work the next day.

Claimant's symptoms of limitation of motion in her left arm and pain in her left forearm, wrist and hand and numbness of her left hand continued. Claimant quit working on October 17, 1973 because of this symptomatology.

Claimant has been seen and examined by numerous physicians; she has received conservative treatment and had three surgical interventions. The first surgery was for release of left dequervains, the second for release of entrapment of a branch of the radial nerve of the radial aspect of the left wrist and removal of small foreign body, and third for resection of the radial sensory nerve, left wrist and silastic capping.

A Determination Order of April 9, 1976 granted claimant an award of 30 degrees for 20% loss of the left forearm.

At the Disability Prevention Division Dr. Mason found claimant's subjective complaints outweighed objective findings which he attributed to post-traumatic and post-surgical neurosis. A psychological evaluation by Dr. May indicated that claimant experienced mild to moderate anxiety but her emotional problems did not significantly hinder claimant's ability to work. Dr. Mason felt claimant was medically stationary; Dr. James concurred.

After claim closure claimant was examined by Dr. Adams and Dr. Gill. Dr. Adams, who examined claimant on May 25, 1976, felt claimant's claim should not be reopened for further surgery because he did not feel claimant would get any relief from such surgery, he felt claimant possibly was malingering for personal gain.

Dr. Gill, who examined claimant on July 9, 1976, agreed with Dr. Adam's diagnosis and impression of claimant's condition but he felt surgery might benefit claimant; that it would relieve claimant's painful trigger area and local sensitivity of her left forearm. Dr. James concurred with Dr. Gill's opinion.

Claimant has not returned to work since October 17, 1973 because of her left forearm and hand condition. Claimant believes that she cannot return to veneer grading, working as a raimman operator or as a waitress because of the activities involved in these jobs.

The Referee found that claimant's claim was not prematurely closed. Dr. May, a psychologist, Dr. Mason and Dr. James all felt claimant could return to work and needed no further medical treatment. Therefore, the Determination Order entered on April 9, 1976 was correct. However, the Referee found that claimant's condition is not medically stationary at present although it had been at the time of claim closure. Therefore, claimant is entitled to have her claim reopened for payment of medical care and treatment afforded her after claim closure, and for payment of compensation for temporary total disability when she is hospitalized for the surgery.

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

ORDER

The order of the Referee, dated August 26, 1976, is affirmed.

WCB CASE NO. 76-74 APRIL 13, 1977

GENE FRANDSEN, CLAIMANT
William Beers, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of December 26, 1975.

On December 9, 1974 claimant was welding on a platform and fell; eventually he underwent repair of an early direct inguinal hernia. Claimant continued to have symptoms and was hospitalized for exploratory surgery in the inguinal area. Nothing was found. Subsequently, claimant developed an acute epididymal orchitis which followed the surgery closely and was, therefore, considered to be a complication thereof.

A Determination Order of April 4, 1975 granted claimant an award for temporary total disability only.

On July 29, 1975 exploratory surgery was again performed and an orchiectomy was done.

Claimant testified that he still has swelling and hurting in the inguinal area and the surrounding area as well. Because of this condition claimant has given up welding and has gone into the horse shoeing business.

On December 26, 1975 a Second Determination Order awarded claimant additional time loss.

On October 6, 1976, after the hearing, the treating physician stated that after the injury claimant had had bizarre pain and repeat operations were done due to a belief that a malignancy was developing in the testicle. The final findings, after studies, was that some type of granulomatous and fibrosis was present in the testis probably unrelated to the surgery, unrelated to trauma, but related to the pain that claimant had. The third surgery was performed for testicular swelling and was not related to the hernia.

The Referee found claimant a credible witness who did not exaggerate; he has had continuous problems in his groin since his ten foot fall from the platform. However, there is no medical evidence to causally connect claimant's complaints of pain in the other areas of his body.

The Referee concluded that there was a lack of medical documentation although he believed claimant's testimony entirely. He could not grant any award for permanent partial disability based upon the medicals.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated November 4, 1976, is affirmed.

MARVIN GENZ, CLAIMANT
David Hittle, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which affirmed its denial of claimant's claim but ordered it to pay claimant compensation for temporary total disability from July 17, 1975, the date of the alleged injury, to February 24, 1976, the date of the denial, less time worked; ordered it to pay a sum equal to 1% of such temporary total disability, as a penalty and granted claimant's attorney a fee of $950 payable by the Fund.

Claimant alleges he had a compensable injury on July 17, 1975. Claimant finished work that day but the following day took time off due to his neck and back pain. Claimant was examined and treated by Dr. Colgan and Dr. Chester, all conservatively.

Claimant saw Dr. Colgan, a chiropractic physician, on October 28, 1975, he diagnosed 1st and 5th cervical and 5th thoracic and 5th lumbar vertebral subluxation with secondary functional disturbances. He recommended chiropractic adjustments. Claimant was released to work on November 26, 1975.

Claimant testified the injury occurred while he was laying pipe on Orchard Heights Road, that it occurred either on July 17 or, possibly, July 8, 1975 and that the owner was given notice within 15 minutes of the accident. Claimant also testified he had complained to his wife about having neck and back problems; that he worked until the job was completed; that he complained to a co-worker about his difficulties; that he was finally terminated and that he filed a claim on October 27, 1975.

The employer, Mr. Montgomery, testified that the crew was laying pipe on Orchard Heights Road; that he never saw any accident or injury; that claimant never reported the alleged injury; that he never terminated claimant, claimant simply disappeared; that claimant's last day at work was on July 10, 1975, and that he never saw claimant again after that date.

The employer's wife, the bookkeeper for the employer, testified claimant terminated on July 10, 1975 according to the payroll records and that claimant came to her house after July 10, 1975 but before July 17, 1975 to get his check.

The employer never notified the Fund about the claim claimant filed because the date of injury on the form indicated a day claimant was not working for him.

The Referee found that the testimony of the employer and his wife impeached claimant's testimony on the disputed points. Also claimant, at the hearing and just prior to the arrival of the employer and his wife, requested permission to go to the restroom and never returned to the hearing. The Referee concluded claimant did not want to be cross examined or identified by the Montgomerys.

The Referee found claimant's case rests on credibility and that claimant was not a credible witness. Furthermore, the medical evidence indicates a pre-existing cervical back problem unrelated to the alleged injury.

The Referee further found that claimant's claim is barred pursuant to ORS 656.265(4) for untimeliness and claimant had not shown good cause for the late filing.

The Referee concluded, however, that claimant was entitled to penalties and attorney fees. Both the employer and the Fund failed to meet their statutory obligations in this case. The employer did not notify the Fund of the claim and the Fund did not accept or deny the claim until February 24, 1976.

The Referee affirmed the denial but awarded compensation for temporary total disability to claimant and assessed a penalty and awarded an attorney fee as set forth in the first paragraph of this order.

The Board, on de novo review, concurs with the Referee that claimant's claim is barred and that the denial should be affirmed. However, the Board finds that compensation for temporary total disability should not commence until the date the Fund first had notice of an injury, namely, November 13, 1975, payable through the date of the denial, February 24, 1976.

