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VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

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PRICE FORTY DOLLARS

WCB CASE NO. 76-658 APRIL 19, 1977

ROBERT CORBETT, CLAIMANT
Keith Tichenor, Claimant's Atty.
Merlin Miller, 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 for an aggravation to it for acceptance and payment of compensation as provided by law.

Claimant sustained a compensable acute thoracic sprain injury on July 31, 1973. The claim was accepted.

Claimant's claim was closed by a Determination Order dated February 8, 1974 with an award of 48° for 15% unscheduled disability.

Claimant saw Dr. Chester in May, 1974 complaining of back spasms while moving a T.V. set. Dr. Buza examined claimant in October, 1974 and diagnosed extruded L5-S1 fragment on the left with upper respiratory infection. On October 27, 1974 claimant underwent a partial lumbar hemilaminectomy.

In July, 1974 claimant requested a hearing on aggravation and the extent of his permanent partial disability. A stipulation was approved on December 24, 1974 granting claimant $4,000.

In November, 1975 Dr. Buza again examined claimant and found probable recurrent low back or chronic back strain. Dr. Buza further indicated that the treatments he rendered to claimant in late 1975 and early 1976 were related to the 1973 industrial injury.

Claimant testified that he felt fine in March, 1975 but in May began experiencing back spasms, pain and swelling which were more severe than before the surgery.

Dr. Buza conceded that his statement that the T.V. incident occurred in 1975 was in error; that it actually occurred in 1974 prior to the surgery and the stipulation.

Dr. Buza does opine that claimant's condition was worse in 1975 and early 1976 and that a portion of that worsening is attributable to the 1973 injury.

The Referee found that the medical evidence, along with claimant's credible testimony, indicates a worsening of claimant's condition since mid-1975 and, therefore, the claim should be reopened. He remanded claimant's claim for aggravation to the employer.

The Board, on de novo review, disagrees with the conclusions reached by the Referee. The Board finds that the disputed claim settlement bars the claim for aggravation. Furthermore, the Board finds that the T.V. incident was an independent, intervening trauma and the condition thereafter was related to this incident and not an aggravation of the 1973 industrial injury.

ORDER

The order of the Referee, dated August 30, 1976, is reversed.

The denial of claimant's claim for aggravation of his 1973 injury is hereby affirmed.

WCB CASE NO. 76-1893 APRIL 19, 1977

GEORGE DOERN, CLAIMANT
W. A. Franklin, Claimant's Atty.
Merlin Miller, 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 affirmed the Determination of March 31, 1976 and remanded claimant's claim for an injury to his left chest to the employer for acceptance and payment of compensation as provided by law.

Claimant, a 56 year old truck driver, sustained a compensable injury to his right chest wall on December 1, 1975. On April 5, 1976 claimant filed another Form 801 indicating an injury to his left chest. The employer accepted the claim for the right chest wall injury but issued a partial denial for the left chest on April 20, 1976.

Claimant testified that he had a left nipple inversion since 1972 as a result of trauma while employed by this employer. Claimant made no claim for this condition.

Dr. Holmes, claimant's treating physician, indicated that claimant had a left inverted nipple for approximately two years which caused him no pain until two months before the surgery. Dr. Holmes, another physician, reported that the inverted nipple would return to normal then recur, however, a year prior to surgery it became inverted and remained so.

On March 15, 1976 a left subcutaneous simple mastectomy was performed on the left chest which indicated no malignancy.

A Determination Order of March 31, 1976 granted claimant no award for permanent partial disability.

The Referee found that the evidence indicates claimant has had an inverted nipple since 1972 which did not become symptomatic until the compensable injury. This constitutes a re-injury of a prior condition which became serious enough after the industrial injury to require surgery.

The Referee concluded that the left chest injury is a compensable injury and, therefore, remanded the claim to the employer for acceptance.

The Board, on de novo review, finds that there is no medical evidence to establish a causal connection between the December 1, 1975 injury and the subsequent surgery to the left chest. Claimant's industrial injury was to the right chest and Dr. Gerow, Dr. Holmes and Dr. Oler all fail to make such a causal connection. Therefore, the partial denial for an injury to the left chest, is affirmed.

ORDER

The order of the Referee, dated July 20, 1976, is reversed.

The partial denial issued by the employer on April 20, 1976 is affirmed.

WCB CASE NO. 76-3305 APRIL 19, 1977

LEZLEY DRAKE, CLAIMANT
Edward Olson, 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 granted claimant an additional 22° for partial loss of the left forearm, giving claimant a total award of 75° for 50% loss of the left forearm. Claimant contends he is entitled to permanent partial disability for loss of the whole arm, not the forearm, for which he contends he has nearly total loss.

Claimant, age 70, sustained a compensable injury on June 22, 1970 sustaining a deep laceration of the medial side of the left forearm with partial severance of the ulnar nerve. Claimant returned to work on October 12, 1970 with marked weakness of the left hand. Claimant then underwent a neurolysis of the left ulnar nerve in September, 1971.

Dr. Hayes in January, 1972 found claimant medically stationary with 50% loss of grip in the left hand and marked weakness in bringing his fingers together.

A Determination Order of February 2, 1972 granted claimant 53° for partial loss of the left forearm.

Claimant continued needing medical treatment and a surgical exploration was subsequently performed by Dr. Mason; he indicated that claimant would be unable to use the left hand until May, 1975 because of ulnar nerve neuroma.

On October 2, 1975 Dr. Mason performed an ulnar nerve operation. A Second Determination Order of May 20, 1976 granted claimant no additional award for permanent partial disability.

In October claimant was examined by Dr. Nathan who found atrophy of the left forearm and reduced left wrist motion. Dr. Nathan further felt that the impairment of the left upper extremity related to the injury only to the left ulnar nerve and the limited range of motion of claimant's left elbow. Dr. Nathan rated claimant's total impairment at 45% of the left upper extremity.

The Referee concluded that based upon the medical reports submitted, claimant is entitled to an additional award of 22° for partial loss of the left forearm.

The Board, on de novo review, finds that the injury of June 22, 1970 was to the elbow, therefore, any award for physical impairment should be judged on the whole left arm not just the forearm which represents impairment below the elbow. Therefore, claimant is entitled to an award of 86.4° for 45% loss of his left arm.

ORDER

The order of the Referee, dated November 17, 1976, is modified.

Claimant is hereby granted an award of 86.4° for 45% loss of his left arm.

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. 75-5089 APRIL 19, 1977

DARRELL HIX, CLAIMANT
Richard Stark, 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 denial of claimant's claim for an industrial injury.

On August 29, 1975 claimant, 16 years of age, got his arm caught between a conveyor belt and a roller at Gold Hill Lime Plant with resultant amputation of the right arm.

On October 31, 1975 the State Accident Insurance Fund denied claimant's claim for the right arm injury on the ground that there was no contract of employment and, therefore, claimant was not a subject workman within the provisions of the Oregon Workmen's Compensation Law.

The evidence indicates that services were performed by the claimant which were of benefit to Mr. Sanders, the owner and operator of the lime plant, and money was paid.

The evidence also indicates that claimant was on the premises of the lime plant because school was out and he was at loose ends, and enjoyed the companionship of his father. His father hauled loads of lime in his truck for Mr. Sanders. During the time that the lime was being processed, the claimant performed work directly related to the plant operation and of benefit to Mr. Sanders.

In June Mr. Sanders gave claimant's father a check to cover his hauling of the lime and Mr. Sanders told him to give $40 out of his check to the claimant because he had earned it. On the day of the injury Mr. Sanders gave claimant a $100 bill to buy school clothes.

No discussion was ever held between Sanders and the claimant or claimant's father concerning services being performed for wages. The father testified that claimant did expect to be paid for his services.

Mr. Sanders testified that while claimant was on the premises he asked him to do some small chores. But he further testified that he felt he had no control over the claimant. Mr. Sanders indicated that claimant knew what work had to be done at the plant and normally just went to work without being told what to do.

The Referee found all of the witnesses to be credible. On the merits of the case he found there was no contract to hire between claimant and Mr. Sanders and that Mr. Sanders did not retain the right of control over the activities of claimant. Furthermore, there was no implied contract of hire established by the fact that Mr. Sanders provided money to claimant; the Referee found that this money was merely a gratuity rather than a wage.

The Referee concluded that claimant's injury was a non-compensable injury.

The Board, on de novo review, finds there was an implied contract for hire between claimant and Mr. Sanders; that Mr. Sanders accepted the claimant's work and did have the right to control the work that was performed. This case is similar to the case of Buckner v Kennedy's Riding Academy 99 Ad Sh 1525 (Or App 1974) wherein the court held that a group of girls had been working for the defendant each day and were given a free lunch and could ride the horses for free. In addition, one girl each day would receive two dollars. The court held that the girls were used in the scope of the defendant's business and were therefore subject workman. It further held that the free lunches and free riding and occasional payment was sufficient remuneration for a contract of hire.

The Board concludes that the facts in this case are similar. Claimant did work for the employer which was of benefit to him; Mr. Sanders had the right to control and did, in fact, tell claimant what to do. Claimant was paid $40 at one time and $100 another time. This constitutes a contract of hire and claimant is, therefore, found to be a subject workman.

ORDER

The order of the Referee, dated March 19, 1976, is reversed.

Claimant's claim for a compensable injury is remanded to the Fund for acceptance and payment of compensation, as provided by law, until closure is authorized pursuant to ORS 656.268.

Claimant attorney is hereby granted, as a reasonable attorney fee, the sum of $800, payable by the Fund.

WCB CASE NO. 76-2739 APRIL 19, 1977

JOHN HOUCK, CLAIMANT
David Glenn, 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 denial of claimant's claim for aggravation.

Claimant sustained a compensable injury on March 13, 1974 when he was involved in a truck collision which resulted in superficial laceration of his nose, bruises to his wrist, knee and toe. Claimant was off work four days and then returned to work on March 18. Claimant's occupation was making two round trips daily between Warm Springs and Portland driving a chip

truck. The accident occurred near Mt. Hood on an icy road during a snow storm at 2 a.m.

Claimant testified that he drove the chip truck from Warm Springs, over the mountain, and immediately became aware he could do this no longer. Claimant forced himself to return to Warm Springs, but upon arrival at Warm Springs claimant refused to make the second round trip and has never driven over the mountain again.

The employer hired claimant as a carpenter helper and subsequently as a millwright helper which is his present job.

Claimant alleges that from the date of the accident until the present he has suffered a complete breakdown of his emotional resources which condition has been diagnosed as anxiety neurosis. Claimant testified that this condition has been aggravated to the extent that it now affects his daily life.

In September, 1975 claimant brought a civil suit against the owner and operator of the truck involved in the accident to recover an award for his injuries including his anxiety neurosis condition Dr. Dixon, a psychiatrist, testified that he had examined claimant only one time on June 2, 1975. Claimant failed to prevail in this action. Claimant then filed a claim for aggravation.

Dr. Dixon's opinion concerning the anxiety neurosis was that it occurred at the time of the injury. Claimant has received no medical treatment for this condition.

A Determination Order of May 23, 1974 granted claimant compensation for time loss only. Claimant did not appeal this Determination Order for two years.

The Referee found that the issue of extent of permanent partial disability cannot be heard because the statute is clear that an appeal of a Determination Order must be made within one year. The Referee found that the medical evidence presented indicates no medical treatment for the alleged anxiety neurosis and no showing of a worsening condition since the date of the Determination Order.

The Referee concluded that claimant's right to appeal the Determination Order is barred pursuant to ORS 656.319(2) and that issue is dismissed. Further, claimant has failed to prove his alleged condition has worsened since the issuance of the Determination Order and there is no indication claimant needs further medical treatment.

The Board, on de novo review, concurs with the findings and conclusions reached by the Referee. However, the Board feels claimant is entitled to psychological counseling under the provisions of ORS 656.245, if he so desires.

ORDER

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

WCB CASE NO. 76-2532 APRIL 19, 1977

CONRAD MILLER, 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 granted claimant an award of 30° for 20% loss of the left leg. Claimant contends he is permanently and totally disabled or, in the alternative, is entitled to a great award for his scheduled disability and is entitled to an award for unscheduled disability.

Claimant sustained a compensable injury on February 27, 1974 causing a left hip fracture and knee injury. Claimant was hospitalized and the hip was pinned. X-rays taken in August revealed excellent healing of the fracture. Claimant then walked with a limp. Claimant is 65 years old and has worked for several years as a painter. Dr. Kunert opined that claimant may never regain the use of his left hip and knee to the point prior to the injury and may not be able to return to his profession.

On November 5, 1974 claimant was examined by Dr. Paluska who felt claimant might have a possible torn medial meniscus of the left knee. A knee arthrogram revealed no evidence of pathology. In December, 1974 claimant underwent removal of the hip pin. In May, 1975 Dr. Paluska indicated claimant's left hip was completely asymptomatic. Claimant was still complaining of knee problems especially with squatting and kneeling. Dr. Paluska felt claimant might have chondromalacia and minimal degenerative arthritis in the knee joint but found claimant to be medically stationary.

On April 19, 1976 Dr. Paluska examined claimant again and found his condition unchanged from the May, 1975 examination. However, claimant had some pain in his low back radiating into the left buttock. Dr. Paluska didn't indicate if the back pain was related to claimant's industrial injury.

A Determination Order of May 14, 1976 granted claimant 15° for 10% loss of the left leg.

Claimant has a pre-existing hearing problem. He testified that his hearing began to fail in 1955 but contends it has worsened since the industrial injury. A right eye visual problem was not found to be related to the February, 1974 injury.

In 1974 claimant had been referred to the Division of Vocational Rehabilitation for job placement assistance. He was trained as a hotel desk clerk and his grades were excellent. However, claimant's counselor indicated that because of claimant's physical limitations, the unstable problems of poor vision and deafness and his age, it was not feasible to train claimant further. The services of vocational rehabilitation were then terminated.

The Referee found claimant now complains of low back pain which is a relatively new problem in this case. Until April, 1976 claimant had had no low back complaints that were reported by the doctor. In May, 1975 Dr. Paluska found full range of motion of claimant's left hip and it was completely asymptomatic. In April, 1976 Dr. Paluska indicated back complaints but there were no objective findings. There were not medical reports submitted to relate the back symptoms to claimant's industrial injury.

The Referee further found that claimant had not been adequately compensated for his left leg disability. He found claimant was entitled to 30° for 20% loss of the left leg.

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

ORDER

The order of the Referee, dated October 1, 1976, is affirmed.

WCB CASE NO. 76-1053 APRIL 19, 1977

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

Reviewed by Board Members Moore and Phillips.

The employer requests review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation, as provided by law, from July 31, 1975 and until closure is authorized pursuant to ORS 656.268.

Claimant sustained a myocardial infarction on July 31, 1975 while at work. Claimant was 61 years old and had worked 40 years as a roofer. Claimant had been employed full time until the winter of 1974-1975 when the employer ceased his business

operations. Claimant then began working out of the union hall on various jobs. Claimant had worked for this employer 13 days at the time of his infarction.

The testimony indicates that a laborer quit and on July 31 claimant was asked to perform the laborer's duties; this job entailed moving rolls of felt paper about the roof and in wheeling a cart of hot tar. Claimant testified that because the insulation is very soft when first laid, it is necessary to lift the rear of the cart while wheeling it and that this is very strenuous work. Claimant also testified that this was not his usual occupation.

Claimant testified he had no problems during the norming hours but did not wheel the cart of hot tar at that time; after lunch it was 79° and claimant testified that on that certain roof it was substantially hotter, as the asphalt is heated to 400-425°. Claimant alleges he suffered chest pains while wheeling the last load of tar in the cart. The foreman then asked him to mop tar and in attempting to do so the mop was stuck in the pan as the asphalt had hardened and that breaking the mop loose was strenuous work and he again experienced chest pains. His vision became blurred and he was nauseated. Claimant then testified that he left the roof going down a ladder and into the shade. Claimant didn't feel any better and decided to go home, and started walking towards his pickup. The testimony hereafter is uncontradicted; at this point claimant was in obvious distress. A co-worker saw claimant walking unsteadily and assisted him to his pickup. Claimant went home, then to a doctor where the myocardial infarction was diagnosed and was hospitalized.

The employer denied the claim based on the report of Dr. Wysham which indicated, in his opinion, that the work activities were not a material contributing factor to the infarction. At the hearing Dr. Wysham testified that he was under the impression that claimant was performing his usual work at the time of the infarction and this work was not particularly stressful.

Dr. Grossman, who actually examined claimant and interviewed him on May 14, 1976 opined that the infarction was the result of claimant's work activities.