The Board concludes that the Fund should be assessed a penalty for its unreasonable delay in processing the claim of a sum equal to 10% of the compensation for temporary total disability due and owing claimant but the attorney fee should be reduced to $500.

ORDER

The order of the Referee, dated October 4, 1976, is modified.

The denial issued by the Fund on February 24, 1976 is affirmed.

Claimant is hereby granted compensation for temporary total disability from November 13, 1975 through February 24, 1976 and additional compensation, as a penalty, equal to 10% of the compensation for temporary total disability.

Claimant's attorney is hereby granted $500 as a reasonable attorney fee, payable by the Fund.

WCB CASE NO. 76-6493 APRIL 13, 1977

CARL HERZBERG, CLAIMANT
Gary Jones, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order of Dismissal

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

It is therefore ordered that claimant's request for cross review is hereby dismissed.

GEORGE HOBSON, CLAIMANT
Charles Seagraves, Claimant's Atty.
Daryll Klein, Defense Atty.
Request for Review by the Employer

Reviewed by Board Members Wilson and Phillips.

The employer requests review by the Board of the Referee's order which remanded claimant's claim to it for payment of compensation, as provided by law.

Claimant has worked for the employer, Bate Plywood, for 19 years; 12 years as a corelayer. Four hours of each shift claimant would turn ply sheets and for four hours he would lay core. These jobs involved considerable use of the wrist and hands. In November, 1975 claimant was terminated by the employer because of a general layoff. In the latter part of January, 1976 claimant went to work for Murphy Creek Lumber Company doing cleanup work.

About four years prior to the termination claimant had begun to notice intermittent episodes of numbness involving both of his arms. Claimant continued to note these symptoms after his layoff. While working nights for Murphy he found that his hands would get colder and more numb than before and noted numbness when he used the air hose, broom or shovel.

The testimony indicates that claimant never complained to the mill superintendent nor did any witness notice that claimant had any physical limitations during his last year of employment. Claimant's job was one of production and required speed.

In March, 1976 claimant saw Dr. Hawley and Dr. Tennyson concerning his problem. He gave a history of being a core layer for several years but denied any trauma to Dr. Tennyson, who diagnosed bilateral carpal tunnel syndrome. On April 12 Dr. Tennyson performed a decompression of the right median nerve on claimant and subsequently on April 20 a decompression of the left median nerve. Dr. Tennyson advised the carrier for Bate that claimant's condition was clearly related to his occupational activity, however, the claim was denied on the ground that the condition had been caused by claimant's present employment and not his prior employment. Dr. Tennyson later indicated that the work of a core layer frequently is associated with the onset of this medical condition.

The Referee found that claimant's bilateral carpal tunnel syndrome was a compensable condition arising out of claimant's employment as a core layer for Bate. Both claimant and Dr. Tennyson relate the condition to this type of work and the Referee found claimant to be credible.

The Referee concluded that claimant had proven he had sustained an occupational disease arising out of and in the course of his employment and remanded his claim to the employer, Bate Plywood, and its carrier.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated November 8, 1976, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with this Board review, the sum of $450, payable by the employer.

(No Number Available) APRIL 13, 1977

RICHARD J. WHITE, CLAIMANT
Ann Morgenstern, Claimant's Atty.
Noreen Saltveit, Defense Atty.
Own Motion Order Referred for Hearing

On March 31, 1977 the Board denied claimant's request that, pursuant to ORS 656.278, it exercise its own motion jurisdiction and reopen his claim for an injury suffered on December 28, 1967.

On March 25, 1977 claimant's counsel advised the Board that there appeared to be certain errors in the letter from the employer's counsel dated March 16, 1977. The letter, received after the Own Motion Order was issued, states that after claimant's original injury in December, 1967 he was hospitalized for three days and subsequently returned to limited duty and received compensation for temporary partial disability to March 21, 1968. Claimant was also hospitalized and received treatment in January, 1973 and July, 1976. During the entire time, according to claimant's counsel, claimant was employed by Igleheart Operations which became a division of General Foods and claimant has not changed employers since his original injury in 1967.

The letter from the employer's counsel dated March 16, 1977 had indicated that since the 1967 injury claimant had worked at heavy labor for several different employers and, therefore, his present condition probably resulted in the work he had done since 1967 and that the responsibility, if any, for claimant's present condition would be of the employer for whom he was working at the time he became symptomatic in 1976; or was due to an off the job injury.

The Board concludes that because of the conflicting evidence offered by both parties it will be necessary to refer the matter to the Hearings Division with instructions to hold a hearing and determine the issue of whether claimant's present condition is the result of his 1967 industrial injury and represents a worsening of his condition since his last award or arrangement of compensation. Upon conclusion of the hearing the Referee shall cause to be prepared a transcript of the proceedings which shall be submitted to the Board together with the Referee's recommendation on whether claimant's request should be granted.

WCB CASE NO. 75-668 APRIL 14, 1977

HAROLD CURRY, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Order

On February 9, 1977 claimant, by and through his attorney at that time, requested the Board to exercise its jurisdiction pursuant to ORS 656.278 and award claimant compensation for temporary total disability from the date of claim closure in 1975, or, in the alternative, to award claimant permanent total disability status. Five medical reports from Dr. Cherry covering a period between January 19, 1976 and February 4, 1977 were submitted in support of the request.

Claimant had suffered an industrial injury on October 25, 1968 and his claim therefor was initially closed on January 19, 1970. Claimant's aggravation rights have expired.

On September 8, 1976 claimant had petitioned the Board to exercise its own motion and reopen his claim for the 1968 injury, and based upon the medical evidence submitted by the Fund, the Board denied claimant's request by an order dated November 17, 1976.

The Fund was advised of the request of February 9, 1977 and claimant's counsel was told to serve the Fund with a copy of the request and the attached documents.

On March 2, 1977 the Fund responded, referring the Board to its previous order of November 17, 1976 and submitting a medical report dated January 25, 1977 from Dr. Donald T. Smith to Dr. Howard Cherry and a copy of a letter from Charles B. Gill, Jr., General Manager of the Fund addressed to Governor Straub under date of January 24, 1977 which set forth the pertinent facts and history of claimant's case.

The Board, after giving full consideration to all of the facts and being fully aware of the long history involved in this case, concludes that claimant's request should be denied.

It is so ordered.

WCB CASE NO. 76-2911 APRIL 14, 1977

VERLIN HAMILTON, CLAIMANT
William Horner, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of November 10, 1975. Claimant contends he is permanently and totally disabled.

Claimant sustained a compensable back injury on September 24, 1973. On December 17, 1973 Dr. Bolliger diagnosed moderate lower dorsal spine spondylosis; hypertrophic arthritis of the lower lumbar joints and possible atherosclerosis. In the latter part of 1973 Dr. Buza performed a laminectomy.

In December, 1974 claimant, prior to being found medically stationary, was injured when he rode his bicycle into a telephone pole guy wire at night. He was knocked unconscious and sustained multiple bruises, a fractured rib and a reinjury to his back.

In July, 1975 claimant was evaluated by Dr. Gripekoven after referral by his family physician, Dr. Danner. It was Dr. Gripekoven's advice that claimant be returned to sedentary type employment which might be unrealistic considering claimant's age and education. On July 22, 1975 Dr. Danner concurred with Dr. Gripekoven and also found claimant to be permanently and totally disabled.