The Referee found that Dr. Wysham's opinion was based primarily on faulty history. He was of the opinion that claimant was performing his regular work, which he was not; he thought the roof was level, it was not; he thought the temperature was in the low 70's, when in fact it was 79°. While Dr. Wysham and Dr. Grossman were not claimant's treating physician, Dr. Grossman at least had the benefit of a personal interview with claimant and also did an examination. Therefore, the Referee found that claimant had established both legal and medical causation. He remanded the claim to the employer for acceptance.

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

ORDER

The order of the Referee, dated October 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 $300, payable by the employer.

WCB CASE NO. 75-1824 APRIL 19, 1977

EVELYN RUNDBERG, CLAIMANT
John Ryan, 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 employer's denial of her claim for aggravation.

Claimant sustained a compensable injury to her low back on August 7, 1970. This injury was diagnosed as acute low back strain and claimant was hospitalized; at that time a hernia was also repaired. While claimant was convalescing from the industrial injury she was involved in a non-industrial automobile accident on May 27, 1971. In December, 1974 claimant was in another automobile accident. Claimant testified that she was hospitalized for 9 days because of the compensable injury; 21 days for the 1971 automobile accident; and 4 days for the 1974 automobile accident.

A Determination Order of April 19, 1972 granted claimant an award of 80° for 25% unscheduled low back disability. Claimant appealed, but the Referee affirmed the Determination Order. During appeal to the Board the parties entered into a stipulation entered on May 1, 1973 which granted claimant an additional 32° for 10% unscheduled disability.

In 1975 claimant filed a claim for aggravation which was denied by the Fund on July 25, 1975. The evidence indicates claimant sought no medical care between June 26, 1972 and June 17, 1974. Claimant saw Dr. Begg who was unable to medically verify her subjective symptoms. December 10, 1974 was the last time Dr. Begg saw claimant until April 8, 1975 when he stated claimant's condition had become aggravated and he recommended reopening the claim.

The Referee found Dr. Begg's opinion to be anomalous in view of the fact that he had not seen claimant since December, 1974 at which time he indicated all treatment was terminated and claimant needed no further hospitalization.

Claimant testified that her condition became worse starting in February, 1973 but the stipulation was not entered into until May 1, 1973, therefore, it is assumed that claimant's worsening condition was taken into consideration at the time of the stipulation.

The Referee found that the medical evidence does not support a finding of a worsened condition since the stipulation of May 1, 1973. Dr. Begg does not differentiate between claimant's conditions caused by the compensable injury and that of the two automobile accidents. In fact, at a prior hearing, the Referee found that the automobile accident produced injuries far more serious than those caused by the industrial injury.

The Referee concluded that after the December, 1974 automobile accident claimant did not return to Dr. Begg but sought treatment from Dr. Goodwin; there were no medical reports submitted at the hearing from him. Therefore, it is assumed that claimant's testimony as to her present subjective symptoms must include symptoms remaining from the 1974 accident. He affirmed the denial.

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

ORDER

The order of the Referee, dated October 8, 1976, is affirmed.

WCB CASE NO. 76-2521 APRIL 19, 1977

ORVAL SETTLES, CLAIMANT
S. David Eves, 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 claimant's claim for aggravation dated May 11, 1976.

Claimant, a 54 year old highway maintenance man, sustained a compensable low back and left leg injury on April 14, 1971. X-rays taken on May 6, 1971 revealed advanced osteoarthritic changes involving the entire lumbar spine. Dr. Garnjobst diagnosed nerve pressure with disc lesion 5th lumbar and 1st sacral. Dr. Tsai diagnosed S1 nerve root compression on the left side due to traumatic disc herniation at L5-S1. Claimant was then treated by bed rest and pelvic traction.

On June 17, 1971 Dr. Tsai performed an L5-S1 lumbar laminectomy and discoidectomy with decompression of the S1 nerve root. Claimant returned to work in September, 1971.

A Determination Order of January 27, 1972 granted claimant an award of 32° for 10% unscheduled low back disability and 15° for 10% loss of the left leg. Thereafter, claimant had occasional flareups and his claim was reopened on two occasions. At the time of the hearing claimant had received 160° for 50% unscheduled disability and 37.5° for 25% loss of the left leg.

On April 21, 1975 Dr. Fry, after examining claimant, found degenerative changes in the cervical spine as well as the lumbar spine; however, he did not state that there had been a worsening of claimant's back condition. Dr. Martens examined claimant on April 5, 1976, and found claimant's cervical spine condition was no different than previously. Claimant claimed that his back condition had worsened but Dr. Martens said he could find no objective evidence of any worsening.

Since April,1966 claimant has suffered from degenerative arthritis of the cervical, dorsal and lumbar areas of the spine, a non-industrial condition. This condition has progressed; however, X-rays revealed that there has been no substantial change in claimant's condition since January 8, 1973. There is no medical evidence indicating that this condition is precluding claimant from returning to the labor market or is a part of the physical limitations of which claimant now complains.

The Referee concluded that claimant had failed to prove a worsening of his low back and left leg condition since the last award or arrangement of compensation made on July 30, 1974. He affirmed the denial.

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

ORDER

The order of the Referee, dated September 3, 1976, is affirmed.

WCB CASE NO. 76-769 APRIL 19, 1977

GILHART SHANKEY, CLAIMANT
D. Keith Swanson, 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 additional award of 30° for

20% loss of the right leg, giving claimant a total of 75° for 50% loss of the right leg and an award of 32° for 10% unscheduled disability of the right hip. Claimant contends he is permanently and totally disabled.

Claimant was employed as a detail man for a used car lot; this job required him to be on his knees quite a bit. Dr. Burr's first report in 1974 indicated that the condition which resulted in the ultimate surgery had developed over a period of six months prior to the first treatment on June 24, 1974. Claimant's condition was diagnosed as chondromalacia of the patella, right knee, and possible degenerative medial meniscus.

Claimant had prior problems with his left knee including surgery in 1961 that was the result of an industrial injury.

On July 26, 1974 Dr. Burr performed surgery for torn medial meniscus repair. However, claimant's condition of chondromalacia patella is still there at the present time.

The first and only comment made about a hip condition was in Dr. Burr's letter of May 17, 1976 which indicated that the hip problem can be related to the knees. The hip problem was diagnosed as trochanteric tendinitis.

The claimant testified that he has difficulty with both knees and his hip. The right knee swells often and is painful and has caused him to fall on several occasions. This is verified by Dr. Burr's chart note of April 25, 1975.

A Determination Order of September 3, 1975 granted claimant an award of 45° for 30% loss of the right leg.

Claimant has not been employed since an attempt to work in November, 1975.

The Referee found, based on Dr. Burr's report, that claimant's right hip condition had been shown to be causally related to the industrial injury. However, claimant has not carried his burden of proof to establish that he is permanently and totally disabled. The Referee found that claimant does have substantial disability to the right knee. Claimant additionally has a mild disability of the right hip arising from the industrial injury.

The Referee concluded claimant was entitled to a greater award for the right leg disability and to an award for unscheduled disability as outlined in the first paragraph of this order.

The Board, on de novo review, concurs with the Referee's finding that claimant is not entitled to an award for permanent total disability. However, the Board finds that claimant is not entitled to an award in the unscheudled area as his condition was diagnosed as trochanteric tendinitis which is a condition of the

tendon which is below the hip area and is therefore in the scheduled area of the body.

The Board further concurs with the increased award for the right leg condition in that claimant has a loss of function equal to 50%.

ORDER

The order of the Referee, dated September 17, 1976, is modified.

Claimant is hereby granted an additional award of 20% loss of the right leg, giving claimant a total award of 75° for 50% loss of the right leg.

WCB CASE NO. 76-835 APRIL 19, 1977

KENNETH SHEPHARD, CLAIMANT
Brian Welch, 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 granted claimant an award of 30° for 20% loss of the right leg. Claimant contends that he is vocationally handicapped and is, therefore, entitled to vocational rehabilitation or, in the alternative, is entitled to a greater award of permanent partial disability.

Claimant sustained a compensable right knee injury on September 27, 1974. Claimant's condition was diagnosed as contusion and laceration of the right leg at the knee with no fractures. Dr. Post treated claimant conservatively.

A report of May 19, 1976 from Dr. Post indicated that claimant has mild permanent impairment in terms of very minimal limitation of motion and in terms of the symptoms he has.

Dr. Cherry examined claimant on December 20, 1975 with findings similar to those of Dr. Post. Dr. Cherry indicated claimant could not return to any type of work he has performed previously and should be retrained.

Claimant testified that he has been a teacher's aide, a clothing salesman, a shoe salesman and a laborer.

Claimant has a strong desire to train for chaplain work in prison reform; he has performed this work before on a volunteer basis.

The Vocational Rehabilitation Coordinator for the Workmen's Compensation Board testified that claimant is not vocationally handicapped. Claimant could now perform duties as a clothing salesman and even as a shoe salesman.

The Referee found that the evidence indicates claimant has poor work motivation with his only interest being in the field of prison reform. The Referee concluded claimant has failed to prove he is vocationally handicapped.

The medical evidence indicates claimant has a minimal physical disability of his right leg. A Determination Order of December 5, 1975 granted claimant an award of 15° for 10% loss of his right leg. The Referee gave greater weight to the medical opinions of the treating doctor over that of Dr. Cherry who was unaware of claimant's vocational background.

The Referee concluded that the strain of using claimant's right leg entitles him to an award of 30° for 20% loss of function of his right leg.

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

ORDER

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

WCB CASE NO. 76-2938 APRIL 19, 1977

DARLENE YAUGER, CLAIMANT
David Vinson, 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 which affirmed the denial of claimant's claim for aggravation.

Claimant sustained a compensable injury on April 11, 1972 while pushing a slat through a saw which caused a jerking motion to her arm and shoulder and caused her head to go forward and bump the saw. The employer contends that claimant had changed her story stating at first that she only bumped her thumb and, not reporting the incident for some 17 days. However, the claim was accepted. The original diagnosis by Dr. Byerly was an acute cervical strain. Conservative treatment continued into January, 1973.

Claimant was then employed at the Eugene Hospital and Clinic on August 19, 1972 but subsequently terminated due to personality conflicts with her supervisor. Claimant then enrolled at Lane County Community College in insurance adjusting.

Claimant testified to riding motorcycles and that she had sustained an injury in a motorcycle accident in which the machine ran over her leg.

On January 5, 1976 Dr. Jones indicated claimant had a cervical strain which was the same diagnosis that was made by Dr. Byerly on May 15, 1972.

The Referee found that claimant had not borne her burden of proving a worsened condition. In fact, there was no medical evidence to indicate any worsening of the 1972 condition. Claimant has received 5% unscheduled disability by a Determination Order of February 16, 1973. All of the evidence indicates claimant is physically capable of performing a wide range of work, study and recreational activities.

The second issue before the Referee was penalties and attorney fees and he found that claimant filed her claim for aggravation on November 20, 1975. Medical reports were then solicited from Dr. Jones on January 26, 1976 and Dr. McHolick on April 29, 1976. The carrier denied claimant's claim on May 10, 1976. The Referee concluded that this was not unreasonable handling of the claim, however, it surely was not prompt. There was no showing of treatment being refused or postponed and thus no hardship to the claimant. Therefore, penalties and attorney fees were not justified.

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

ORDER

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

WCB CASE NO. 75-1697 APRIL 21, 1977

DALLAS ARNOLD, CLAIMANT
Richard Kropp, 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 granted claimant an award of permanent total disability.

Claimant, then a 58 year old carpenter, sustained a compensable injury on December 23, 1970. X-rays taken three days later revealed compression fracture of the 1st lumbar vertebral body and degenerative intervertebral disc disease with osteophytosis and calcification of the nucleus pulposus in the lower thoracic area, narrowing of the L4-5 interspace and slight subluxation at this level.

Claimant was treated by Dr. Martens who released claimant for work in June, 1971 with limitation of no lifting over 25 pounds and no bending or stooping.

A Determination Order of September 23, 1971 granted claimant 48° for 15% unscheduled disability. By a stipulation entered into in December, 1971 claimant's award was increased by 25%.

In April, 1973 claimant was examined by Dr. Berg, an orthopedist, who felt claimant was a poor candidate for rehabilitation and further that at claimant's age he might wish to retire from the labor market.

In June, 1973 Dr. Martens concurred with Dr. Berg's opinion that a 40% permanent partial disability was appropriate for claimant's disability. Dr. Martens also concurred with Dr. Berg's finding that claimant was not a feasible candidate for vocational rehabilitation; however, Dr. Martens indicated claimant was anxious to continue to work or he could not support his family if he were to retire.

A stipulation entered into in November, 1973 granted claimant an additional 10% unscheduled disability.

In January, 1975 Dr. Berg reported that claimant's condition was slowly becoming more aggravated. A Second Determination Order of April 17, 1975 granted claimant an additional award of 25%, giving claimant a total award of 75% unscheduled disability.

In August, 1975 Dr. Martens opined that claimant is unable to return to work. He is precluded from any occupation which requires prolonged standing, walking, driving trucks, bending, lifting, stooping or twisting. In view of claimant's age and work experience retraining is unfeasible.

Since Dr. Martens released claimant for restricted work claimant has periodically been a powerline groundman on call from his union. In 1973 he worked four to six months; in 1974 he worked one 14 weeks job which terminated on November 3, 1974 and he has not worked or sought employment since.

The Fund contends that there were no medical reports suggesting that claimant's symptoms were worse after Dr. Martens agreed with Dr. Berg's report of April 23, 1973 and rated claimant's disability at 40%. The Referee found that from claimant's

testimony he indicated he was getting worse all the time he was working and had further deterioration of his condition after he quit working. This was supported by claimant's wife and two friends in their testimony.

The Fund further contends a complete lack of medical evidence to support a disability rating of over 50% which was granted by the Determination Order of April 17, 1975. The Referee found there was medical evidence to support an award over 50%. Dr. Martens, by deposition, indicated claimant has continuing pain attributable to progressive osteoarthritis manifesting itself as degenerative disc disease, aggravated by the industrial injury. Dr. Martens further opined that this aggravation continued to be a causative factor in the progressive deterioration of claimant's back.

The Referee concluded that claimant, in his opinion, was motivated to work. He worked during 1973 and 1974 in a limited physical capacity which does not indicate claimant could perform regular employment on a full time basis. The evidence indicates claimant is permanently incapacitated from any gainful and suitable occupation, therefore, he is permanently and totally disabled.

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

ORDER

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

The 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. 76-2558 APRIL 21, 1977

ROBERT GILMORE, CLAIMANT
Garry Kahn, Claimant's Atty.
Paul Roess, 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 as of April 19, 1976 for the payment of benefits as provided by law including the payment of compensation for temporary total disability commencing February 27, 1976 until closure is authorized pursuant to ORS 656.268.

Claimant sustained a compensable injury to his low back on February 5, 1975. Claimant's injury was diagnosed as acute lumbosacral strain with possible early degenerative disc disease. On February 28, 1975 Dr. Chiapuzio diagnosed acute mechanical low back pain with nerve root irritation. On February 28, 1975 claimant underwent a myelogram which proved normal.

On April 8, 1975 claimant was examined by Dr. Mason at the Disability Prevention Division. Dr. Mason diagnosed lumbosacral strain, mild with no evidence of herniated intervertebral disc lesion or nerve root compression; marked emotional overlay exaggeration. Dr. Mason recommended a job change and no surgery was indicated.

On July 1, 1975 Dr. Raaf examined claimant who found claimant had an exceedingly bizarre gait and objective findings on the neurological examination were all negative. Dr. Raaf felt there was a tremendous functional overlay which was either hysteria or malingering, the doctor knew not which.

On January 14, 1976 Dr. Adams examined claimant and it was his impression that claimant was malingering or had hysteria. He also felt claimant had marked functional overlay from his back injury. Dr. Adams recommended employment which would not put a strain on claimant's back. Dr. Adams did find claimant's condition improved since right after his injury.

A Determination Order of April 19, 1976 granted claimant time loss only from February 5, 1975 to February 26, 1976.

On April 23, 1976 Dr. Bert indicated claimant was not able to do any work whatsoever and was undergoing physical therapy and was being seen periodically by him.

The Referee found the evidence indicates vast discrepancies between claimant's subjective complaints and the objective medical findings. Dr. Raaf and Dr. Adams felt claimant was suffering hysteria or malingering but they could not determine which. Dr. Berg felt claimant was experiencing conversion reaction.

Claimant has a 10th grade education and has acquired a GED. Claimant has worked for the employer ten years as a pond man and 20 years, not for this employer, driving truck. Claimant has not had any prior low back injuries but did suffer injury to his ribs in 1973.

Claimant is presently on public assistance. He has exhausted his savings account and since job termination has made only $20 selling some jewelry and has applied for social security but up to now has heard nothing from his application.

The Referee concluded, based upon the evidence presented, that claimant's claim was prematurely closed as he was not medically stationary at the time of claim closure. Claimant is entitled to compensation for temporary total disability commencing February 27, 1976 as he is unable at the present time to work and he remanded the claim to the employer for acceptance and payment of benefits as provided by law.

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

ORDER

The order of the Referee, dated August 24, 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. 75-4128 APRIL 21, 1977

DENNIS GNEHM, 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 by the Board of the Referee's order which remanded claimant's claim for a left knee injury to it for payment of compensation as provided by law.

Claimant sustained a compensable low back injury on May 2, 1975. Claimant was treated by Dr. Lilly and released for work on July 7, 1975. On July 7, 1975 Dr. Lilly reported that claimant had slipped and fallen at home three days prior and he sustained a knee sprain.

Claimant indicated that the prescriptions, Valium, Tylenol and Robaxin, prescribed by Dr. Lilly caused him to be dizzy and caused his fall. On December 11, 1975 Dr. Lilly indicated that the prescriptions could not have made claimant dizzy; however, on July 23, 1976 Dr. Lilly indicated that the prescriptions could have made claimant dizzy and such dizziness could cause a fall.

On September 11, 1975 Dr. Lynch performed a left knee meniscectomy.

On August 22, 1975 Dr. Lynch stated that claimant had related to him the dizziness he experienced which caused him to fall, twisting his left knee. On September 15, 1975 Dr. Lynch

explained that he believed claimant in his statements concerning the medication causing dizziness which, in turn, caused claimant to fall.

The Referee found claimant had proven a compensable injury.

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.

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. 76-2852 APRIL 21, 1977
WCB CASE NO. 76-2853

MARY HARTMAN, CLAIMANT
Sidney Galton, Claimant's Atty.
Dennis VavRosky, Defense Atty.
Michael Hoffman, 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 additional award of 48° for 15% unscheduled disability resulting from her injury of January 30, 1975; and awarded claimant 48° for 15% unscheduled disability for her injury of July 25, 1975, this award being a decreased award of 16°. Claimant contends she is permanently and totally disabled or, in the alternative, entitled to a greater award for her unscheduled disability.

Claimant sustained her first industrial injury on January 30, 1975 to her low back when she was emptying a garbage can into a dump box. Claimant worked for Meier and Franks whose carrier, at the time of the first injury, was Underwriters Adjusting Company. A Determination Order of June 1, 1976 granted claimant no award for permanent partial disability for this injury.

On July 25, 1975 claimant reinjured her low back; the carrier at this time was Liberty Mutual Insurance Company. A Determination Order of June 1, 1976 granted claimant an award of 64° for 20% unscheduled disability.

Claimant was a 55 year old woman and had been employed as a maid for four years prior to the first accident. After the initial injury claimant was treated conservatively and was released for work on April 21, 1975. Claimant testified to some discomfort prior to the accident of July 25, 1975. Therefore, there was a question if the July 25, 1975 injury was an aggravation of the January, 1975 incident but the carrier accepted the claim as a new injury.

After the July 25, 1975 accident claimant was again treated conservatively and, on January 8, 1976, Dr. Gambee found claimant medically stationary. However, Dr. Postles, her treating physician, had not released claimant to work.

The Referee found that although claimant contends she is permanently and totally disabled this contention is not supported by the medical evidence. Claimant's condition has been diagnosed as chronic lumbosacral strain superimposed on degenerative disc disease and osteoarthritis together with chronic severe obesity.

The Referee concluded that the medical evidence indicates claimant is entitled to an award of 30% unscheduled disability to her low back. However, the evidence presented does not indicate how much of claimant's disability is attributable to which accident. Therefore, the Referee found that the only way to be fair to the carriers was to apportion the award equally. The Referee apportioned the awards as indicated in the first paragraph of this order.

The Board, on de novo review, disagrees with the amount and the disbursement between carriers ordered by the Referee. The Board finds that the first industrial injury of January 30, 1975 left claimant with no permanent impairment, and affirms the Determination Order of June 1, 1976 which granted no award to claimant. The Board further finds that the Determination Order of June 1, 1976 for the injury sustained on July 25, 1975 which granted claimant an award of 20% unscheduled disability adequately compensates claimant for any loss of wage earning capacity.

ORDER

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

The Determination Orders dated June 1, 1976 are hereby affirmed.

LYLE JOHNSON, CLAIMANT
J. David Kryger, 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 granted claimant an award of permanent total disability.

Claimant suffered a compensable back injury on February 7, 1972. The next day he saw Dr. Drost who diagnosed acute muscle spasm, lumbar spine. Claimant was released to full employment on April 3, 1972. However, on April 28, 1972, claimant became disabled again.

Claimant was examined by Dr. Tsai on May 9, 1972. Claimant had not worked since April 28, 1972. Dr. Tsai recommended conservative treatment and felt claimant had a disc herniation, mid-line L4-5 and L5-S1.

Claimant was hospitalized for seven days in May, 1972 and then returned to work for two weeks, but recurrence of pain forced him to quit again. On August 18, 1972 claimant underwent a left L3-4 laminotomy and disc cordectomy. Claimant then developed left knee pain and was referred to Dr. Ellison.

On December 26, 1972 claimant consulted Dr. Sullivan for internal and external hemorrhoids. A hemorrhoidectomy followed.

On February 6, 1973 claimant was examined at the Disability Prevention Division where X-rays revealed severe degenerative changes in the lumbar spine.

A Determination Order of April 7, 1973 granted claimant an award of 80° for 25% unscheduled disability.

A psychological evaluation of claimant indicated that he was not highly motivated to return to work, with psychological factors interfering to some degree with his restoration and rehabilitation. This psychopathology is related to his industrial injury to a moderate degree.

On March 15, 1973 claimant was examined by the Back Evlauation Clinic which found loss of function of claimant's back was mild.

On July 17, 1974 claimant underwent excision of the disc at L4-5. Dr. Ellison continued to treat claimant and released him on a trial basis to his former occupation on January 30, 1975.

A Second Determination Order of May 2, 1975 granted claimant an additional award of 32° for 10% unscheduled disability.

In July, 1975 Dr. Ellison indicated claimant was unable to return to work and his disability would be permanent.

Dr. Steele examined claimant in February, 1976 and opined that claimant's condition was stable with no further treatment indicated. Claimant was severely limited for most types of gainful employment requiring prolonged sitting, lifting, or physical activity. Dr. Ellison agreed with this assessment and felt claimant to be permanently disabled from any employment.

A Third Determination Order of April 29, 1976 granted claimant an additional 32° for 10% unscheduled disability.

The Referee found that claimant attempted to return to work after his hospitalization in May, 1972 but had a recurrence of pain and quit, and then underwent surgery in August, 1972. Subsequently, he returned to work but again had recurring back pain which necessitated another surgery. After being found to be medically stationary in March, 1975 claimant again attempted to return to work but his physical condition worsened and by July of that year claimant could not continue.

The Referee concluded that claimant was motivated to return to work as exemplified by his attempts to return to work. Claimant's physical disabilities, coupled with the other factors of claimant's age, experience, training, skills, etc., placed him prima facie within the odd-lot category. Because claimant had proven he was prima facie permanently and totally disabled the burden shifts to the Fund to show work that claimant could suitably, gainfully and regularly perform within his physical limitations. The Fund has not met this burden, therefore, the claimant is granted an award of permanent total disability.

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

ORDER

The order of the Referee, dated November 19, 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. 76-1996 APRIL 21, 1977

MICHAEL MARCOTT, CLAIMANT
Evohl Malagon, 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 as it relates to the temporary total disability compensation. Claimant contends he was not medically stationary and is entitled to further compensation for temporary total disability.

Claimant sustained a back injury on June 28, 1974. Claimant returned to work on Monday with pain in the left shoulder, neck and low back and was unable to continue working. Claimant was examined by Dr. Fax on July 12, 1974. Claimant had been involved in a rear-end automobile accident in October, 1972 in which he suffered a cervical sprain.

Dr. Becker treated claimant for approximately six months and claimant wore a cervical and back support. Dr. Fax diagnosed low back strain and probable cervical strain and recommended conservative treatment.

Dr. Becker again examined claimant on August 1, 1974. His impression was chronic cervical and lumbosacral strain with a history of acute sprain dating from June 28, 1974.

Claimant was examined at the Disability Prevention Division on October 9, 1974 which found chronic lumbosacral sprain with exacerbation occurring on June 28, 1974. They also found moderate functional overlay, secondary gain factor.

Claimant saw Dr. Viets on June 18, 1975 stating he had received no relief from Dr. Becker and Dr. Lilly and his symptoms had worsened. Dr. Viets referred claimant to Dr. Campagna who found probable protruded cervical disc; he recommended a myelogram which proved negative.

Claimant suffered from left thoracic outlet syndrome and on December 11, 1975 underwent surgery for this condition.

A Determination Order of April 25, 1975 granted claimant compensation for temporary total disability through March 2, 1975 and an award of 15% unscheduled neck and back disability.

Claimant contends he is entitled to compensation for temporary total disability from March 2, 1975. However, the evidence indicates that on August 1, 1974 Dr. Becker felt claimant's symptoms would resolve with conservative treatment. On October 9, 1974 the Disability Prevention Division examined claimant and

indicated no further treatment was necessary. Consequently, the Referee found that there is no evidence to indicate that compensation for temporary total disability is payable following the period for which the Determination Order granted such compensation.

The Referee concluded that the evidence only supports a finding that the lumbar, not the cervical condition is related to claimant's industrial injury and the evidence does not support a finding that claimant is entitled to any further compensation for temporary total disability.

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

ORDER

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

WCB CASE NO. 76-2748 APRIL 21, 1977

ROGER ROLAND, CLAIMANT
Hugh Cole, 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 found claimant to be medically stationary as of February 5, 1976, and granted the defendant the right to offset future awards for temporary total disability payments made to claimant from February to April, 1976 and set aside the Determination Order as being prematurely issued. Claimant contends he is entitled to compensation for temporary total disability beyond February 5, 1976 and that he was not medically stationary; is further entitled to compensation for temporary total disability between February 5, 1976 and July 27, 1976 on the basis that he was vocationally handicapped on a continuous basis during that period and is entitled to an award for permanent partial disability.

Claimant sustained a compensable right shoulder injury on November 4, 1975. A Determination Order of April 14, 1976 granted claimant compensation for temporary total disability from November 5, 1975 through February 5, 1976 and no award for permanent partial disability.

Subsequent to the Determination Order claimant was examined by Dr. Pasquesi and Dr. Wisdom who both agreed claimant should receive vocational retraining as claimant was now precluded from heavy construction work.

Claimant was paid compensation for temporary total disability commencing in July, 1975 in anticipation of claimant's eligibility for vocational retraining and is still receiving temporary total disability benefits.

Claimant's contention that he is entitled to an award for permanent partial disability is in error; the Referee concluded that permanent partial disability cannot be made until termination of claimant's vocational retraining program. Furthermore, the Referee found that the Determination Order was premature and, therefore, must be set aside until completion of claimant's vocational retraining.

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

ORDER

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

WCB CASE NO. 76-3988 APRIL 21, 1977

ALFRED WHITTAKER, CLAIMANT
Brian Welch, 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 of 75° for 50% loss of the right hand.

Claimant sustained a compensable right hand injury on August 7, 1975. Claimant experienced pain, swelling and stiffness of his right hand, particularly the right index finger. His condition was diagnosed as contusion and laceration of the right index finger. Claimant later developed septic tenosynovitis. Claimant was treated conservatively.

Claimant's condition failed to improve and, on February 4, 1976, Dr. Nye performed an index amputation of claimant's right finger. Claimant was released to work on March 21, 1976.

Dr. Nye, in his closing report, indicated claimant has radiating discomfort because of digital nerve neuroma of the index finger, lack of breadth of the hand, weakness and the hand is sensitive to cold. On March 21, 1976 claimant returned to his regular job.

The Referee found, based upon the evidence presented and claimant's credible testimony, that claimant had proven his entitlement to an increased award for permanent partial disability. The medical evidence alone establishes a right hand injury with nerve involvement which results in weakness and loss of strength

or grip only. However, supplemented by claimant's testimony indicating further problems of chronic pain, lack of breadth and sensitivity to cold, all result in limitation of use of that member. Therefore, he granted claimant an additional 22.5° for loss of the right hand.

The Board, on de novo review, finds that the rating of a scheduled member is based solely on the loss of function of that member. Therefore, the award of 30% loss of the right hand granted by the Determination Order adequately compensates claimant for the loss of function of that member.

ORDER

The order of the Referee, dated October 22, 1976, is reversed.

The Determination Order of July 12, 1976, is affirmed.

SAIF CLAIM NO. EA 352217 APRIL 22, 1977

BONNIE BROOKS, CLAIMANT
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Claimant sustained a compensable injury on April 15, 1953 to her low back. Her claim was closed by a Determination Order of July 8, 1953 with time loss only. Her claim was reopened and again closed on August 23, 1954 granting claimant additional time loss benefits.

The claim was again reopened and claimant was treated by Dr. Reubendale who examined her on August 19, 1957. The claim was again closed with an award to claimant of 15% loss function of an arm on November 7, 1957. Claimant's aggravation rights have expired.

Claimant's claim was reopened and she was treated by Dr. Shiomi who, on September 16, 1976, diagnosed traumatic arthritis, neck, shoulder, extremities, hips and low back.

On February 3, 1977 Dr. Pasquesi performed a closing examination on claimant and indicated she was medically stationary and had a 20% impairment of the whole man.

By letter dated March 11, 1977 Dr. Shiomi indicated he did not concur with Dr. Pasquesi's rating of claimant's disability and recommended an award of 50% unscheduled disability of claimant's neck and low back.

On April 12, 1977 the Fund requested a determination. The Evaluation Division of the Board recommended compensation for temporary total disability from October 26, 1976 through March 11, 1977 and an additional award to claimant of 10% loss function of an arm for unscheduled disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from October 26, 1976 through March 11, 1977 and to an additional award of 10% loss function of an arm.

WCB CASE NO. 76-3094 APRIL 22, 1977

LLOYD CANNADY, CLAIMANT
Rod Podner, 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 claimant's claim for a compensable injury.

Claimant alleges a compensable injury on May 18, 1976. Claimant testified he was walking across the employer's building carrying shims when he hit something with his foot, causing a knee injury. Three days earlier on May 15, 1976 claimant had been riding his bicycle and going downhill when his brakes failed and the bike went over an embankment. Claimant admits this injury was to his knee; however, he testified that he rode the bicycle home. The leg remained swollen for three days. Monday, May 17, claimant called his employer and stated that he would not be at work that day due to a knee injury.

On May 18 claimant returned to work and worked until the alleged injury at 11 a.m. Claimant testified he didn't bump the knee at the time of the alleged accident, nor fall down and does not know what he tripped on. After the alleged injury claimant testified that he could put no weight whatever on his knee and had to hop to the supervisor's office. Medical treatment ensued and eventually surgery.

Calimant testified to prior knee injury in February, 1974 but both he and his wife testified that he had no difficulty with the knee from February, 1974 to May, 1976.

Dr. Winkler, on June 16, 1976, indicated that the original injury could have occurred at home but was aggravated while at work. Dr. Winkler's statement is based on history given to him by claimant.

The Referee found that there was no question but that the injury at work was an aggravation of the bicycle incident injury because nothing had happened on May 18 that would qualify as a new injury. After the bicycle accident claimant had been quite inactive and the walking he did at work worsened the condition of the knee but would not qualify as an accident arising out of and in the scope of his employment.

The Referee concluded that the rule that an employer takes an employee as he finds him does not extend to an employee sustaining an off-the-job injury, then showing up for work in an injured condition and then alleging an accident at work. He, therefore, affirmed the denial.

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

ORDER

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

WCB CASE NO. 75-2768 APRIL 22, 1977

ROY FENTON, CLAIMANT
Willard Bodtker, Claimant's Atty.
Dept. of Justice, 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 of 160° for 50% unscheduled disability and allowed an offset by the employer for any temporary total disability compensation paid to claimant from February 26, 1975 through March 26, 1975 against the permanent partial disability award granted by his order.