In September, 1975 claimant was examined by the Orthopaedic Consultants who

found claimant unable to return to his regular occupation with or without limitations, however, claimant could return to some other occupation or be referred to the Division of Vocational Rehabilitation for job placement. They found total loss of functional as moderately severe due to the industrial injury.

On November 10, 1975 a Determination Order granted claimant 288 degrees for 90% unscheduled disability.

Dr. Danner, in March, 1976, opined that before the bicycle accident claimant was gradually improving, however, the bicycle accident aggravated his back condition and the combination of the industrial injury and the bicycle accident made claimant permanently and totally disabled.

The Referee found that the injuries claimant sustained in the bicycle accident cannot be found to be a consequential result of his industrial injury. In fact, claimant's physical condition resulting from his industrial injury was improving before the bicycle incident. Therefore, the Referee concluded, claimant has no greater disability as a result of his industrial injury than that for which he was awarded.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 30, 1976, is affirmed.

WCB CASE NO. 76-2912 APRIL 14, 1977

DONALD HERMAN, CLAIMANT
Garry Kahn, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests review by the Board of the Referee's order which ordered the medical bills from Dr. Tilden be applied as an offset to the credit of the Fund.

Claimant, a policeman, on October 31, 1970 sustained a compensable injury to his back and neck when his police car was rearended. Claimant filed a third party claim against the driver of the other vehicle and recovered $4,418.63. Following the disbursement of this amount the Fund was allowed credit against future claims of $1,982.21.

Since October, 1975 claimant has been receiving medical treatment from Dr. Tilden, a chiropractor, for his industrial injury. The sole issue is whether this treatment constitutes an aggravation of his compensable injury or is merely palliative and furnished under the provisions of ORS 656.245.

The Referee found, based on claimant's testimony and the medical reports submitted by Dr. Tilden, that claimant's condition had not been aggravated and that the treatment provided claimant by Dr. Tilden was palliative, therefore, the Fund should be allowed to offset the medical bills of Dr. Tilden in accordance with the credit allowed it for future claims.

The Board, on de novo review, concurs with the conclusions reached by the Referee.

ORDER

The order of the Referee, dated August 27, 1976, is affirmed.

CLAIM NO. D 53-124426 APRIL 14, 1977

JACK HUNTER, CLAIMANT
Peter Hansen, Claimant's Atty.
Own Motion Order Referred for Hearing

On June 14, 1968 the claimant suffered a compensable injury to his back while working for IT & T Lustra Corporation, whose workmen's compensation coverage was furnished by Employers Insurance of Wausau (at that time Employers Mutual Liability Insurance Company of Wisconsin). Claimant's claim was closed with an award of 64 degrees for 20% unscheduled low back disability by a Determination Order mailed August 14, 1970. Claimant's aggravation rights expired on August 13, 1975.

On January 21, 1977 claimant, through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen claimant's claim for the 1968 injury. The request was supported by a report from Dr. Clarke dated October 19, 1976 and reports from Dr. O'Toole dated May 17, 1976 and November 16, 1976.

On January 28, 1977 the carrier was advised by the Board of claimant's request for own motion relief and furnished copies of the request and the medical reports and asked to state its position within 20 days thereafter.

On February 7, 1977 the carrier responded and furnished the Board copies of all the pertinent medical data which was contained in their claims file.

On February 18, 1977 claimant's counsel supplied the Board with a medical report from Dr. Clarke dated February 8, 1977.

At this time the Board does not have sufficient medical or lay evidence to enable it to make a determination on the validity of the request made by claimant. Therefore, the matter is referred to the Hearings Division with instructions to hold a hearing and take evidence on the issue of whether claimant's present condition is related to his industrial injury of June 14, 1968 and, if so, if claimant's condition has worsened since his last award or arrangement of compensation.

Upon conclusion of the hearing the Referee shall cause to be prepared a transcript of the proceedings which he shall submit to the Board together with his recommendation on claimant's request.

(No Number Available) APRIL 14, 1977

HELEN KELSO, CLAIMANT
Own Motion Determination

Claimant sustained a compensable injury on October 10, 1968; her aggravation rights have expired and claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen her claim. An Own Motion Order, dated October 29, 1976 remanded claimant's claim to the employer with compensation as provided by law commencing on January 19, 1976 until closure was authorized pursuant to ORS 656.278.

Claimant's treating physician referred her to the Portland Pain Rehabilitation Center for a complete evaluation. The Center reported that claimant has voluntarily removed herself from the labor market and chosen to stay at home. At the time of discharge from the Center, claimant was making gains and exhibited no pain behavior. A return to light work was recommended although claimant is not so motivated.

On February 17, 1977 claimant's treating physician indicated she was medically stationary.

On March 14, 1977 the carrier requested a determination. It was the recommendation of the Evaluation Division of the Board that claimant be granted compensation for temporary total disability from January 19, 1976 through February 17, 1977 but no award for permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 19, 1976 through February 17, 1977.

WCB CASE NO. 75-3198 APRIL 14, 1977

ELMER MILLER, CLAIMANT
Dan O'Leary, Claimant's Atty.
Bob Joseph, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson, Moore and Phillips.

The employer requests review by the Board of the Referee's order directing it to provide claimant with the appropriate medical benefits provided by law commencing April 1, 1975, also to pay claimant compensation for temporary total disability from April 1, 1975 to the date of the hearing, October 8, 1975, and thereafter, less time worked, until the claim is closed pursuant to ORS 656.268, to pay claimant as a penalty additional compensation equal to 25% of the compensation for temporary total disability due and owing claimant from April 1, 1975 to October 8, 1975 and to pay claimant's attorney a reasonable attorney fee of $850.

Claimant suffered a compensable injury to his left shoulder on April 23, 1974. He filed a claim which was accepted as a disabling injury by the employer-carrier on May 3, 1974. Dr. Kattenhorn on April 29, 1974 diagnosed an acute lumbar sprain and recommended conservative treatment; he advised claimant to discontinue to work.

On May 17, 1974 Dr. Rusch, an orthopedic specialist, examined claimant and, after making several diagnoses, recommended claimant use a thoracal-lumbar back support and discontinue employment. On September 3, 1974 Dr. Rusch released claimant to return to regular employment.

On April 14, 1975 claimant again consulted Dr. Rusch, complaining of persistent pain and discomfort in the lumbar area which was exacerbated by increased activity which involved bending, lifting, prolonged sitting and so forth. Dr. Rusch advised the claims manager for the employer on April 14, 1975 that claimant appeared to be having some degree of legitimate recurrent back complaints aggravated by activity and relieved by rest. He also stated that claimant had not participated in a rehabilitation exercise program and, if anything, had aggravated his back by attempting to return to horse back riding and manual labor when a vocational rehabilitation type of program should have been engaged in. Dr. Rusch further stated that claimant did not appear to be interested in any continuation of a specific treatment program and was awaiting further action from the employer.