Claimant sustained a compensable injury on March 22, 1974 to his back and right hip. Claimant was examined by Dr. Hews on April 29, 1974, who diagnosed lumbosacral strain and connective tissue stretch injury resulting in a lumbar syndrome. Claimant was treated conservatively. Dr. Hews found claimant had suffered no permanent impairment from this injury.

A Determination Order of August 8, 1974 granted claimant an award for time loss only.

Claimant continued performing light duty work for six months and was then laid off for missing time from work and for his back condition.

Claimant again consulted Dr. Hews on November 22, 1974. Dr. Hews recommended that claimant change jobs or be retrained and restricted his lifting to 60-70 pounds. In January, 1975 Dr. Hews released claimant for modified work. On March 18, 1975 Dr. Hews found claimant medically stationary as of February 26, 1975 and diagnosed claimant's condition as lumbar scoliosis with associated lateral flexion and congenital malformation of S1.

A Second Determination Order of April 10, 1975 granted claimant time loss only.

On April 14, 1975 Dr. Hews wrote to the Fund recommending vocational rehabilitation for claimant. Subsequently, a Special Determination Order was issued on April 28, 1975 which affirmed the original Determination Order.

Claimant then went to Toledo, Ohio and worked ten months in a warehouse. Claimant was examined in Ohio by Dr. Hein, an orthopedist, who found chronic lumbar back sprain and recommended a chairback brace. Dr. Hein found no evidence of nerve root irritation and rated claimant's back disability at 20%.

Claimant has not worked since returning from Ohio. Prior to his March 22 injury claimant had had no back problems or injuries to his back.

The Referee found that the medical reports indicate that claimant suffers from a congenital back problem but it is clear that until his March, 1974 injury claimant was able to and did work reasonably steadily at extremely heavy manual labor and had no difficulty in so doing, nor did he have any back complaints. Therefore, based upon the evidence presented the Referee found that claimant is now precluded from any employment which requires heavy lifting or constant and repetitive bending. These are the only types of jobs claimant has ever performed. Therefore, taking into consideration claimant's age and lack of education, claimant is now precluded from a large segment of the labor market.

The Referee concluded claimant is entitled to an award for 160° for 50% unscheduled disability to compensate him for his loss of wage earning capacity.

The Board, on de novo review, finds, based on the medical report of Dr. Hein, that claimant is entitled to an award of 64° for 20% unscheduled disability. Dr. Hews found in April, 1974 that claimant had suffered no permanent impairment; in April, 1975 he recommended that claimant be retrained for another job with limitations on claimant of no lifting over 60-70 pounds. Therefore, an award for 64° for 20% unscheduled disability adequately compensates claimant for his loss of wage earning capacity.

ORDER

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

Claimant is hereby granted an award of 64° for 20% unscheduled disability.

WCB CASE NO. 76-3607 APRIL 22, 1977

GLENN GROFF, CLAIMANT
William Thomas, Claimant's Atty.
Dept. of Justice, Defense Atty.

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 for permanent total disability effective the date of his order.

Claimant is a 43 year old man who is functionally illiterate and has worked for the employer for 22 years and is the only job claimant has ever known. Claimant was a chipperman. Claimant had a prior low back problem for which he received treatment and also has one more vertebra than normal.

On August 2, 1974 claimant sustained an onset of symptoms with a snapping in his low back. The diagnosis was subacute lumbosacral sprain. Dr. Ellison recommended claimant should not return to work lifting weights of 50 pounds or more, bending, stooping, prolonged sitting or work involving inclines or ladders.

A Determination Order of March 27, 1975 granted claimant an award of 192° for 50% unscheduled low back disability.

In June, 1975 claimant's claim was reopened for vocational rehabilitation. Claimant was then seen at the Disability Prevention Division where prognosis for vocational rehabilitation was considered quite poor and it was felt possibly that claimant would never work again if he could not return to his former job. Claimant's rehabilitation counselor felt he was not feasible for rehabilitation services because of negative medical, social and emotional factors.

A Second Determination Order of January 14, 1976 granted claimant no further award for permanent partial disability.

Shortly thereafter, the claim was reopened by a report from Dr. Tsai indicating claimant had an L5 nerve root compression. On January 28, 1976 Dr. Tsai performed a lumbar laminectomy. Subsequently, Dr. Tsai indicated claimant could not return to his job as a chipperman. Dr. Tsai opined claimant could perform the job of lumber stripper, but claimant declined, fearing being fired by the mill's new foreman. The claim was closed again with no further award for permanent partial disability.

Claimant testified that in December, 1974 he had attempted the job of stripperman but was unable to do so because of back symptoms.

The Referee found claimant has severe back impairment with a pre-existing back injury, however, claimant had been able to work fairly regularly prior to August, 1974. Claimant, furthermore, is illiterate and has only performed one job in his entire working life to which he cannot now return. Claimant did try the job of stripperman but had to discontinue due to back symptoms from the twisting involved in this job. Claimant feels he cannot now perform that job for physical reasons and is reluctant to try because the foreman frowns on claimant's attempts. Vocational rehabilitation is not feasible in this case.

The Referee found that taking into consideration the factors in this case of claimant's age, lack of education, rehabilitation prospects, motivation all but his age are adverse to him. Claimant may lack motivation at the present time, but taking into consideration the report of the psychologist that indicates motiviational problems all boil down to the fact that claimant has lost the only job he has ever performed and the only job he probably ever could have performed as he lacks the education, experience, training and emotional attitudes necessary to seek other employment. Therefore, the Referee concluded, claimant falls within the provisions of ORS 656.206 and is permanently and totally disabled.

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

ORDER

The order of the Referee, dated November 16, 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. 76-739 APRIL 22, 1977

BILLIE JOE JACKSON, CLAIMANT
Richard Kropp, Claimant's Atty.
Dept. of Justice, 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 February 6, 1976. Claimant contends she is permanently and totally disabled.

Claimant sustained a compensable injury on February 3, 1975. On February 7, 1975 Dr. Lawton diagnosed L5-S1 nerve root impingement on the right and calcific tendonitis on the right. On February 12, 1975 Dr. Needham diagnosed degenerative sclerosis at L5-S1 interspace level. Claimant was treated conservatively.

On July 2, 1975 Dr. Macmanus examined claimant and found chronic low back syndrome and recommended nothing of a neurosurgical nature but continued conservative treatment.

A Determination Order of February 6, 1976 granted claimant an award of 96° for 30% unscheduled low back disability.

On March 31, 1976 Dr. Martens examined claimant and diagnosed strain cervical spine, minimal osteoarthritis of the lumbar spine. Dr. Martens found claimant was precluded from returning to any occupation that requires overhead work, bending or lifting over 25 pounds, stooping, sweeping, vacuuming or mopping. No treatment was recommended except exercises.

Claimant was examined by the Orthopaedic Consultants on November 22, 1976 who found loss of function due to this injury to claimant's low back was mild.

The Referee found that claimant had no motivation whatsoever; claimant admitted seeking no employment, stating that such an attempt would be useless until she recovered her health. Claimant has neither looked for work nor registered with the employment office.

The Referee concluded, based upon the medical evidence submitted, that the award granted by the Determination Order of 30% adequately compensates claimant for any loss of wage earning capacity and her physical impairment.

The Board, on de novo review, finds that based on the medical evidence, claimant is now precluded from a large segment of the labor market by the limitations put on her of no overhead work, bending, lifting over 25 pounds, stooping, sweeping, etc. Therefore, the Board finds that claimant is entitled to an award of 128° for 40% unscheduled low back disability to adequately compensate her for her loss of wage earning capacity.

ORDER

The order of the Referee, dated September 20, 1976, is modified.

Claimant is hereby granted an additional award of 32°, giving claimant a total award of 128° for 40% unscheduled low back disability.

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 the sum of $2,300.

WCB CASE NO. 75-3253 APRIL 22, 1977
WCB CASE NO. 76-2375

RICHARD LARSON, CLAIMANT
Vernon Richards, Claimant's Atty.
Dennis VavRosky, Employer's Atty.
Roger Luedtke, Defense Atty.

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the denials issued by both employers of claimant's claim for an occupational disease.

Claimant was employed as a welder for Dillingham for eight years up to January 10, 1975 and for about four weeks starting January 10, 1975 as a welder for Wagner Mining Company. Claimant alleges an occupational disease in the nature of chronic bronchitis arising from his exposure to fumes and dust during the course of his employment.

The Referee disposed of the claim against Wagner Mining Company as claimant testified that there was no smoke or dust while employed at Wagner and further experienced no coughing while so employed. Furthermore, claimant failed to file a claim for an occupational disease with Wagner Mining Company within 180 days from the date he became disabled or was informed by his physician he was suffering from an occupational disease. Therefore, claimant had failed in his burden of proving an occupational disease while working for Wagner.

Claimant testified to having a cough for a period of about one year before he quit working for Dillingham and saw Dr. Macy in November, 1974 who diagnosed emphysema. Claimant testified that if he were away from the fumes for a while he didn't cough much.

Dr. Robins, a lung specialist, testified on behalf of claimant that he had treated claimant from March 17, 1976 through April 23, 1976. He established claimant was not allergic nor did he have emphysema. In his opinion claimant had chronic bronchitis, severe, persistent and disabling; the cause was undetermined. Dr. Robins testified that exposure to dust fumes would aggravate the cough but that the cough was quite persistent regardless of what claimant did.

Dr. Tuhy who examined claimant on the employer's behalf, diagnosed chronic bronchitis but was unable to relate this condition to the exposure of welding fumes and dust.

The Referee found there was no medical opinion offered in support of a relationship between claimant's exposure to welding fumes and dust and to his condition of chronic bronchitis. Therefore, he affirmed the denials issued by the employers.

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

ORDER

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

WCB CASE NO. 76-876 APRIL 22, 1977

EDWARD POWELL, CLAIMANT
Nels Peterson, 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 denied claimant's claim for aggravation.

Claimant sustained a compensable injury on February 13, 1970. A Determination Order of March 8, 1974 granted claimant an award of 35% unscheduled low back disability. Claimant appealed and, after a hearing on December 18, 1974, was granted an award of 50% unscheduled low back disability.

Claimant was vocationally rehabilitated during the pendency of his claim as a barber. He worked part time at two barber shops until October, 1975 when he quit, he testified, due to increased pain.

The Referee found claimant was not a credible witness and the ultimate decision rests with medical substantiation. Dr. Cherry found claimant's disability to be greater then that awarded even indicating claimant was permanently and totally disabled. However, Dr. Cherry does not state that claimant's condition has worsened referable to any point in time. Dr. Cherry first saw claimant on January 21, 1976 and not before.

Dr. Goodwin first saw claimant on January 24, 1972 and performed the second operation on claimant's back on March 7, 1974 and followed claimant until June 17, 1975. He examined

claimant on April 29, 1976 and concluded that claimant's physical status had not changed since his closing evaluation on January 14, 1974.

Therefore, the Referee concluded claimant had failed to establish a worsened condition from his industrial injury.

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

ORDER

The order of the Referee, dated October 27, 1976, is affirmed.

WCB CASE NO. 76-1207 APRIL 22, 1977

HAROLD SHAFFER, CLAIMANT
John Svoboda, Claimant's Atty.
Jack Mattison, 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 80° for 25% unscheduled back disability. Claimant contends he is entitled to an award for 60% unscheduled disability.

Claimant sustained compensable back injuries on November 5, 1973. Claimant continued to work but did receive some osteopathic manipulation. Claimant worked five months spotting for trim saws and another six months as an edgerman. He then went to work operating an overhead crane for four months. Claimant's back condition worsened and he saw Dr. Hockey. Dr. Hockey diagnosed a degenerative lumbosacral disc causing some intermittent nerve root irritation and he felt that this was moderately disabling to claimant.

In June, 1975 claimant was examined by Dr. Halferty at the Disability Prevention Division who concurred with Dr. Hockey's diagnosis and found only minimal functional overlay. Dr. Halferty recommended claimant change jobs to restrict his lifting and bending.

Claimant then underwent a psychological evaluation which indicated moderately severe personality trait disturbance, paranoid type, and that claimant's emotional problems were aggravated by the industrial injury.

In July, 1975 claimant was hospitalized and had a myelogram which confirmed the lumbosacral disc degeneration and arthritis. It was found claimant had persistent permanent loss of function of the lower back due to arthritic lumbosacral joint.

In 1974 claimant enrolled in a home study heavy equipment course to become a grader operator. Claimant did not complete the course. In late 1975, through vocational rehabilitation, claimant enrolled in an on-the-job training program to become a civil engineering technician. Claimant was reported doing well in this training program and is presently working a 40 hour week.

A Determination Order of February 24, 1976 granted claimant 48° for 15% unscheduled disability.

The Referee concluded that, based on all of the factors involved in this case, including the testimony and medical evidence presented, claimant has lost 25% of his wage earning capacity and granted him an award equal to 80°.

The Board, on de novo review, affirms the order of the Referee, but also finds that claimant is entitled to psychological counseling under the provisions of ORS 656.245, if he so desires.

ORDER

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

WCB CASE NO. 76-3911 APRIL 22, 1977

MARILYN WHITESIDES, CLAIMANT
Rolf Olson, 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 compensation for temporary total disability from July 9, 1976 through September 15, 1976 and granted her an award of 16° for 5% unscheduled disability. Claimant contends she is entitled to additional compensation for temporary total disability from December 21, 1975 through July 18, 1976, inclusive.

Claimant sustained an injury on December 5, 1975 which was first denied by the Fund. After a hearing, the claim was remanded to the Fund for acceptance and payment of compensation. The only medical reports in the file at the time of this hearing were from Dr. Ketchum dated December 11, 1975 which indicated claimant was medically stationary and another report from Dr. Bolin dated July 23, 1976.

Claimant is a full time student and indicated that she would have quit her job in any event to attend college in Bend. Claimant did not seek any employment during the summer months. Claimant contends an inability to work at full capacity because

of her low back injury and she continues to have disabling pain in her low back from time to time.

Dr. Renwick's final report of September 16, 1976 indicates claimant was found to be medically stationary on September 15, 1976 but that she should avoid strenuous lifting or prolonged standing for hours on her feet. The doctor further felt that claimant's condition would be completely resolved in time.

The Referee found little testimony concerning claimant's actual loss of wage earning capacity as she is a full time student now and has sought no employment whatsoever. However, by Dr. Renwick's report there is a mild degree of permanent impairment and the Referee granted claimant an award of 16°. He further concluded that claimant's condition was medically stationary on September 15, 1976 and, therefore, there was no need to reopen her claim.

However, the Referee found claimant was entitled to additional compensation for temporary total disability from the date Dr. Bolin found claimant was not medically stationary, July 19, 1976, until September 15, 1976 when Dr. Renwick found claimant was medically stationary.

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

ORDER

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

SAIF CLAIM NO. C 189782 APRIL 25, 1977

LELAND RHODES, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Order

On February 22, 1977 claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen his claim for an injury sustained on June 12, 1969.

The Board, by letter dated March 8, 1977, notified claimant that upon receipt of Dr. Woolpert's report, a copy would be furnished to the State Accident Insurance Fund and they would be granted 20 days within which to state their position to claimant's request.

The Fund was provided with a copy of Dr. Woolpert's letter on April 12, 1977 and on April 19, responded, stating they would not reopen claimant's claim as claimant had been uncooperative in past examinations and his claim had been closed

on July 20, 1970 with no award for permanent partial disability and the Fund had fulfilled its responsibility.

In his letter report of March 10, 1977, Dr. Woolpert indicates that claimant has increased difficulty with his shoulder and, in his opinion, that this condition is a worsening of his industrial related injury of 1969 and he recommended exploratory surgery.

The Board, after giving full consideration to this matter, concludes that claimant's claim shall be remanded to the Fund for reopening with compensation for temporary total disability commencing the day claimant is hospitalized for the recommended surgery by Dr. Woolpert, and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

SAIF CLAIM NO. YC 75094 APRIL 26, 1977

DAVE CORBIN, CLAIMANT
Dept. of Justice, Defense Atty.
Amended Own Motion Determination

The Board issued its Own Motion Determination Order in the ab ove entitled matter on April 11, 1977. The Order portion of that Own Motion Determination should be amended to read as follows:

ORDER

Claimant is hereby granted compensation for temporary total disability from June 18, 1976 through August 30, 1976 and an award of 53° of a maximum 100° for loss of vision of the left eye; this award is in addition to all previous awards.

WCB CASE NO. 76-3413 APRIL 29, 1977

FRED FAGG, CLAIMANT
D. Keith Swanson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests Board review of the Referee's order which affirmed the Determination Order dated June 28, 1975.

Claimant sustained a low back injury on April 16, 1975. Dr. Bolin diagnosed a minor lumbosacral sprain. Claimant had had an injury to this same area of his back on June 20, 1973. Dr. Bolin released claimant for regular work on June 2, 1975. On June 23, 1975 claimant suffered a minor exacerbation.

On July 25, 1975 claimant again injured his low back. Dr. Bolin thought this was an exacerbation of the April 16, 1975 injury, but referred claimant to Dr. Burr who, after examining claimant on September 29, 1975, diagnosed a lumbosacral strain.

Dr. Harwood examined claimant on January 26, 1976; he found claimant to be medically stationary. There was paresthesia in the lower left extremity indicating the possibility of nerve root pressure at L5-S1 which he thought preexisted the industrial injury and was unrelated thereto. Dr. Bolin agreed with Dr. Harwood but felt claimant needed continued maintenance treatments to keep him employed.

Claimant was examined by Dr. White on March 9, 1976, who felt claimant should avoid heavy lifting.

A Determination Order dated June 28, 1976 awarded claimant 16° for 5% unscheduled disability for the injury of April 16, 1975. Another Determination Order on the same date granted claimant 16° for 5% unscheduled disability for the injury of July 25, 1975. Claimant appealed the award for the July 25, 1975 injury only.

Dr. Bolin has treated claimant since June, 1973 when he had suffered a low back industrial injury. It was found that claimant has a genetic defect which causes a weakness which predisposes him to injuries. Since January, 1976 claimant has sought treatments from Dr. Bolin, averaging ten times a month. X-rays taken in October, 1976 indicated claimant's condition was the same as since his first injury in 1973.

Presently claimant works on a limited basis, he testified that his condition has deteriorated during the past year. Following the injury of April, 1975 claimant's condition improved, however, after the injury of July, 1975 his symptoms were more acute and it was recommended that he not return to employment requiring heavy lifting.

The Referee found that if claimant restricts himself to sedentary occupations he should have few problems. The Referee

found that claimant had been limited in his working capacity following both the June, 1973 and April, 1975 injuries and the effects of these injuries, from which he had not completely recovered, cannot be charged to the July, 1975 industrial injury.

The Referee concluded that claimant has received an award of 32° for 10% undscheduled disability which is adequate to compensate him for his loss of wage earning capacity. He affirmed the Determination Order.

The Board, on de novo review, finds that claimant has received an award of 16° for the April 16, 1975 injury which apparently was satisfactory to claimant at that time, however, after the July 25, 1975 injury claimant did not feel the award of 16° for that injury was adequate. The Referee should not have treated the two Determination Orders as one even though each was entered on the same date. Each was for a separate injury.

The Board further finds that after the second injury claimant's wage earning capacity was diminished more than the award received represents.

The Board concludes that claimant is entitled to an award of 64° to adequately compensate him for this loss of wage earning capacity.

ORDER

The order of the Referee dated December 8, 1976 is modified.

Claimant is hereby granted an award of 64° for 20% unscheduled disability. This award is in lieu of the award granted by the Determination Order of June 28, 1975 for the July 25, 1975 injury.

Claimant's attorney is granted a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed the sum of $2,300.

WCB CASE NO. 76-3305 MAY 3, 1977

LEZLEY DRAKE, CLAIMANT
Edward Olson, Claimant's Atty.
Roger Warren, Defense Atty.
Amended Order on Review

The Board issued an Order on Review on April 19, 1977 in the above entitled matter. The sixth paragraph on page 2 of said order should be deleted and the following paragraph inserted in lieu thereof:

> "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 compensation as paid, not to exceed the sum of $2,300."

In all other respects the Order on Review is ratified and reaffirmed.

SAIF CLAIM NO. SC 287931 MAY 3, 1977

RAYMOND PRESNELL, CLAIMANT
Donald Kelley, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order Vacating Own Motion Order

On March 31, 1977 an Own Motion order was entered in the above entitled matter whereby claimant's claim for an injury sustained on January 29, 1971 was remanded to the State Accident Insurance Fund for acceptance and payment of compensation as provided by law and until closure was authorized pursuant to ORS 656.278.

The claim was remanded based upon a request made by claimant's attorney which was supported by a medical report from Dr. Streitz. Five years had expired since the initial closure of the claim pursuant to ORS 656.268 and the Board assumed, not being advised to the contrary, that claimant's aggravation rights had expired and therefore it chose to exercise its own motion jurisdiction pursuant to ORS 656.278.

On April 29, 1977 the Board received from claimant's attorney a motion to vacate the Board's Own Motion order on the grounds and for the reason that the five year period had not expired, having been tolled by the filing of a medical report from Dr. Stanley Young dated March 24, 1975 which indicated claimant needed further medical services and thus must be considered as a claim for aggravation and inasmuch as it was filed prior to the expiration of the five year period, had the effect of tolling that statute of limitation.

Based upon the fact that claimant's aggravation rights had not actually expired at the time he requested the Board to exercise its own motion jurisdiction, the Board concludes that claimant had an adequate remedy and could, as he did, request a hearing on the validity of his claim of aggravation.

ORDER

The Own Motion order entered in the above entitled matter on March 31, 1977 is hereby vacated and set aside.

SAIF CLAIM NO. YA 988863 MAY 6, 1977

HAZEL KASPAR, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on April 10, 1963. On September 16, 1963 claimant underwent a laminectomy and fusion. The claim was closed by a Determination Order of April 17, 1965 with an award to claimant of 15% loss function of an arm for unscheduled disability.

Claimant filed an aggravation claim and, by an order dated March 4, 1966, claimant's request was denied. Claimant again appealed and, by an order dated April 18, 1966, was granted 20% loss function of an arm, for a total award of 35% unscheduled disability. Claimant's aggravation rights have expired.

A medical report from Dr. Hews of February 5, 1975 indicated that claimant's condition had worsened and her symptoms were a result of her April, 1963 industrial injury.

By a Board's Own Motion Order of March 13, 1975 claimant's claim was remanded to the Fund for acceptance and to provide further medical care and treatment.

On April 19, 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 January 20, 1975 through November 1, 1976. Further, that claimant is not entitled to any further award for permanent partial disability; the treatment claimant has been rendered was palliative not curative in nature and no award is warranted.

The Board concurs with the recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 20, 1975 through November 1, 1976.

WCB CASE NO. 74-2727 MAY 6, 1977

FLOYD MENDENHALL, CLAIMANT
Don Wilson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Phillips and Moore.

The State Accident Insurance Fund has requested Board review of a Referee's order finding: (1) There were no procedural bars precluding his consideration of the merits of claimant's claim and, (2) that claimant's heart attack was compensable as an accidental injury arising out of and in the course of his employment.

The Fund's request for review specified no issues to be addressed on review and no briefs were filed. We have, therefore, reviewed the entire record de novo.

Having done so we are persuaded the Referee's well written order is correct as to both the facts and the law and adopt his opinion as our own.

OAR 436-82-100 provides that if the Fund appeals to the Board and the Board affirms the Referee that the Board shall allow claimant's attorney an additional fee to be paid by the Fund. The rule also provides, in 82-005(2), that the amount of the fee must be based on the efforts and services of the attorney.

It appears no efforts or services were provided by claimant's counsel on this review. Therefore, no attorney's fee will be allowed.

ORDER

The Opinion and Order of the Referee, dated the 26th day of March, 1976, is affirmed.

WCB CASE NO. 76-3129 May 6, 1977
WCB CASE NO. 76-3630

ALBERT SOTERION, CLAIMANT
Charles Seagraves, Claimant's Atty.
Philip Mongrain, Employer'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 both the denial of claimant's claim for aggravation (WCB Case No. 76-3129) and the denial of claimant's claim for a compensable injury on April 14, 1976 (WCB Case No. 76-3630).

Claimant sustained a compensable injury to his back on June 6, 1975; he lost no time from work and received only minimal medical attention. His claim was accepted as a non-disabling injury. Claimant continued working until January, 1976 when he terminated for reasons not associated with the industrial injury.

Claimant had had a pre-existing prior back injury in 1963 or 1965 which had been superimposed on a pre-existing spinal condition. Both before and after his June 6, 1976 injury at Roseburg Lumber Company, whose carrier was Employers Insurance of Wausau, claimant had continuing back problems which at times necessitated chiropractic treatment.

The day after his termination at Roseburg Lumber Company claimant went to work for Sun Studs, Inc., whose carrier was the Fund. Claimant noted some back distress over the next few months. On April 14, 1976, while in the process of getting out of his van, claimant twisted his body and extended his left leg towards the ground, he then felt a sharp pain in his back. Claimant consulted Dr. Parsons, a chiropractor, during his lunch hour and was given some medication. Claimant finished his shift; he worked a month longer, missing no time from work. Claimant was then discharged; the reasons therefor were never fully explained.

Claimant did not file a claim with Sun Studs for the incident in April, 1976, however, Dr. Parsons forwarded a physicians report to Wausau indicating a relationship to the 1975 injury. Later the Fund became aware of this report and both carriers denied claimant's claims; Wausau for an aggravation of the June 6, 1975 injury and the Fund for an alleged new injury.

The Referee found that claimant's back condition resulting from his June 6, 1975 injury at Roseburg Lumber Company had not worsened and he affirmed the denial by Wausau.

The Referee further found that claimant had not sustained a new injury on April 14, 1976 arising out of his employment with Sun Studs.

The Board, on de novo review, agrees with the findings of the Referee but finds that claimant is entitled to medical services pursuant to the provisions of ORS 656.245 and his need for this medical treatment is related to the industrial injury of June 6, 1975 and is, therefore, the responsibility of Roseburg Lumber Company.

ORDER

The order of the Referee, dated October 15, 1976, is affirmed.

No NUMBER MAY 9, 1977

GENEVIEVE DUMIRE, CLAIMANT
Dan O'Leary, Claimant's Atty.
Own Motion Order

On February 18, 1977 the claimant, by and through her attorney, Dan O'Leary, petitioned the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen her claim for an industrial injury suffered on May 23, 1966 while in the employ of W. T. Grant Company, whose workmen's compensation coverage was furnished by Liberty Mutual Insurance Company. Claimant's claim was closed by a Determination Order mailed March 13, 1967 which awarded claimant compensation for 15% loss of an arm by separation for unscheduled disability due to aggravation of her pre-existing condition.

Claimant's petition was accompanied by a letter report from Dr. William Elston dated October 14, 1976. On March 11, 1977 Liberty Mutual was furnished a copy of the petition and Dr. Elston's report by the Board and advised that it had 20 days within which to state its position with regard to claimant's petition to reopen. On April 8, 1977 Liberty Mutual advised the Board that it felt there was not sufficient evidence to substantiate causal relationship between claimant's present condition and her industrial injury of May 23, 1966 and it declined to reopen the claim.

The Board, after giving full consideration to this matter, concludes that, based upon the letter report of Dr. Elston, that claimant's claim should be reopened at this time for such medical care and treatment as she may require and for the payment of compensation as provided by law.

ORDER

Claimant's claim for an industrial injury suffered on May 23, 1966 is hereby remanded to the employer, W.T. Grant Company, and its carrier, Liberty Mutual Insurance Company for the payment of compensation as provided by law, commencing on the date of this order and continuing until the claim is closed pursuant to ORS 656.278.

Claimant's attorney shall receive, as a reasonable attorney fee, a sum equal to 25% of any compensation paid claimant for temporary total disability and on permanent partial disability payable out of said compensation as paid, not to exceed $500.

WCB CASE NO. 76-2852 MAY 9, 1977
WCB CASE NO. 76-2853

MARY HARTMAN, CLAIMANT
Sidney Galton, Claimant's Atty.
Dennis VavRosky, Defense Atty.
Michael Hoffman, Defense Atty.
Order on Motion

On April 28, 1977, Underwriter's Adjusting Company moved the Board for an Own Motion Order permitting it to use part of a permanent partial disability award granted to claimant by a Referee for a January 30, 1975 injury claim, and paid to her pursuant to ORS 656.313 by Liberty Mutual Insurance Company pending Board review of the Referee's order, (now considered an overpayment by virtue of the Board's reversal of the Referee's order) as its payment of the balance due on a permanent partial disability award granted to claimant for a July 25, 1975 injury.

The issue of the extent of claimant's disability resulting from each of the injuries in question is presently pending in a consolidated appeal to the Circuit Court of Multnomah County.

In view of the pending appeals, we believe the parties should have their respective legal rights in this matter adjusted by the Circuit Court because any order the Board might now grant could be rendered moot by the Circuit Court's actions.

Therefore, the motion should be and it is hereby denied.

IT IS SO ORDERED.

WALTER GAY, CLAIMANT
Larry Bruun, 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 granted claimant an award of 112° for 35% unscheduled disability. Claimant contends this award is inadequate.

Claimant sustained a compensable low back injury on January 16, 1973 caused by his normal activities on the job of reaching, pulling, twisting, turning and stooping. A Determination Order of May 25, 1973 granted claimant no award for permanent partial disability.

Claimant's claim was subsequently reopened and on April 21, 1975 claimant underwent an L4-5 laminotomy, neurolysis and discectomy. A Second Determination Order of May 12, 1976 granted claimant no award for permanent partial disability.

The medical evidence indicates that Dr. Fleshman found claimant is now limited in lifting to ten pounds and only to be performed occasionally. Dr. Short found claimant could stand and walk only from one to four hours in an 8 hour work day. The Orthopaedic Consultants felt claimant's disability was mildly moderate.

The Referee found claimant has an 8th grade education and normal intelligence. Claimant further has diffuse brain damage of both frontal lobes, and has personality problems with hysterical and inadequate features.

The Referee concluded, based on claimant's physical residuals, his age, education, work experience, and psychological problems, that claimant has lost 35% of his wage earning capacity.

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

ORDER

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

DENISE MAGNUSON, CLAIMANT
Allan Coons, Claimant's Atty.
Merlin Miller, 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 reopening for coordinated treatment recommended by Carolin Keutzer and the weight reduction program recommended by Dr. Benoit, including but not limited to, weight reduction programming and psychological counseling commencing February 13, 1976 and until closure is authorized pursuant to ORS 656.268; and reversed the Third Determination Order making an offset of the permanent partial disability awarded by the Determination Order against the temporary total disability compensation ordered by this order.

Claimant sustained a compensable left leg injury on June 5, 1969. Between June 5, 1969 and June 19, 1972 claimant underwent substantial period of medical treatment and two claim closures. Claimant's knee injury and the treatment therefor produced further medical problems for which she required further treatment, namely, thrombophlebitis. On March 12, 1975 claimant's claim was reopened by Referee John F. Drake on the basis of aggravation. On February 25, 1976 a Third Determination Order was issued.

By the three Determination Orders claimant has received a total of 37.5° for 25% loss of the left leg.

Claimant has not worked since 1973 after her hospitalization. Claimant was referred to the Vocational Rehabilitation Division in an attempt to set up a program at a community college for her. This counseling for placement led to psychological consultation by Carolin Keutzer, a clinical psychologist. This consultation was discontinued when claimant's vocational program was terminated and she was scheduled to attend the Disability Prevention Division. Claimant has not returned for counseling with Keutzer.

Claimant has a chronic thrombophlebitis condition which is the consequential result of the knee injury sustained at the time of her industrial injury. Claimant is also very much overweight. This condition of being overweight is partly due to the consequences of claimant's injury in that the phlebitis condition is the main reason for the sedentary activity environment she endures which contributes to her gaining weight. Subsequently, the increased weight she bears has an adverse affect on the phlebitis condition and causes recurrence of symptoms.

The Referee found that this conclusion is supported by the evidence by expert opinion of Carolin Keutzer who testified that the psychological components were caused to become active as the consequential result of claimant's industrial injury and that these components contribute to the weight increase which, in turn, affects the phlebitis.

The Referee further found that claimant has marketable vocational skills and if claimant's medical problems can become resolved or lessened she could be retrained or re-employed. Unless these conditions are resolved or lessened, however, claimant is unemployable.

Therefore, the Referee concluded claimant's claim was prematurely closed and her claim is remanded to the employer for the recommended weight reduction program and psychological counseling.

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

ORDER

The order of the Referee, dated November 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 $300, payable by the employer.

WCB CASE NO. 76-3655 MAY 10, 1977

JAMES MCDONALD, 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 Fund's denial of July 6, 1976 for claimant's claim for aggravation.