On May 23, 1975 Dr. Rusch specifically indicated that claimant had resumed orthopedic care as of April 14, 1975. He said claimant's recurrent back complaints were, in fact, substantiated by objective medical findings and he recommended that claimant not return to his former employment as a plywood mill worker as of April 14, 1975.

Claimant continued to experience discomfort and contacted Dr. Beckwith who, in a report mailed to the employer on July 8, 1975, stated claimant was under continued medical treatment and, based upon his examination, he felt claimant should be considered "a total disability as of 1 April, 1975." On July 7, 1975 claimant's attorney made a formal written request to the employer to provide claimant with medical care and treatment and time loss benefits from and after April 1, 1975.

The evidence indicated that during 1974 and 1975 claimant was involved in certain activities which certainly were in conflict with his claim of physical disability. He engaged in breaking and exercising horses, repaired barns and stalls, built a corral and loaded and unloaded baled hay from a pickup. There were other activities which obviously required lifting, standing, stooping, squatting and prolonged sitting. Claimant's regular job with the employer was considered light work. When claimant was released by Dr. Rusch on September 3, 1974 to return to regular employment the mill had shut down approximately two weeks prior thereto. On June 16, 1975 the mill returned to operation. The employer would not have allowed the claimant to return to work when the "call back" was commenced in June because claimant did not have a medical release to return to full duty; the employer's plywood superintendent did not think that Dr. Rusch's report of May 23, 1975 and Dr. Beckwith's report of July 8, 1975 would have been sufficient to allow claimant to return to work.

The manager for the employer has the responsibility for processing and paying workmen's compensation claims; he denied receiving, or any knowledge of, Dr. Rusch's report of May 23, 1975 or Dr. Beckwith's report of July 8, 1975 until he saw the documents at the time of the hearing. He did receive Dr. Rusch's report of April 14, 1975 and he conceded that the report indicated a recurrence of claimant's condition but he said that it did not state that claimant could return to work. Subsequently, he received Dr. Rusch's report which was furnished to him by claimant's counsel but he could recall how long this report was in his possession. He was aware that Dr. Rusch was recommending that claimant not return to work because he talked directed to the doctor about claimant's case.

The Referee found that the claims manager, Mr. Jackson was, in fact, aware that claimant was claiming entitlement to temporary total disability benefits because he

indicated the fact of nonpayment on June 4, 1975 and he was also informed of claimant's claim by claimant's attorney on July 17, 1975. Mr. Jackson testified he did not pay claimant compensation for temporary total disability claimed from April, 1975 because he did not feel that claimant was entitled to such benefits because (1) claimant was laid off, (2) he did not feel the medical evidence was sufficient to show disability and (3) claimant may have been drawing unemployment compensation benefits.

The Referee found that claimant had proved by a preponderance of the evidence that he was entitled to further medical care and treatment pursuant to ORS 656.245(1) and to compensation for temporary total disability from and after April 1, 1975 until his claim was properly closed pursuant to ORS 656.268. The Referee found that claimant was also entitled to penalties and attorney fees pursuant to ORS 656.262(3) through 656.382.

The employer's position regarding its failure to provide this medical care and treatment and to pay compensation from and after April 1, 1975 rested on its own evaluation and assumptions about claimant's credibility, his activities during 1974 and 1975 and the fact that he drew unemployment compensation benefits during those two years. The Referee concluded that the medical findings, not the other facts just mentioned, control whether claimant was, in fact, entitled to continued medical care and treatment and time loss benefits. Furthermore, the employer had in his possession at least by June 4, 1975 Dr. Rusch's report of May 23, 1975 which indicated, based upon medical findings, that claimant could not return to his former employment as of April 14, 1975. Also the claims manager was personally aware of Dr. Rusch's recommendations. The employer was on notice that medical benefits as well as time loss benefits were appropriate commencing on April 14, 1975 and its failure to provide such medical care and treatment or to pay compensation for temporary total disability from and after April 14, 1975 constituted unreasonable delay and unreasonable refusal to pay compensation, therefore, the Referee imposed penalties and awarded an attorney fee.

The Referee, based upon the evidence presented at the hearing, concluded that the employer's contention that it was entitled to an offset for an alleged overpayment of a prior time loss benefit was not well taken and, in any event, such issue was premature; the claim had never been appropriately closed pursuant to ORS 656.268. He denied the employer's request.

The majority of the Board, on de novo review, affirms and adopts the order of the Referee, which has set forth the facts with great clarity and contains well expressed opinions and conclusions.

ORDER

The order of the Referee, dated January 13, 1976, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with this Board review, the sum of $450, payable by the employer.

Board Member George A. Moore dissents as follows:

This reviewer is of the opinion (1) that claimant is not entitled to medical care and treatment after April 1, 1975; (2) claimant is not entitled to temporary total disability benefits after April 1, 1975; and (3) the employer did not unreasonably fail to provide care and treatment and pay time loss benefits after April 1, 1975.

Dr. Rusch's initial examination (Cl. Ex. 3) reveals no knowledge of claimant's regular job as a MOR-Panel operator. Such regular job is considered light work.

Instead Dr. Rusch reported:

> "...While at work in a plywood mill, the patient was pushing approximately 120 pound sheets (sic) of plywood with a pushing device. After repetitively doing this, he noticed a gradual pain in the lumbar back area and to a lesser extent, (sic) in the intrascapular area."

On June 17, 1974 Dr. Rusch felt a job change was in order. The only job that the doctor indicated any familiarity with was pushing the 120 pound plywood sheets. (Cl. Ex. 3, 4).

On September 3, 1974 claimant was released to return to his "former type" of of employment. The doctor opined a need for neither further medical attention nor physical therapy. (Cl. Ex. 5).

However, on August 16, 1975 the employer made a large layoff and claimant's job was not called back for rehire until June 16, 1975. (Tr. 179).

After a period of over nine months and while claimant's claim was still open, he returned at Dr. Rusch's request for an office re-evaluation on April 14, 1975. (C. Ex. 6). In this nine month interim claimant had galloped and breezed horses at Portland Meadows, (Tr. 11); had taken a fall while galloping a horse, (Tr. 55); galloped horses prior to the Tillamook County Fair (Tr. 74); hauled clay in and out of horse stalls, shoveled the clay, and tamped the clay with an iron tool (Tr. 74, 75); broke a wash-rack at the Tillamook County Fairgrounds (Tr. 75); continued to work repairing stalls after the fair (Tr. 77); constructed a round corral (Tr. 77); broke untrained horses (Tr. 77, 88); and dismounted such horses by giving "himself a little push and hits the ground like a rubber ball. I mean he is very agile." (Tr. 82, 93, 107).

The claimant has the burden of showing that his current medical care and treatment is "resulting from the injury." Dr. Rusch, instead, opined that claimant's attempt to return to riding horses professionally and the manual labor set forth above was the medical causation for his current symptomatology. I cannot find that claimant is entitled to medical care and treatment after April 1, 1975.

With regard to the payment of temporary total disability, this reviewer notes that claimant was released to his "regular employment" September 3, 1974. (Cl. Ex. 5).

Temporary disability payments ordinarily continue until a workman returns to regular work, is released by his doctor to return to regular work, or there has been a determination that the workman's condition is medically stationary under ORS 656.268. Jackson v SAIF, 7 Or App 109.