Claimant sustained a compensable injury on May 21, 1972 and has not worked since. His claim was closed by a Determination Order on January 30, 1974 with an award for 96° unscheduled disability. Claimant appealed and, by an order dated September 25, 1974, claimant's award was increased to 160°.

Claimant took a course in locksmithing which he completed during January, 1976. However, claimant contends he cannot perform this job as he is physically incapable. He

testified he has no physical stamina, he can't stay on his feet for an hour without rest, he can't sleep lying down at night, his back and hip hurt continuously, he stays loaded on pain pills and he cannot operate his lawn mower.

Claimant testified he did not know when the increased pain began but now has more spasms than ever. He indicated he uses a crutch at all times now.

The Referee found that the medical evidence from Dr. Davis is so general it could include medical problems not attributable to the industrial injury. Also Dr. Hafner's report finds claimant's right hip condition worsening but this condition is unrelated to the industrial injury.

The Referee affirmed the denial of claimant's claim for aggravation.

The Board, on de novo review, concurs with the conclusions reached by the Referee. However, it must be pointed out that in Dr. Hafner's report of November 1, 1976 the doctor found claimant's right hip problem was related to the industrial injury.

The Board concludes that claimant's right hip condition is not compensable. In Referee Rode's order he had found that the right hip condition was unrelated to the industrial injury and he made no award to claimant for said condition. In the order before us the Referee found no showing that claimant's disability had spread from the low back to the hip area.

ORDER

The order of the Referee, dated November 30, 1977 is affirmed.

WCB CASE NO. 75-3304 MAY 10, 1977

DONALD REYNOLDS, CLAIMANT
Ralph Spooner, 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 32° for 10% unscheduled head disability. Claimant contends the award is inadequate.

Claimant was struck on the head by a tree on March 12, 1974 and suffered serious skull fractures. Claimant's spleen was also found to be damaged and was surgically removed. He underwent further surgery for a skull defect.

Two weeks after the injury claimant was examined by Dr. Rowell, an ophthalmologist with claimant complaining of double vision. Visual acuity was measured at 20/20 in both eyes.

In July, 1974 claimant returned to his regular job operating a shovel in the woods, and now works full time.

A Determination Order of July 15, 1975 granted claimant no award for permanent partial disability.

In January, 1976 Dr. Rowell stated that the double vision problem continued when claimant turned his eyes 20 degrees to the left and this condition was permanent.

Claimant was examined at the Neurological Clinic upon referral by his attorney. It was found that some cranial nerve deficiency existed and was permanent. There was some disturbance of memory and visual motor performance. Claimant's disability was rated as mild to moderate impairment due to brain damage. Claimant underwent an electroencephalogram which results were abnormal.

The Referee found that claimant was entitled to unscheduled disability from the residuals of the industrial injury. However, there was no scheduled disability for the loss of vision. Claimant has no visual loss and has 20/20 visual acuity in each eye.

The Referee concluded claimant does have mild to moderate brain damage from the industrial injury. Claimant can perform his job as a shovel loader in the woods; however, he suffers from headaches and a disturbance of memory and visual motor performance. Therefore, the Referee granted claimant an award of 32° for 10% unscheduled head disability.

The Board, on de novo review, finds that claimant is entitled to a greater award of permanent partial disability than that granted by the Referee in that claimant's residuals from the industrial injury are considered to be mild to moderate. Therefore, the Board concludes that claimant is entitled to an award of 64° for 20% unscheduled head disability.

The Board further wishes to emphasize to the claimant that he is entitled to aggravation rights should his condition from the industrial injury worsen, under the provisions of ORS 656.245.

ORDER

The order of the Referee, dated September 17, 1976, is modified.

Claimant is hereby granted an award of 64° for 20% unscheduled head disability. This award is in lieu of that granted by the Referee's order.

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.

WCB CASE NO. 76-3157 MAY 10, 1977

FRED WHITFIELD, CLAIMANT
Peter Hansen, Claimant's Atty.
A. Thomas Cavanaugh, 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 of April 9, 1976 issued by the employer.

Claimant originally injured himself while employed as an automobile mechanic. A Determination Order of July 20, 1973 granted claimant an award of 80°. In July, 1974 claimant filed a claim for aggravation which was denied in October, 1974. Claimant appealed and, after a hearing, his claim was remanded to the employer for acceptance of his claim for aggravation on January 20, 1975. A Second Determination of May 13, 1975 granted claimant an additional award of 64°. Claimant again appealed and, after a hearing, an order of September 16, 1975 increased claimant's award to a total of 208°.

On January 9, 1976 claimant sustained a fall at home when his legs gave out on him and he fell to the floor striking his head. Claimant was knocked unconscious by the fall. His wife was unable to revive him and called for an ambulance. The ambulance bill was $106, the emergency bill at the hospital was $47.20 and an X-ray bill was $6.

Claimant was discharged from the hospital with a diagnosis of Munchausen's syndrome. Dr. Short billed claimant $12 for the office call on January 12, 1976. Claimant indicated to Dr. Short that he did not know what caused his fall.

The Referee found that the medical reports do not convincingly relate claimant's January 9, 1976 fall to claimant's industrial injury. Claimant testified that during September, 1975 he experienced a dull tooth-ache type pain in his legs all the time extending into the knees. Upon being questioned at the hearing claimant stated that he falls frequently.

The Referee concluded that the diagnosis made of claimant's condition was Munchausen's syndrome which is defined as a condition characterized by habitual presentation for hospital treatment of an apparent acute illness, the patient giving plausible and dramatic history, all of which are false. Therefore, the Referee affirmed the denial.

The Board, on de novo review, disagrees with the conclusions reached by the Referee. In his report of October 4, 1976 Dr. Short states that claimant's falling episodes are the result of weakness or numbness or pain in the right leg. He further stated that it is probable that the fall of January 9, 1976 was a similar episode and it is not uncommon for chronic low back patients to fall because of pain or weakness in the legs.

Therefore, the Board concludes that the employer is to accept claimant's claim for the medical expenses incurred after his fall of January, 1976.

ORDER

The order of the Referee, dated October 20, 1976, is reversed.

The employer is hereby ordered to accept claimant's claim for the medical expenses incurred by him following his fall of January 9, 1976.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with this Board review and at the hearing, the sum of $900, payable by the employer.

WCB CASE NO. 76-4773 MAY 10, 1977

DONALD S. WINCER, CLAIMANT
Dan O'Leary, Claimant's Attorney
R. Kenney Roberts, Employer's Atty.
Stipulated Settlement

It is hereby stipulated by and between Donald S. Wincer through his attorney Dan O'Leary and Independent Paper Stock, through their insurer EBI Insurance Company, by and through R. Kenney Roberts of their attorneys that claimant filed a claim of occupational disease occurring on or about July 23, 1974 which claim was filed on June 6, 1976. The insurance carrier denied responsibility for this claim. A hearing was held before Hearing Referee Page Pferdner and an Opinion and Order issued on January 5, 1977 finding claimant's claim compensable and allowing temporary total disability and medical expenses from June 6, 1976 forward but denying benefits prior to June 6, 1976. Claimant has requested a review of this Opinion and Order. The employer has cross-appealed this Opinion and Order. The parties wishing to resolve their dispute;

It is hereby stipulated and agreed that this matter be compromised and settled subject to the approval of the Workmen's Compensation Board by EBI Insurance Company agreeing to pay temporary total disability at the rate and as if the claim had originated on June 6, 1976. EBI Insurance Company is not responsible or liable for temporary total disability benefits or medical expenses, including surgical expenses, incurred prior to June 6, 1976. However, EBI Insurance Company agrees to pay to claimant in a lump sum an amount which would reflect the difference between what claimant was paid in time loss benefits and the amount he would have received if he were paid temporary total disability benefits at the rate in effect at the time such time loss was incurred between July 23, 1974 and June 6, 1976 for those periods of time previously paid by the private insurance carrier.

It is further agreed that at such time as claimant's condition becomes medically and vocationally stationary, claimant will be entitled to an award of permanent disability for all disability which he can prove was caused or contributed to by his work for Independent Paper Stock Company, whether such disability is attributable to conditions existing before or after June 6, 1976, except that the employer and carrier shall not be responsible for any permanent disability which arose prior to July 23, 1974. Except as specifically modified by this stipulation, the Opinion and Order of the Referee dated January 5, 1977 shall remain in full force and effect.

It is further agreed that claimant's attorney shall be paid the attorney fee awarded by the Amended Opinion and Order dated February 1, 1977, in addition to the compensation made payable by this order and the Opinion and Order of the Referee, and not out of said compensation.

Stipulation approved and request for review and cross-request for review are dismissed with prejudice.

WCB CASE No. 76-5761 May 13, 1977

LARRY ANDERSON, CLAIMANT
Keith Tichenor, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order Referred for Hearing

On April 20, 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 an injury sustained on or about August 21, 1969. Claimant's aggravation rights expired on May 27, 1975. In support of his request claimant attached medical reports from Dr. Corson, Dr. Trucke, and Dr. Campagna with copies being submitted to the Fund along with his request.

By letter dated April 22, 1977 the Board informed the Fund that it had 20 days within which to state to the Board its position regarding claimant's request.

On April 28, 1977 the Fund responded, stating claimant's present problems stem from being struck by an automobile which possibly ran over him on February 1, 1976 and a fall he sustained on July 4, 1976 at home.

The Board, after giving due consideration to this matter, concludes that at the present time it does not have enough evidence before it to make a decision and, 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 August 21, 1969 and, if so, whether claimant's condition has worsened since his last award or arrangement of compensation in May, 1970.

Upon conclusion of the hearing the Referee shall cause a transcript of the proceedings to be prepared which the Referee shall submit to the Board, together with his recommendation on claimant's request.

SAIF CLAIM NO. EC 172227 MAY 13, 1977

ALFRED BLAKER, CLAIMANT
Allen Owen, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order Referred for Hearing

Claimant on April 1, 1977, 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 treatment and hospitalization commencing on or after August 17, 1976 for an industrial injury sustained on January 31, 1969. Claimant attached several documents and medical reports in support of his request which were furnished to the Fund. Claimant's aggravation rights expired on February 25, 1975.

However, on October 15, 1975 the Fund reopened claimant's claim. Subsequently, on July 20, 1976, the claimant's claim was closed under the provisions of ORS 656.268 with regular appeal rights to claimant. An appeal of the July 20, 1976 Determination Order resulted in the Referee's opinion that the Determination Order should have been closed pursuant to ORS 656.278.

By letter dated April 7, 1977 the Board informed the Fund that it had 20 days within which to state its position regarding claimant's request.

On April 22, 1977 the Fund responded, stating it could not justify further compensation based on the record, but recommended a hearing be held to determine their responsibility.

Therefore, claimant's request is referred to the Hearings Division with instructions to hold a hearing and take evidence on the issue of whether claimant's medical treatment and hospitalization are related to his injury of January 31, 1969 and are the responsibility of the Fund and, if so, then what is the extent of claimant's permanent partial disability, if any.

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.

WCB CASE NO. 76-2265 MAY 13, 1977

MAGGIE BRITTAIN, CLAIMANT
Rick McCormick, 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 dismissed claimant's claim for penalties and attorney fees.

Claimant sustained a compensable back injury on July 1, 1975. Claimant came under the care of Dr. Martens who diagnosed lumbosacral sprain and he treated her conservatively. A Determination Order of March 2, 1976 granted claimant time loss only.

On March 25, 1976 claimant's back and right leg pain became exacerbated. She was hospitalized on April 2, 1976 for a myelogram. The myelogram indicated a herniation at L4-5. Dr. Martens recommended a laminectomy but claimant was anxious to avoid such surgery as her husband had had two back surgeries and she was afraid of undergoing such a procedure.

On April 19, 1976 Dr. Martens requested permission from the carrier to perform the surgery. Claimant was referred for an examination to the Orthopaedic Consultants who recommended no surgery be performed, indicating there was insufficient objective evidence to warrant a laminectomy. They further felt claimant's condition was medically stationary and she could do bookkeeping work. Dr. Martens concurred with the physicians' findings.

Claimant testified that it was her decision not to undergo the surgery. However, from July through August, 1976 her back became progressively worse and on September 2 she was hospitalized and had surgery the following day. The carrier immediately reopened claimant's claim and commenced time loss benefits.

The Referee found no basis whatever to assess penalties and attorney fees against the carrier. Claimant had refused,at first, the surgery recommended by her doctor and therefore there was no basis to reopen her claim. Once claimant did enter the hospital for the surgery, the carrier began time loss benefits and has fulfilled their obligation.

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

ORDER

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

WCB CASE NO. 76-2648 MAY 13, 1977

DANIEL CAMPOS, CLAIMANT
John Klor, 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 affirmed the Determination Order of July 23, 1976 and affirmed the denial of claimant's claim for a hemorrhoid condition.

Claimant, a 31 year old mover, sustained a compensable low back injury on November 1, 1974. Claimant was treated by Dr. Braman, a chiropractor, who still treats claimant two or three times a week.

On June 25, 1975 claimant was examined by the Orthopaedic Consultants who found a mild chronic lumbar strain. The physicians recommended a thyroid checkup. Claimant had a thyroidectomy in 1964 and is presently substantially overweight. This was a non-industrial condition.

Claimant testified he has no mobility in his back. He hasn't worked since February 20, 1975. Claimant did undertake vocational rehabilitation in a program of heavy equipment sales.

A Determination Order of July 23, 1976 granted claimant an award of 48° for 15% unscheduled disability.

The Referee found that, based on the medical evidence presented and claimant's testimony, claimant has failed to sustain his burden of proving he has any disability greater than that awarded by the Determination Order.

Concerning claimant's claim for a compensable hemorrhoid condition, claimant testified he first began having symptoms in June, or July, 1975. Claimant was treated for this condition by Dr. Sullivan whose reports were not offered into evidence. Dr. Braman indicated, in a report of November 18, 1975, that the

hemorrhoid condition was a result of claimant's injury. This opinion is opposed by the three physicians at the Orthopaedic Consultants who indicated that the condition was not related to the industrial injury.

The Referee concluded that the medical reports do not support a finding that the hemorrhoid condition was related to claimant's industrial injury.

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

ORDER

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

No NUMBER MAY 13, 1977

GLENN DAVENPORT, CLAIMANT
Own Motion Order

On April 4, 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 June 28, 1966. In support of his request claimant attached various medical reports.

On April 26, 1977 the Board wrote to Dr. Voth, Medical Director for the employer-carrier, Pacific Northwest Bell, requesting a medical report from Dr. Grewe to indicate the responsibility for the surgery which Dr. Grewe performed and stating whether claimant's condition had worsened since his last award of compensation and, if so, whether that worsening was a result of the industrial injury.

On April 27, 1977 Dr. Voth responded, attaching a report from Dr. Grewe dated January 12, 1977. In that report Dr. Grewe states that in the absence of any contrary information claimant's recent exacerbation of symptoms is a progression in the "long-standing, chronic intermittent problem". Therefore, there is a relationship between claimant's present symptoms and his industrial injury. Also, by letter dated March 21, 1977, Dr. Logan related claimant's condition to the 1966 industrial injury.

The Board, after giving full consideration to this matter, concludes that, based upon the report from Dr. Grewe and that of Dr. Logan, that claimant's claim should be reopened at this time for such medical care and treatment, including surgery, as

has been or may be required and for the payment of compensation as provided by law, commencing October 22, 1976, the date of the surgery, until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 76-2411 MAY 13, 1977

DALE DIAMOND (HANSEN), CLAIMANT
Robert VanNatta, 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 denial of claimant's claim.

Claimant has had several years experience as a disc jockey and approached the owners of a restaurant and lounge in Portland stating that he could perform a disc jockey type show before a live audience better and cheaper than the person who was performing at the club at that time. The parties agreed upon $50 per night for four shows a week. Claimant testified that there was no written agreement concerning the $50 per night, however, the employer testified that there was. The club had been foreclosed in November, 1975 and the employer was only able to get his tax records out of the club.

No payroll deductions were made from the $50; each week claimant presented a bill indicating four nights at $50 plus any advances he may have made for the purchase of records which were given away at the club and promotional T-shirts advertising the claimant and the club.

The employer instructed claimant about what type of music was to be played and claimant played the records he thought fit that description.

After arrangements were made for claimant to take over the show claimant purchased $8,000 worth of equipment consisting of speakers, mixers, amplifiers, and turntables. He furnished records from his own collection.