The employer did not pay temporary total disability benefits after April 1, 1975 because their plant was shut down, claimant had been released to work by Dr. Rusch as of September 24, 1974, and the medical evidence supported the fact that claimant's intervening activities were the cause of his increased symptomatology.

Although the claim closure had not been accomplished, the record did recite the fact that the employer had been unable to contact the claimant at various times to schedule the necessary closing examinations. Therefore, I recommend reversing the Referee's order and finding that claimant is not entitled to further medical care and

treatment nor temporary total disability after April 1, 1975, and that the employer did not unreasonably fail to provide these benefits.

/s/ George A. Moore, Board Member

SAIF CLAIM NO. NC 95824 APRIL 14, 1977

ROBERT MURRAY, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on October 13, 1967. Thereafter claimant came under the care of Dr. James who treated claimant continuously to the present and performed numerous surgeries on claimant.

Claimant has undergone eight surgeries involving the fingers of the left hand, his left foot, and left toes. Four Determination Orders have been entered and claimant has received total awards of 85% loss of the left forearm; for 5% loss of the right forearm; for 20% loss of the left leg; and for 50% unscheduled neck disability.

On March 21, 1977 Dr. James found claimant's condition medically stationary and that he had a solid arothedesis.

On March 29, 1977 the Fund requested a determination. It was the recommendation of the Evaluation Division of the Board that claimant had been adequately compensated by the prior awards for his permanent partial disability. However, claimant was entitled to compensation for temporary total disability from November 24, 1976 through March 21, 1977.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from November 24, 1976 through March 21, 1977.

SAIF CLAIM NO. PC 101782 APRIL 14, 1977

CHARLIE W. OWEN, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable low back injury on November 27, 1967. On December 8, 1967 Dr. Serbu diagnosed acute low back strain.

On March 4, 1968 Dr. Serbu found claimant to be medically stationary with no permanent partial disability.

A Determination Order of March 22, 1968 granted claimant time loss benefits only.

Claimant requested a hearing and on October 2, 1968 claimant was awarded 32 degrees for 10% unscheduled low back disability. The claim was reopened by a stipulation on September 22, 1972 with time loss commencing June 22, 1972.

Claimant was examined on June 22, 1972 by Dr. Campagna who diagnosed nerve root irritation bilaterally of S1 secondary to herniated disc. On July 12, 1972 a laminectomy and discectomy of L4-5 was performed and repeated on November 3, 1972 secondary to recurrent disc. On September 21, 1973 claimant was seen by the doctors at the Disability Prevention Division; degenerative disc disease at L4-5 was diagnosed.

A Determination Order of June 18, 1974 granted an additional award of 48 degrees for 15% unscheduled low back disability.

Claimant appealed and on October 25, 1974, after a hearing, an order of the Referee reopened claimant's claim commencing time loss on March 1, 1974. On January 16, 1975 Dr. Holbert diagnosed degenerative joint disease at L4-5 and nerve root scarring at L4-5 and on May 13, 1975 claimant underwent a fusion at L4-S1.

In his closing report of March 16, 1977 Dr. Holbert indicated claimant did not want the offered repair of his pseudoarthrosis.

On March 24, 1977 the Fund requested a determination. The Evaluation Division of the Board recommended compensation for temporary total disability from March 1, 1974 through March 16, 1977 and an additional award of 32 degrees for 10% unscheduled disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from March 1, 1974 through March 16, 1977 and an award of 32 degrees for 10% unscheduled disability. This is in addition to all previous awards.

WCB CASE NO. 75-5373 APRIL 14, 1977

GILBERT RICHARD, CLAIMANT
Jan Baisch, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an award of permanent total disability to commence on October 3, 1975 with due credit allowed to the Fund for payments made under the Determination Order of that date.

Claimant sustained a compensable low back injury on October 28, 1970, and underwent a period of chiropractic treatment. Dr. Weinman, an orthopedist, diagnosed a strain superimposed upon severe degenerative joint disease and referred claimant to the Physical Rehabilitation Center; the physicians at the Center recommended claimant not return to heavy physical labor because of possible aggravation of his condition.

On July 31, 1971 claimant underwent a total laminectomy at L2-3 and was released for light carpentry work on March 1, 1972. On May 3, 1972 a Determination Order granted claimant 128 degrees for 40% unscheduled low back disability.

In 1974 claimant's claim was reopened for aggravation and claimant came under the care of Dr. Campagna. In March, 1975 Dr. Campagna indicated claimant would have been able to resume his occupation in March, 1974. In June, 1975 X-rays revealed spondylosis of all three levels of claimant's spine. Dr. Campagna found claimant's condition stationary and that he was totally disabled from severe spondylosis of the entire spine which was not related to his industrial injury.

Dr. Weinman examined claimant in September, 1975 and diagnosed degenerative joint disease of the lumbar spine, severe. He felt the degeneration might have been speeded up by claimant's injury; he thought that the injury contributed 20% of the increase in claimant's symptoms and the degenerative joint disease and the passage of time would account for the remaining 80% of claimant's problems.

On October 3, 1975 a Second Determination Order granted claimant an additional award of 80 degrees, giving claimant a total of 208 degrees for 65% unscheduled disability.

With the aid of the Division of Vocational Rehabilitation claimant was able to function as a cabinet maker in 1972 and 1973 but claimant testified he has not been able to work in any capacity since October, 1973. Claimant is currently taking no medicine nor is he under any medical care.

The Referee found that the evidence indicated that claimant had a pre-existing degenerative disc disease which was aggravated by the industrial injury. In June, 1975 Dr. Campagna reported claimant was totally disabled as a result of severe spondylosis.

The Referee concluded, notwithstanding the reports of Dr. Campagna and Dr. Weinman, that claimant was permanently and totally disabled. Claimant had been able to work regularly prior to the industrial injury despite his underlying condition. After the injury he was not able to work for any sustained periods. The incident that rendered claimant incapable of working regularly at any suitable and gainful occupation was the industrial injury which aggravated his pre-existing condition. Therefore, he granted claimant an award of permanent total disability, effective from the date of the last Determination Order.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated June 29, 1976, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with this Board review, the sum of $400, payable by the Fund.

PERRY RODENBAUGH, CLAIMANT
Richard Busse, Claimant's Atty.
Noreen Saltveit, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which awarded him 192 degrees for 60% unscheduled low back disability. Claimant had been granted an award for permanent total disability by a Determination Order dated February 19, 1975 and the employer had requested a hearing.

Claimant was a 60 year old chef when he suffered a compensable injury to his low back on August 10, 1974. Dr. Edelson was first consulted by claimant and he has continued to be claimant's treating physician. In November, 1974 claimant was enrolled at the Disability Prevention Division and he has also been examined by Dr. Davis and Dr. Paxton. Claimant has never been hospitalized nor has he had surgery.

Based on the documentary evidence, the Referee found that claimant was not permanently and totally disabled primarily because, although claimant contended that he cannot work because of the disability resulting from his injury, claimant continued to work for two weeks after the injury occurred. The osseous abnormalities to which claimant had referred to indicate his severe disability resulting from injury was shown by medical evidence to have pre-existed the injury; furthermore, it did not prevent claimant from working following the injury.

Claimant also contended that he fell within the odd-lot category. The Division of Vocational Rehabilitation stated that claimant was not interested in any rehabilitation program and Dr. Paxton reported that claimant had no motivation to return to work. Claimant's wife is an invalid and claimant and his wife receive substantial benefits at the present time.

The Referee found that claimant was more motivated to stay home and take care of his invalid wife than to return to work. He found that claimant believes his responsibility is to his wife which is more important than his responsibility to the employer. The Referee concluded that claimant was not so disabled that motivation was not a factor to be considered in determining whether or not claimant was odd-lot permanent total disability.

Having found that claimant was not entitled to an award of permanent total disability, the Referee proceeded to evaluate claimant's unscheduled disability, taking into consideration claimant's age, education, intelligence and adaptability upon which the consequences of the injury had been superimposed. He found that claimant, now 62 years old, had one year of college and that both his intelligence and adaptability were in the high average range. Although claimant's principal employment had been in the food preparation field, he has also worked at several other different types of jobs and could be reasonably concluded that claimant would be capable of returning to such other employment. The physical impairment resulting from the injury was not easy to ascertain because of psychological dysfunction which Dr. Hickman attributed largely to the industrial injury. Dr. Hickman felt that this psychological dysfunction could be alleviated by treatment but claimant interrupted the recommended treatment when his

wife became ill. Furthermore, after claimant received his award for permanent total disability he lost interest in receiving any treatment.

Based upon the foregoing evidence, the Referee concluded that the wage earning capacity of claimant had been impaired 60% as a result of his industrial injury. He, therefore, awarded claimant 192 degrees in lieu of the award of permanent total disability granted by the Determination Order of February 19, 1975.

The Referee further ordered that the claimant's permanent total disability award should not be reduced by payments heretofor made on his permanent total disability award.

The Board, on de novo review, affirms the order of the Referee.

ORDER

The order of the Referee, dated October 1, 1976, is affirmed.

WCB CASE NO. 75-3259 APRIL 14, 1977
WCB CASE NO. 75-3260

WILLIE ROLLINS, CLAIMANT
Allan Coons, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of December 10, 1974 (WCB Case No. 75-3260) and increased the award made by the Determination Order of July 31, 1975 (WCB Case No. 75-3259) to 90 degrees for loss of the right leg.

Claimant sustained a compensable injury to his right leg, diagnosed as hemarthrosis, acute. Subsequently, claimant's leg condition worsened. On December 5, 1973 Dr. Larson and Dr. Miller diagnosed thrombophlebitis. The Fund first denied responsibility but, after receipt of Dr. Miller's report which causally connected claimant's condition to his industrial injury, accepted the condition.

A Determination Order of July 31, 1975 granted claimant 30 degrees for 20% loss of the right leg.

Between January 18, 1974 and February 26, 1974 claimant developed an inguinal hernia. On March 27, 1974 claimant underwent repair for bilateral inguinal hernia. On June 13, 1974 claimant received his second industrial injury when he tore the incisional area of the hernia repair while at work.

A Determination Order of December 10, 1974 granted claimant compensation for time loss only.

Claimant was examined by Dr. Mehl on August 25, 1975. He diagnosed inguinal ligament strain without hernia or phlebitis. Upon examination on October 24, 1975 a large lymph node and several small lymph nodes which appeared tender were noted. The

doctor indicated claimant's condition was probably related to the phlebitis in the vein. A venogram indicated the tracts were completely open and without obstruction. Dr. Mehl believed that claimant had a form of phlebitis periodically for a couple of years which was probably related to his industrial injury of October 3, 1973. However, he thought that claimant's most recent complaint was not related to his work environment.

Claimant's primary occupation is truck driving, however, he has been a construction worker, laborer, cement finisher. Presently he is working as a flagman but has not sustained any reduction of wages.

The Referee found that claimant had failed to prove his contention that his claims had been prematurely closed. Claimant's current complaints were not found by Dr. Mehl to be related to claimant's work related activities. There was no contradictory medical evidence offered.

The Referee further found that claimant had failed to prove that he was entitled to any award for an unscheduled disability. The medical evidence indicates no residual effects from either claimant's hernia condition or his right leg condition. On August 25, 1975 Dr. Mehl found no evidence of inguinal hernia or phlebitis. He affirmed the Determination Order of December 10, 1974.

The Referee concluded, however, that claimant was entitled to a greater award for his scheduled disability. Claimant's testimony and the medical evidence indicate the impairment to claimant's right leg is substantial. Furthermore, the medical evidence supports a finding that claimant is no longer able to engage in heavy work or any job placing heavy physical demand on claimant's knee joint. The Referee awarded claimant an additional 60 degrees for a total of 90 degrees for 60% loss of his right leg.

The Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 10, 1976, is affirmed.

WCB CASE NO. 76-6065 APRIL 14, 1977

ROBERT E. SELF, CLAIMANT
Evohl Malagon, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order Referred for Hearing

On October 13, 1969 claimant, while employed by Gheen Irrigation Works, suffered a compensable injury to his lower back. The claim was closed by a Determination Order mailed July 7, 1970. Claimant's aggravations rights expired on July 6, 1975.

Claimant asked the State Accident Insurance Fund, pursuant to ORS 656.245, to provide him with medical treatment prescribed by Dr. John L. Carter in his report dated October 25, 1976. Claimant alleges that the Fund failed to properly accept or deny this request and on November 4, 1976 he requested a hearing on said issue and asked for an assessment of penalties and an award of attorney fees.

On April 6, 1977 claimant, by and through his counsel, requested the Board to

exercise its own motion jurisdiction under the provisions of ORS 656.278 and reopen his claim for the October 13, 1969 injury.

At the present time the Board does not have before it sufficient evidence upon which to make a determination of claimant's request to reopen the October 13, 1969 claim. Therefore, the matter is remanded to the Hearings Division with instructions to hold a consolidated hearing on this issue and the issue of the propriety of the Fund's action on claimant's request for medical care under the provisions of ORS 656.245. Upon conclusion of the hearing the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendation on the claimant's request to reopen his claim. The Referee shall also enter an order, appealable under the provisions of ORS 656.289, on the issue of the Fund's failure to properly accept or deny the request for medical care and treatment pursuant to ORS 656.245.

WCB CASE NO. 76-4931 APRIL 14, 1977
WCB CASE NO. 75-5587

ROBERT V. SMITH, CLAIMANT
Cash Perrine, Claimant's Atty.
Merlin Miller, Defense Atty.
Dept. of Justice, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer, Burke Plumbing and its carrier, The Travelers Insurance Company, request review by the Board of the Referee's order directing Travelers to accept claimant's claim for an injury suffered on June 23, 1975 and to provide claimant benefits, as provided by law, and pay claimant's attorney a reasonable attorney fee.

Claimant suffered a compensable injury to his low back on September 15, 1970 while employed by Burke, whose carrier at that time was the State Accident Insurance Fund. He received chiropractic treatment for this injury from Dr. Spurlock until October 19, 1970. The claim apparently was closed on a "medical only" basis on September 15, 1970.