On the night of, or about, June 5, 1975 claimant was playing records and taking requests from the audience and towards the end of his shift a girlfriend of the off-duty day time bartender requested a record be played and dedicated to the bartender. Claimant played the record and as it started to play he announced to whom it had been dedicated. Apparently some remark was made by both the bartender and the claimant. Whereupon

the bartender came around the back part of the stage and struck claimant, breaking his nose. The bleeding wouldn't stop and claimant went to the emergency room at the hospital where the bleeding couldn't be stopped and claimant was hospitalized for six days.

The employer was aware of the altercation, being told about it from the bartender on duty that night and by claimant. Claimant was concerned about his medical expenses.

The Referee found that the employer had sufficient knowledge and notice of the incident however, he found claimant was an independent contractor and not an employee of the employer.

Therefore, the Referee affirmed the denial.

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

ORDER

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

WCB CASE NO. 76-1304 MAY 13, 1977

ROBERT SEAVERS, CLAIMANT
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 denied claimant's claim for a neck condition as an aggravation of his industrial injury.

Claimant sustained a compensable right shoulder injury on October 28, 1972. Claimant complained of a shoulder and arm injury. X-rays taken at that time of his cervical spine indicated a normal spine at that level.

Claimant was evaluated by the University of Oregon medical staff. It was found that claimant was overreacting to his injury and the doctor was unable to identify any organic pathology.

Dr. Berselli later diagnosed tenosynovitis and subsequently performed surgery; a Hitchcock procedure of the right shoulder. On January 20, 1975 Dr. Berselli recommended claim closure. A Determination Order of February 19, 1975 granted claimant 32° for 10% unscheduled right shoulder disability.

Claimant continued having problems and on July 6, 1976 Dr. Berselli indicated that it was his opinion that claimant's neck problems were not related to the industrial injury of October 1972.

Claimant testified that he first experienced neck pain in June 1975.

The Referee found that the only medical evidence in the record does not causally relate claimant's neck condition to his industrial injury. Therefore, the Referee concluded that claimant has not met his burden of proof and his claim is denied.

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

ORDER

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

WCB CASE NO. 76-3439 MAY 13, 1977

JIM SOUCIE, CLAIMANT
Brian Welch, Claimant's Atty.
Marshall Cheney, 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 granted claimant an award of 80° for 25% unscheduled disability.

Claimant, an edgerman, developed a respiratory problem in September, 1975 which he contends is work related. Claimant was treated by Dr. Cutter and Dr. Sykes. His condition was diagnosed as extrinsic asthma related to the inhalation of wood dust at work. Claimant's claim was closed on June 29, 1976 with no award for permanent partial disability or temporary total disability.

Claimant presently does not experience any respiratory problems. He changed jobs in June, 1976 from an edgerman to a choker setter in the woods. Therefore, claimant is no longer exposed to heavy concentration of wood dust. Claimant now works fewer weeks per year and at a lesser wage.

The sole criteria for rating unscheduled disability is loss of wage earning capacity and the Referee found claimant has proven a permanent loss of wage earning capacity. Claimant can no longer work inside any mill because of his sensitivity to wood dust.

The Referee concluded claimant is entitled to an award of 25% unscheduled disability.

The Board, on de novo review, finds that claimant has sustained a loss of wage earning capacity equal to 32° for 10% unscheduled disability. Claimant is being trained as a heavy equipment operator in the woods and his loss of wage earning capacity in this job is minimal. Claimant does have an opportunity for jobs in the woods with higher pay. Therefore, an award of 10% adequately compensates claimant for any loss of wage earning capacity he may suffer.

ORDER

The order of the Referee, dated October 21, 1976, is modified.

Claimant is hereby granted an award of 32° for 10% unscheduled disability. This award is in lieu of that granted by the Referee's order, which in all other respects is affirmed.

SAIF CLAIM NO. FC 275071 MAY 13, 1977

MELVIN SPENCER, CLAIMANT
Dept. of Justice, Defense Atty.
Order Vacating Own Motion Determination

On April 14, 1977 an Own Motion Determination order was entered in the above entitled matter, based upon the recommendation of the Evaluation Division of the Board. On February 4, 1977 the Fund had requested a determination, submitting closing evaluation reports from Dr. Schuler and physicians of the Orthopaedic Consultants.

Claimant had suffered an injury to his right Achilles tendon on November 2, 1970. The claim was closed and claimant ultimately received an award for 30% loss of his right foot. On May 21, 1973 claimant suffered another injury to the same area of the right foot and this claim was closed by a Determination Order. Claimant requested a hearing on the denial of his claim for aggravation of the 1970 injury and the adequacy of the award for the 1973 injury. The Referee, after a hearing on both issues on March 14, 1974, concluded that claimant had not suffered an aggravation of his 1970 injury but had suffered a new independent industrial injury on May 21, 1973. He found

claimant's condition was medically stationary and awarded claimant 27° for loss of the right foot. The order was never appealed and became final by operation of law and is binding upon all parties.

Apparently, neither Dr. Schuler nor the Orthopaedic Consultants were made aware of the 1973 injury as their closing evaluations referred only to the 1970 injury.

The claimant, having been found to have suffered a new industrial injury on May 21, 1973 ,is entitled to five years from the date of the Determination Order entered with respect to that specific injury within which to file a claim for aggravation. When the Fund voluntarily reopened claimant's claim in 1976 to allow claimant to receive treatment from Dr. Schuler such treatment must be presumed to relate to the 1973 injury not the 1970 injury and upon receipt of the Fund's request for a determination Evaluation should issue a second Determination Order pursuant to ORS 656.268.

ORDER

The Own Motion Determination entered in the above entitled matter on April 14, 1977 is hereby vacated and set aside.

If claimant is found to be medically stationary, the Fund shall request a determination from the Evaluation Division of the Board based upon claimant's May 21, 1973 industrial injury and upon said request Evaluation shall issue a Determination Order pursuant to ORS 656.268.

No NUMBER MAY 13, 1977

PAUL TREFETHEN, CLAIMANT
Rick McCormick, Claimant's Atty.
Own Motion Order Referred for Hearing

On April 7, 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 sustained on February 12, 1970. In support of his request claimant attached a medical report from Dr. Tsai dated December 27, 1976. A copy of claimant's request and the medical report were furnished to the carrier, Georgia Pacific Corporation.

On April 8, 1977 the Board informed the carrier that it had 20 days within which to state its position regarding claimant's request.

On April 27, 1977 the carrier responded, stating that it appeared that claimant had sustained a new injury in October, 1975 and attached medical reports from Dr. Tsai dated December 29, 1975 and Dr. Stainsby dated April 16, 1971 in support of its contention.

At this time the Board does not have sufficient medical or lay evidence to enable it 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 related to his industrial injury of February 12, 1970 and, if so, if claimant's condition has worsened since the last arrangement or award of compensation on May 31, 1971.

Upon conclusion of the hearing the Referee shall cause a transcript of the proceedings to be prepared and shall submit to the Board the transcript along with his recommendation on claimant's request.

No NUMBER MAY 13, 1977

NELSON ZELLER, CLAIMANT
J. David Kryger, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order Referred for Hearing

On April 21, 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 injury sustained on April 15, 1937. Claimant attached medical reports from Dr. Collis of February 28, 1977 and March 30, 1976 in support of his request.

The Board, on April 26, 1977 informed the Fund of claimant's request. On March 9, 1977 the Fund had informed claimant that it refused to reopen his claim and the Board now requested the Fund to state if their position was the same. By letter dated May 2, 1977 the Fund responded stating their position was unchanged.

The Board finds that the evidence before it is insufficient to make a determination, 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 problems are related to his industrial injury of April, 1937 and, if so, whether claimant's condition has worsened since the last award of compensation in 1937.

Upon conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and submit it to the Board, along with his recommendation on claimant's request.

No NUMBER MAY 17, 1977

DARRELL FULTON, CLAIMANT
Own Motion Order

On February 18, 1977 claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen his claim for further medical treatment for an injury sustained on November 14, 1968. In support of his request claimant attached a medical report from Dr. Coletti dated March 9, 1977.

The Board, by letter dated April 11, 1977, sent a copy of the request together with Dr. Coletti's report to the carrier advising it that it had 20 days within which to state its position.

On April 19, 1977 the carrier, Liberty Mutual, responded, stating it refused to reopen claimant's claim on the ground that claimant's aggravation rights expired on April 11, 1974.

The Board, after giving full consideration to this matter, concludes claimant's claim should be remanded to the carrier for acceptance and payment of compensation, as provided by law, commencing on February 8, 1977 and until closure is authorized pursuant to ORS 656.278.

IT IS SO ORDERED.

No NUMBER MAY 17, 1977

WILLIAM HARSHMAN, CLAIMANT
Own Motion Determination

Claimant sustained a compensable injury to his low back on September 22, 1969. He was examined and treated by Dr. Spurlock who diagnosed acute upper thoracic and lumbar myofacitis. A Determination Order of January 22, 1970 granted claimant compensation for time loss only.

The claim was reopened and claimant was treated by Dr. Carroll who, on August 2, 1971, diagnosed recurrent lumbar strain.

A Second Determination Order of November 15, 1971 granted claimant additional compensation for time loss.

Claimant's claim was again reopened on June 20, 1976 and claimant saw Dr. Carroll. On January 21, 1977 Dr. Carroll performed a closing examination.

On March 10, 1977 the carrier requested a determination. The Evaluation Division of the Board recommends compensation for temporary total disability from June 20, 1976 through January 21, 1977, less time worked, and no award for permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from June 20, 1976 through January 21, 1977, less time worked.

WCB CASE NO. 75-5411 MAY 17, 1977

ESTHER LAKEY, CLAIMANT
Peter Davis, Claimant's Atty.
Merlin Miller, 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 of her claim for aggravation with payment of compensation for temporary total disability commencing May 14, 1976 and until closure is authorized pursuant to ORS 656.268. The employer contends that claimant has sustained no aggravation of her condition and also that her claim should not be reopened for referral to the Portland Pain Rehabilitation Center but such can be provided to claimant under the provisions of ORS 656.245.

Claimant suffered a compensable low back injury on January 4, 1971. In June, 1974 claimant underwent surgery for a foraminectomy and decompression at L4-5. Her claim has been closed a number of times by Determination Orders with the last closure in December, 1974; claimant has been awarded a total of 208° for 65% unscheduled disability and 15° for 10% loss of the right leg. Claimant appealed and, subsequently, the Board increased claimant's unscheduled disability to 240° for 75% unscheduled disability.

In November, 1975 Dr. Heatherington stated that claimant's condition had worsened during the past five months with increasing pain in her low back, right leg and severe headaches.

The employer had claimant examined on November 21, 1975 by Dr. Hill, who had previously examined her in September, 1974, who found her condition had somewhat deteriorated since he had last seen her.

On December 12, 1975 the employer denied claimant's claim for aggravation.

In January, 1976 claimant was admitted to the Providence Hospital and underwent a stereotactic facet rhizotomy. In May, 1975 Dr. Johnson, a neurological surgeon, indicated he did not feel that any further neurosurgical or orthopedic procedures would benefit claimant. He did recommend referral to the Portland Pain Rehabilitation Center; Dr. Seres accepted claimant contingent upon the carrier's approval. The approval was not forthcoming.

The Referee found that claimant had had a gastrointestinal problem which was stipulated to as being causally related to her industrial injury. Claimant has had very little time since her injury when she was pain free. The spinal surgery claimant underwent in June, 1974 was not of relief to her; claimant presently uses pain medication daily.

Considering all of the medical evidence presented in this case, it is evident that subsequent to the rhizotomy procedure in January, 1976 claimant's physical condition was worsening. In May, 1975 Dr. Johnson recommended claimant be referred to the Portland Pain Rehabilitation Center. Therefore, from that time forward, this claimant should have been considered as being temporarily and totally disabled and should have received compensation accordingly. The employer argues that claimant is probably eligible for enrollment at the Portland Pain Rehabilitation Center but is not entitled to compensation for temporary total disability during enrollment. The Referee concluded that although enrollment at the Center does not constitute true hospital confinement, it is confinement just the same and for which claimant is entitled to compensation for temporary total disability while so enrolled. The compensation for temporary total disability shall commence the date of Dr. Johnson's referral, May 14, 1976, and the claim is remanded to the employer for acceptance of claimant's claim for aggravation of her January 4, 1971 industrial injury.

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

ORDER

The order of the Referee, dated October 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 $300, payable by the employer.

WCB CASE NO. 76-3740 MAY 17, 1977

BERNICE MACKEY, CLAIMANT
Allen Coons, Claimant's Atty.
J. W. McCracken, Defense Atty.
Request for Review by Employer

The employer requests review by the Board of the Referee's order which awarded claimant 192° for 60% unscheduled disability.

On May 7, 1974 claimant developed pain in her back and shoulder not attributable to any specific incident but testified to by claimant as a sudden onset from twisting or turning.

On August 28, 1974 Dr. Davis examined claimant and diagnosed chronic dorsal and cervical muscular sprain.

Dr. Rockey released claimant for light work on June 12, 1974. He had found symptoms in her neck and back unrelated to any physical abnormalities and based largely on emotional tension. Dr. Rockey stated claimant could not return to her former job pulling on the bundle chain.

No light type work was available and claimant was referred for evaluation for vocational rehabilitation. Claimant's rehabilitation counselor, Mr. Demers, indicated that claimant had a very mild but definite chronic brain syndrome of some kind. After considering this, together with claimant's age and history of physical stress and activity in her employment, he found that formalized training was not justifiable at that time. The Vocational Rehabilitation Division referred claimant to the Associated Consultants for assistance in job placement. At first claimant was extremely cooperative in following up job leads, however, later claimant showed a growing lack of interest in being available to follow through promptly on job search goals that had been jointly developed. Based on this lack of interest, it was felt that claimant had no desire to actively pursue "new sampling sites". Claimant now has enrolled in an adult education class on her own and testified she intended to continue with this class.

A Determination Order, dated July 12, 1976, awarded claimant compensation for time loss only.

The Referee found claimant well-motivated to return to work. Dr. Rockey's closing examination of May 10, 1976 indicated minimal physical findings, however, claimant has chronic postural strain of the thoracic and lumbar areas which should be considered stationary. Claimant should not return to heavy manual labor due to this condition.

The Referee found claimant and the lay witnesses credible in their testimony that claimant was physically active prior to the industrial injury and there was a marked decrease in her physical competency thereafter.

A wide assortment of employment opportunities were investigated by vocational rehabilitation to no avail. The Referee was convinced claimant could not return to heavy duty employment and her educational limitations impede her in obtaining lighter employment.

Therefore, he concluded claimant was entitled to an award of 192° for 60% unscheduled disability to compensate her adequately for her loss of wage earning capacity.

The Board, on de novo review, finds, based on the medical and lay evidence, that claimant has not sustained a loss of her wage earning capacity due to the residuals of her injury that would justify an award of 192°. Claimant has not fully accepted the vocational assistance offered her and, at the present time, she hasn't shown that she is entitled to more than an award of 35% of the maximum.

ORDER

The order of the Referee, dated November 19, 1976, is modified.

Claimant is hereby granted an award of 112° of a maximum of 320° for unscheduled disability. This is in lieu of the award granted by the Referee's order.

WCB CASE NO. 76-3658 MAY 17, 1977

MICHAEL MURPHY, CLAIMANT
Milo Pope, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant sustained a compensable injury on March 28, 1973 when he twisted his right knee. Dr. Kubler examined him and diagnosed ligamental strain, right knee.

After the injury claimant was off work the rest of that day and then returned as a flagman. Claimant performed this job for six weeks and then returned to truck driving. In February or March, 1975 claimant commenced working as a driver for Hill Meat Company.

On May 12, 1976 claimant was involved in a driving accident while driving a semi and trailer. There was property damage, however, claimant testified there were no personal injuries to himself or others. On May 17, 1976 claimant consulted Dr. Corbett for pain in the right knee with a giving-out sensation. On June 7, 1976 claimant underwent surgery for torn right medial meniscus.

Claimant filed a claim for aggravation which was denied on July 9, 1976 by the carrier.

Claimant testified that after he returned to work in March, 1973 his leg bothered him once in awhile, but it became worse in the latter part of 1975 and the beginning of 1976. Claimant further testified that while loading or unloading meat he had fallen on several occasions due to a slippery floor.

The Referee found that the medical evidence presented indicates that claimant's physician was unaware of the May 12, 1976 truck accident and of the falling incidents at work.

Based on all of the evidence presented the Referee concluded that the right knee condition of 1976 is not causally related to claimant's industrial injury of March 28, 1973 and affirmed the denial of claimant's claim for aggravation.