On June 23, 1975 claimant again consulted Dr. Spurlock, stating that he had suffered an on the job injury on that day. Claimant was referred to Dr. Miller, a neurosurgeon, who performed a laminectomy in October, 1975 and on January 3, 1976 indicated claimant had reinjured his back on June 23, 1975 while lifting tubs at work. He felt that claimant had been able to work as a plumber until then and that he had aggravated a pre-existing condition of spondylolisthesis which had been causing his symptoms over the years. On March 21, 1976 Dr. Miller advised that claimant would probably not return to work as a plumber and that vocational rehabilitation would be appropriate.

After the 1970 injury claimant had continued working for various employers and was again working for Burke at the time of the June 23, 1975 injury. The Travelers was providing Burke with workmen's compensation coverage at that time.

On or about September 18, 1975 claimant filed a claim for an injury to his back while lifting material on the job. When claimant had been hospitalized by Dr. Miller in September, 1975 The Travelers denied the claim on the basis of claimant's failure to

file a claim within 30 days of its alleged occurrance and also because no particular injury or date of injury was alleged. After this denial claimant filed a claim for aggravation with the Fund which was denied. The issue before the Referee was whether claimant had suffered an aggravation of an old injury or a new injury; also whether the claim was timely filed.

The Referee found that claimant had established good cause for his failure to notify the employer within 30 days of his injury. ORS 656.265(4)(c). The Referee found that on September 1, 1975 when claimant went to the office of the Fund to discuss the claim he had no knowledge that it was no longer Burke's carrier but had been succeeded by The Travelers; also it was reasonable for the claimant to assume that his present problems could have been associated with his 1970 injury. Therefore, the Referee found that claimant's claim against The Travelers was not barred.

On the merits of the case, the Referee concluded that the weight of the evidence was that claimant had suffered a new injury in 1975 rather than an aggravation of his 1970 injury. Except for a few days in 1970 claimant had missed little or no work on account of his back until June, 1975. Both Dr. Miller and Dr. Spurlock were of the opinion that the 1975 injury was a new development that the disc resulted from the trauma imposed on the pre-existing spondylolisthesis. Claimant had been able to do heavy work for nearly five years without any severe back difficulty and the only medical treatment over that period of time consisted of a few chiropractic treatments.

Claimant had requested penalties against The Travelers. The Referee found that The Travelers' processing of the claim was not unreasonable in view of the peculiar circumstances of this case and he denied the request.

The Board, on de novo review, affirms the order of the Referee. Claimant had been relatively free of any back symptoms for a long period of time and suddenly in June, 1975 suffered an injury which required a laminectomy. This injury precluded claimant from returning to work as a plumber, a job which he had been able to perform without any difficulty between 1970 and 1975; unquestionably, the incident of June 23, 1975 constitutes a new independent, intervening trauma, therefore, claimant's condition is the responsibility of The Travelers, the carrier for the employer at that time.

ORDER

The order of the Referee, dated May 24, 1976, is affirmed.

Claimant's attorney is granted as a reasonable attorney fee for his services in connection with this Board review, the sum of $150, payable by The Travelers.

SAIF CLAIM NO. FC 275071 APRIL 14, 1977

MELVIN SPENCER, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable ankle injury on November 2, 1970, which resulted in a tear of his Achilles tendon. This condition was repaired on November 4, 1970 by Dr. Ruebendale. A Determination Order of July 21, 1971 granted claimant an award for 15% loss of the right foot.

Claimant appealed; an order entered November 4, 1971 granted an additional 15%, giving claimant a total award for 30% loss of his right foot.

Claimant sustained another industrial injury to the same foot on May 21, 1973. A hearing was held March 14, 1974 and it was determined that the injury in 1973 was a new injury not an aggravation of his 1970 injury. The Referee awarded claimant an additional 27 degrees loss of the right foot, giving claimant a total award of 50.5% loss of the right foot.

In October, 1976 Dr. Schuler started claimant on a course of physical therapy. On January 3, 1977 claimant was examined by the Orthopaedic Consultants whose findings were the same as at the time of the claim closure in 1973. On January 26, 1977 Dr. Schuler found claimant medically stationary and recommended claimant find a job which did not require prolonged standing on his feet.

On February 4, 1977 the Fund requested a determination. The Evaluation Division of the Board, based upon the reports of Dr. Schuler and the Orthopaedic Consultants, recommended no further increase in permanent partial disability; however, claimant was entitled to compensation for temporary total disability from October 4, 1976 through January 27, 1977.

ORDER

Claimant is hereby granted compensation for temporary total disability from October 4, 1976 through January 27, 1977.

WCB CASE NO. 76-611 APRIL 14, 1977

EVA WAMBOLDT, CLAIMANT
Bert Joachims, Claimant's Atty.
Michael Hoffman, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Moore and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the Determination Order of December 31, 1976.

Claimant worked nine years for Electronics Specialties doing various jobs. Claimant's last job was as a lathe operator from June, 1973 to November, 1974; she milled and grooved slip rings. While the slip rings, made of gold and silver embedded in nylon,

were in the lathe they were cooled with freon gas. There were no vents on the workbench where the lathe was located. At the end of this workbench in a shielded area the slip rings were cleaned with a spray gun, this portion of the workbench was vented. The odor from this cooling process made claimant sick to her stomach.

Claimant testified that the instructions on the freon bottle stated that the freon was not to be breathed. Claimant further testified that she began to lose her balance, felt tightness and numbness in her head and ringing in her ears. During March, 1974 claimant consulted Dr. Leavitt; at that time claimant's balance was so poor that she walked hugging the wall on the way to the lunchroom; also, she was fatigued by the end of the work day.

Dr. Leavitt treated claimant for an inner ear infection and gave her medication for this but without any resultant success. Claimant then underwent a hernia operation and was off work for 54 days during which the symptoms subsided. She returned to work in September, 1974 and the symptoms again commenced. Acting upon her doctor's request claimant quit work in November, 1974.

Claimant uses a cane all the time at home. She still has ringing in her ears although it has lessened. She cannot bear to touch her forehead as the nerves feel like they were standing out in the open.

The Referee found that both Dr. Carter and Dr. Blachly, who also had examined claimant, felt claimant's problems were not from breathing freon gas but it was more likely that claimant had a conversion reaction which was not causally related to her work.

Dr. Leavitt believed the freon caused claimant's problems because of the history given to him by her and because he failed to find any other basis for her condition.

The Referee concluded that the preponderance of the evidence was that claimant is medically stationary and entitled to compensation for temporary total disability only; she has failed to prove by a preponderance of the evidence that her disability was permanent. He affirmed the Determination Order.

The majority of the Board, on de novo review, adopts the Referee's order.

ORDER

The order of the Referee, dated September 16, 1976, is affirmed.

Dissenting opinion of Board Member Phillips:

The majority opinion concludes that the reaction experienced by claimant is only temporary as a result of the majority medical opinion.

Testimony is to the effect that claimant still experiences the same reactions to the exposures of the work place as she did when she terminated her work. Whether that reaction is from the exposure to chemicals or a conversion reaction as the result of the repeated exposure is academic. In either case the condition is compensable.

I would reverse the Referee and find the claimant does have permanent disability as a result of her exposures in the work place.

/s/ Kenneth V. Phillips, Board Member

WCB CASE NO. 75-5171 APRIL 14, 1977

GREGORY WATSON, CLAIMANT
Richard Stinson, Claimant's Atty.
Scott Gilman, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the employer's denial of claimant's claim for an industrial injury.

The employer filed a cross appeal, contending the Referee failed to find whether or not claimant's claim was compensable, and also that claimant was precluded from receiving workmen's compensation benefits because he falsified his physical condition when he applied for employment.

Claimant began working for the employer as a production worker on September 15, 1975. After five shifts he did not return to work and five days later consulted Dr. Fry with complaints of low back pain. On October 21, 1975 Dr. Fry performed surgery for L5-S1 laminectomy and discectomy. On November 13, 1975 claimant's claim was filed; it was denied on the ground that the injury did not arise out of and in the scope of claimant's employment.

In April, 1969 claimant had been involved in a high speed motorcycle accident; he had suffered a concussion and numerous abrasions, compression fractures of the 8th, 9th and 10th thoracic vertebra. One month later he had been involved in an automobile accident and fractured the 11th dorsal vertebra. In October, 1969 claimant was thrown from his car and suffered a concussion, multiple pelvic fractures, compression fracture of the 7th cervical vertebra and dislocation of the 6th cervical vertebra. This required a cervical fusion. The evidence indicates claimant has suffered other injuries in 1973. In April, 1974 claimant was struck in the neck and shoulder by a four by four and in September, 1974 he was involved in another automobile accident. Again in January, 1975 claimant was rear-ended in another automobile accident and received injuries including spasms and muscle tenderness in the lumbar spine. Claimant has had another automobile accident on September 28, 1974 and was thrown through the windshield, however, there is no medical documentation of his injuries.

Dr. Fry indicated that claimant had mechanical low back pain as a result of his January, 1975 automobile accident but his heavy type of work exacerbated his back condition.

The Referee found some evidence that claimant's work for the employer exacerbated a pre-existing condition, causing an increase in symptoms. However, claimant's falsifying his application and lying under oath at the hearing made it difficult for the Referee to believe any of claimant's testimony. The Referee further found that Dr. Fry's opinion cannot be given much weight because it was based upon claimant's history as related to him.

The Referee concluded that there was inadequate medical evidence of a causal relationship between claimant's work and his symptoms; also, claimant's work did not aggravate his low back symptoms.

The Referee also noted that claimant has had several industrial injuries and knew the procedure for filing claims and yet did not file his claim until November 13, 1975.

The Referee affirmed the denial.

The Board, on de novo review, affirms the Referee's order that claimant has failed to sustain his burden of proving he sustained a compensable injury. However, the Board finds that the employer's contention of claimant's falsification of his physical condition on his application excludes him from receiving workmen's compensation benefits is not tenable in Oregon under the provisions of the Workmen's Compensation Act.

ORDER

The order of the Referee, dated September 2, 1976, is affirmed.

(No Number Available) APRIL 14, 1977

In the Matter of the Second Injury
Fund Relief of
CLARK & POWELL LUMBER CO., EMPLOYER
Dept. of Justice, Defense Atty.
Own Motion Determination Order

On July 17, 1975, the Evaluation Division of the Workmen's Compensation Board entered a Second Injury Determination Order granting second injury relief to the above named employer regarding an injury suffered by its employee, John E. Curl on February 20, 1974. (SAIF Claim No. WD 7748)

The employer first applied for second injury fund relief on April 10, 1974. That application was interpreted as containing evidence of employer knowledge of preexisting disability sufficient to satisfy Rule IV B of the criteria for eligibility found in the Second Injury Rules. Second injury relief was therefore granted.

The Board has since learned that despite the worker's extensive preexisting disability, the employer was totally unaware of its existence until after the February 20, 1974 injury occurred.

The employer has thus failed to meet all of the criteria for eligibility as required by the rules and is not eligible to receive relief from the Second Injury Fund. Under these circumstances, no further payments from the Second Injury Fund should be made to the Clark & Powell Lumber Co. on account of the February 20, 1974 compensable injury of its employee John E. Curl.

It is so ordered.

ADVANCE PAYMENT

AGGRAVATION

AOE/COE

NOTICE OF INJURY

OCCUPATIONAL DISEASE

PENALTIES AND FEES

PERMANENT PARTIAL DISABILITY

(1) Arm and Shoulder
(2) Back - Lumbar and Dorsal
(3) Foot
(4) Forearm
(5) Hand
(6) Leg
(7) Neck and Head
(8) Unclassified

(1) ARM AND SHOULDER

(2) BACK

(3) FOOT

(4) FOREARM

(5) HAND

(6) LEG

(7) NECK AND HEAD

(8) UNCLASSIFIED

PROCEDURE

REQUEST FOR REVIEW

TEMPORARY TOTAL DISABILITY

TOTAL DISABILITY

VOCATIONAL REHABILITATION

Name	WCB Case Number	Pag
Kane, Donald	75-798	39
Kelso, Helen	No Number Available	281
Kephart, Archie F.	75-925	115
Kephart, Archie F.	75-925	148
Kiewel, Robert	75-3551	83
Kiger, Richard	76-938	245
Kindy, Jack	75-5212	270
Kirwan, Frank	75-5201	23
Kleatsch, James	76-705	106
Knapp, Carol	76-2203	271
Knaus, Terry	76-2660	52
Koonce, Maurice	76-2717	91
Koster, George	SAIF Claim No. GC 91028	257
Kulikov, Foma	75-3567	176
Kunkel, Edwin E.	75-4558	239
Kytola, Allan	75-2708	19
Lamberts, Irene	76-1865	15
Lamkey, Melvin	76-51	207
Landry, Linda	76-333	40
Larson, Kenneth	428-C-01297 (Great American) 05-X-025591 (Argonaut)	251
LeFever, Harvey	75-4494, 75-5500 and 76-856	196
LeFever, Harvey	75-4494, 75-5500 and 76-856	224
Leith, Marvin	76-2323	140
Lewis, Alden	76-1592	188
Logan, Ronald	76-38	148
Logerwell, George	76-439-E	63
Mabry, James	75-4644	90
MacDougall, Vivian	76-1444	14
Makinson, Joel	75-5040	89
Mapes, Rodney	75-3041	236
Martinez, Joe	76-1519	153
Matchett, James	76-1953	247
Mattern, Mary	76-363	87
Mayes, Raymond	76-3262	144
McBride, Billy	76-2205 and 76-3231	223
McCartney, Jerald G.	Claim No. 133CB2906035	62
McCullough, Eva	76-1227	123
McCuskey, Richard	75-3960	18
McFarland, Weldon F.	75-4766-E	2
McFarland, Weldon	75-4766-E	232
McFarren, Robert E.	76-580	100
McMain, Michael	76-2830	179
Merrifield, Gary R.	75-4758	23
Merritt, Alfred	76-4209	240
Michel, Donald	76-3147	15
Midwood, Evelyn	SAIF Claim No. C 51408	251
Miller, Elmer	75-3198	28

ORS CITATIONS