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

ORDER

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

WCB CASE NO. 76-1229 MAY 17, 1977

GORDON PETERSON, CLAIMANT
Robert Robertson, Claimant's Atty.
Ray Heysell, 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, applicable to this occupational disease claim.

Claimant has always been a faller and bucker since 1954 and has always operated a power chain saw while working for this employer for the last twelve years. Before working in the woods, claimant noticed no hearing problems whatever. He first began noticing a problem with his hearing in 1964 and that his left ear hurt a little and he was more sensitive to noise. These hearing problems continued and claimant first made complaints to his doctor in 1974 but no audiograms were taken at that time.

Claimant's condition worsened during 1975 and he finally consulted an ear specialist, Dr. Traynor. An audiogram performed at that time revealed a bilateral sensori-neural loss more marked on the left than the right. Dr. Traynor found that any relation-

ship between claimant's work conditions and the hearing problem was a possibility but it was also possible that the hearing deficiency was brought on by other causes.

After being examined by Dr. Traynor claimant filed a claim for an occupational disease on January 23, 1976. This claim was denied by the employer on February 25, 1976.

Claimant was later examined by Dr. Swanson, an ear, nose and throat specialist. Dr. Swanson's opinion was, based on the history of duration and the degree of noise exposure expressed by claimant, that the hearing loss was consistent with a possibility of noise induced hearing loss from occupational noise or exposure. Dr. Swanson testified personally at the hearing and more specifically stated his feeling that claimant's hearing loss was noise induced from exposure to noise of a power chain saw in claimant's occupation.

The Referee found that the two medical opinions expressed in this case, those of Dr. Traynor and Dr. Swanson, are not opposed. Dr. Swanson found that claimant's hearing loss was induced from exposure to noise at his occupation; Dr. Traynor found that that was a possibility. Therefore, there being no contradictory evidence presented, the Referee concluded that claimant had proven that he had suffered an occupational disease in the nature of a bilateral hearing loss caused by his occupational exposure working for this employer.

The Referee further found that claimant's claim was not barred for late filing as no doctor had advised claimant that he was suffering from an occupational disease or that his hearing loss was from job exposure until so told by Dr. Swanson. Claimant had already filed a claim at that time. Therefore, claimant's claim is not barred.

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

ORDER

The order of the Referee, dated August 10, 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.

SAIF CLAIM NO. KB 53968 MAY 17, 1977

JUDITH PHIPPS, CLAIMANT
Donald Yokom, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

Claimant, acting by and through her attorney, on November 1, 1976 requested the Board to exercise its own motion jurisdiction and reopen her claim for a compensable injury suffered in 1964. Claimant's claim has been closed and her aggravation rights have expired.

The last award or arrangement of compensation was made on March 16, 1965.

The State Accident Insurance Fund responded to claimant's request, stating it would pay claimant's medical bills and time loss while claimant was at the Pain Clinic. Claimant indicated that this would not be satisfactory.

The Board did not have sufficient evidence, at that time, to make a determination on the merits of claimant's request and, therefore, by order referred the matter to its Hearings Division with instructions to hold a hearing and take evidence on the issue of whether claimant's present condition represented a worsening since the date of the last award or arrangement of compensation.

Pursuant to this order which was entered on February 8, 1977 a hearing was scheduled to be held before Referee George W. Rode, however, the hearing was not held because on April 5, 1977 the Fund accepted the reopening of claimant's 1964 claim, based upon the examination report of Dr. Gripekoven, dated March 23, 1977.

Referee Rode recommended that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and order the Fund to pay claimant the benefits to which she was entitled by law, including compensation for temporary total disability from September 2, 1975 and award claimant's attorney, as a reasonable attorney fee, a sum equal to 25% of the compensation for temporary total disability paid, not to exceed $500.

ORDER

Claimant's claim is remanded to the Fund for acceptance and payment of compensation, as provided by law, commencing on September 2, 1975 and until closure is authorized pursuant to ORS 656.278.

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

FERN RENNELLS, CLAIMANT
R. Ladd Lonnquist, Claimant's Atty.
Roger Luedtke, 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 granted claimant an award of 48° for 15% unscheduled cervical spine and psychological component disability.

Claimant sustained a compensable injury when she, after a dispute between claimant and her supervisor, was forcibly ejected from the plant where she worked and shoved about a block and a half. Claimant went immediately to the emergency room at the hospital and was subsequently released. She saw her family doctor on October 5, 1974 and he found claimant emotionally upset; her neck was stiff and was tender to palpitation over the posterior cervical area of C2 to C7 and contusion on the left forearm.

Dr. Brown indicated, on November 12, 1974, that he had been treating claimant on an almost daily basis since October 5, 1974. By medical reports of May 12 and June 17, 1975 Dr. Brown indicated he last saw claimant on March 6, 1975 and had found her completely recovered from her on-the-job injuries.

A Determination Order of July 24, 1975 granted claimant no award for permanent partial disability.

Claimant was also examined by Dr. Mundal, a specialist in internal medicine on March 15, 1976. Dr. Mundal found claimant was suffering from tension headaches and that the anger and resentment that claimant harbors is her main residual from the accident.

Dr. Quan, a psychiatrist, was deposed and he felt that the aggravating circumstances of claimant's being expelled from the plant caused her to suffer, as a result, some psychiatric impairment. He found claimant had a pre-existing neurosis which was aggravated by her forcible eviction from the plant. Dr. Quan rated the disability to claimant as being 10% of the whole man.

The Referee found, giving claimant the benefit of the doubt and considering that Dr. Mundal did find some slight continuation of limitation of motion more than one and a half years after the original injury, that claimant has sustained some permanent residuals from the injury. He, therefore, awarded claimant 48° for 15% unscheduled cervical and psychological component disability.

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

ORDER

The order of the Referee, dated December 16, 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 employer.

WCB CASE NO. 74-2522 MAY 18, 1977

JOHN ABRAMS, CLAIMANT
Charles Seagraves, 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 Fund to pay medical services commencing in late 1972 for claimant's left leg care and granted an award to claimant of 76.8° for a total award to claimant of 192° for 100% unscheduled low back disability. Claimant contends he is permanently and totally disabled.

Claimant sustained a compensable injury on December 12, 1966. After two lumbar laminectomies his claim was closed with an award of 48° loss of an arm by separation for unscheduled disability. Claimant returned to work in a supervisory position and as a sawyer but in mid-1972 his symptoms became progressively worse and his claim was reopened; a fusion was performed. Claimant has not worked since.

On May 1, 1974 Dr. Gantenbein examined claimant at the Disability Prevention Division and found residuals of herniated disc and below the knee amputation, left leg. On May 14, 1974 claimant underwent a psychological evaluation which revealed average intelligence and moderately severe anxiety tension reaction.

On May 31, 1974 claimant was examined at the Back Evaluation Clinic where it was found claimant's condition was medically stationary with no specific treatment recommended. The physicians further felt that claimant could not return to his former occupation but he could be trained for other occupations because he is bright mentally. Total loss of function of his back due to this injury was moderate.

A Determination Order of July 5, 1974 granted claimant an award of 112° for 35% unscheduled low back disability.

On November 15, 1974 Dr. Campagna examined claimant and stated that claimant's condition was stationary and he was totally and permanently disabled as a result of his 1966 accident.

On December 1, 1975 Dr. Russakov examined claimant and diagnosed chronic back and lower extremity pain, suspect conversion reaction, suspect depression vs thought disorder. Dr. Russakov recommended claimant be referred to the Portland Pain Rehabilitation Center.

In his deposition of September 15, 1975 and clarification report of April 11, 1975, Dr. Short indicated that claimant's sciatic pain is either from the spine or is because of phantom pain in the amputated foot, or both. He recommended the claimant be referred to the Pain Clinic and that the stump problems were causally related to the back surgeries, whether phantom or sciatic and that claimant's enrollment at the clinic would be of benefit from a treatment standpoint to the claimant.

Claimant's working experience has entailed work only in sawmills. Claimant takes from 2 to 10 Empirin, 2 or 3 Valium or 2 to 10 Darvon alternately a day. He also wears a back brace.

The Referee found that claimant's motivation is not suspect and that his complaints are genuine. Mr. Adolph, a vocational expert, felt that claimant was permanently and totally disabled.

The Referee concluded that first the Fund was liable for the medical expenses incurred involving claimant's stump commencing in November, 1972.

The Referee also concluded that although Dr. Campagna and Mr. Adolph, the vocational expert, felt that claimant was permanently and totally disabled, he felt that Dr. Short's opinion should be given a great deal of weight and that claimant should be enrolled at the Pain Clinic. Claimant refuses to go. Therefore, although claimant is motivated to return to work and he is not guilty of exaggerating his symptoms, his refusal to attend the clinic must be considered in deciding extent of his disability.

The Referee granted claimant an award of 192° for 100% unscheduled disability.

The Board, on de novo review, disagrees with the conclusion reached by the Referee and finds claimant, by the medical evidence presented, to be permanently and totally incapacitated from any gainful and regular work and is, therefore, entitled to an award for permanent total disability.

ORDER

The order of the Referee, dated March 8, 1976 is modified.

Claimant is hereby granted an award of permanent total disability commencing on June 18, 1974.

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 the sum of $2,300.

WCB CASE NO. 75-4789 MAY 18, 1977

CHARLES BOWLIN, CLAIMANT
Bernard Jolles, Claimant's Atty.
James Huegli, 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 September 15, 1975. Claimant contends he is permanently and totally disabled.

Claimant sustained a compensable injury to his right hand, knees and low back on January 28, 1975. Claimant came under the care of Dr. Keizer for his knee problems and was treated conservatively. Claimant, during this period, did not receive any treatment for his back.

Claimant returned to work in May, 1975 and worked until October 20, 1975; he has not worked since.

Dr. Grossenbacher examined claimant on June 3, 1976 and diagnosed lumbosacral strain, chronic; probable degenerative medial meniscus, right knee; and possible strain of the left knee by history. Dr. Grossenbacher noted that claimant's subjective complaints relating to his lumbar spine outweigh objective findings. He further found no disability regarding the lumbar spine. Dr. Grossenbacher further found that an arthrogram for the right knee was desirable but, in his opinion, there was no disability in claimant's left knee.

On February 13, 1976 Dr. Grossman examined claimant and diagnosed chronic low back strain and chronic strain both knees.

A Determination Order of September 15, 1975 granted claimant time loss only.

The Referee found that claimant's testimony should be given no weight as he misrepresented material facts as demonstrated by the film produced at the hearing.

The Referee further found that based on the obvious hostility existing between the workmen who testified on claimant's behalf, and the management, that the testimony on both sides was not credible.

The Referee concluded that all of the medical evidence indicating pain in claimant's knees and back is unsupported by any objective medical findings. Therefore, the Determination Order of September 15, 1975 must be affirmed.

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

ORDER

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

Dissenting opinion of Kenneth V. Phillips, Board Member:

The majority opinion discounts totally the corroborating testimony of four lay witnesses and two doctors. I find no reason to doubt the credibility of these witnesses and, therefore, am compelled to a decision which considers as credible the reports, opinions and testimony of Drs. Ackerson and Grossman. Likewise, I find no reason to question the credibility of the claimant's fellow workmen and, therefore, accept it.

Considering the entire record I would reverse the decision of the Referee. I find sufficient evidence to support an award of 64° unscheduled disability for loss of 20% of the labor market as a result of the injury to the back. I also find sufficient evidence to support a finding of 20% loss of the right knee. I do not find evidence to support a finding of additional temporary total disability nor do I find evidence to support a finding of permanent damage to the left knee.

I would make a recommendation for referral to the Disability Prevention Division for a determination as to a vocational disability.

Kenneth V. Phillips, Board Member

WCB CASE NO. 76-4399 MAY 18, 1977

RICHARD BROWN, CLAIMANT
Thomas Wurtz, Claimant's Atty.
J. W. McCracken, 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 of claimant's claim for a compensable injury.

Claimant, a 37 year old truck driver, alleges a compensable back injury between December 12-20, 1975 occurring from driving over a long period of time on his job. Claimant worked for this employer for 16 years and had suffered from back problems for several years. Between December 12-20, 1975 claimant and his lead driver pulled a chipper truck to the state of Illinois, driving straight through with only the necessary stops. Claimant's lead driver, prior to the trip to Illinois, had never heard claimant complain of back trouble even though he knew claimant had had prior back problems. During January, 1976 claimant was having back trouble and wore a bulky back brace and complained of low back ache and pain down his leg.

Claimant worked steadily from January to May 10, 1976. The day following claimant's return from the trip he developed sharp pain down his leg. This he testified, was unlike other times when he had had back problems.

Dr. Degge examined claimant on January 3, 1976 and treated him conservatively. Claimant finally hospitalized himself on May 10, 1976 and again saw Dr. Degge and gave a history that his current symptoms began three weeks earlier while using a wheelbarrow for garden work. Dr. Degge felt claimant had a protruded intervertebral disc at L5-S1 on the left. On May 18, 1976 the disc was excised and the lumbosacral junction was fused.

Claimant had been treated at the Orthopedic and Fracture Clinic in 1969, 1970, 1973 and 1974 for low back problems not work-related. Claimant had worn a back brace off and on since 1970 but has worn it continuously since December, 1975.

The Referee found that Dr. Degge reported, after claimant's hospitalization in May, 1976, claimant giving a history of an incident involving a wheelbarrow for some garden work three weeks prior to his hospitalization and then driving a truck on rough ground and the symptoms became more severe. After the driving trip to Illinois claimant made no report of injury for several months. He continued to work until May, 1976. Upon being hospitalized he reported to Dr. Degge that the current symptoms had begun three weeks previously when using a wheelbarrow.

Dr. Degge, in his examination following the January, 1976 examination, found no protruded disc but, in May, 1976, the symptoms suggested such a protruded disc.

The Referee concluded, taking into account the entire record presented, that claimant had failed to establish he had sustained a compensable injury as he alleged and he affirmed the denial of claimant's claim.

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

ORDER

The order of the Referee, dated December 8, 1976, is affirmed.

SAIF CLAIM NO. EC 82273 MAY 18, 1977

DEWEY COOMBS, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on July 17, 1967 to his right knee and subsequently underwent numerous reconstruction procedures on that knee. On July 2, 1967, due to his injury to the right knee, claimant slipped and injured his right elbow.

Claimant came under the care of Dr. Broth and on August 2, 1976 Dr. Groth diagnosed medial right epicondylitis.

On April 14, 1977 the Fund requested a determination. The Evaluation Division of the Board recommends claimant be granted compensation for temporary total disability from July 2, 1976 through March 21, 1977 and to an award of 9.6° for 5% loss of the right arm for his scheduled disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from July 2, 1976 through March 21, 1977 and to an award of 9.6° for 5% loss of the right arm.

WCB CASE NO. 76-2714 MAY 18, 1977

NORM JACKSON, 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 affirmed the denial of claimant's claim for aggravation.

Claimant sustained a compensable injury on April 19, 1974. The claim was accepted and subsequently closed on August 12, 1974 by a Determination Order which granted claimant time loss only.

At the time of claimant's injury he was treated by Dr. Faber and Dr. Amick; the former diagnosed sacroiliac strain and treated claimant conservatively.

Claimant returned to work and, in February, 1975, sustained another industrial injury which resulted in surgery in May, 1975 for anterior C6-7 disc removal. Claimant returned to work in August, 1975 and worked until December, 1975 when the seafood plant was shut down.

Claimant testified that in February, 1976 while bending over to pick up his shoes, he suffered an aggravation of the back injury, causing severe and immediate low back pain. Claimant saw Dr. Amick who stated that claimant's condition could easily be related to the accident of April, 1974.

The cross-examination revealed that claimant has had a long history of identical back injuries and aggravations. Claimant admitted that all of the nine injuries or aggravations he has experienced were in exactly the same area of his back but testified that the accident of April, 1974 was more severe than any of the others.

The Referee found claimant was a credible witness and had frankly admitted to all of the exacerbations to the same area of his back. These exacerbations date back to December, 1965 and the physicians make the same diagnosis in each case. Therefore, the trauma of February 1, 1976 is not the result of the April, 1974 incident any more than it is the result of any one of incidents to claimant's back.

Therefore, the Referee concluded claimant has not sustained his burden of proving he has experienced a worsening of his condition from the April, 1974 industrial injury and he affirmed the denial of claimant's claim.

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

ORDER

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

WCB CASE NO. 76-2114 MAY 18, 1977

WAYNE ROYAL, CLAIMANT
John Kottkamp, Claimant's Atty.
Dept. of Justice, Defense Atty.

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 35% loss of his right hand.

Claimant, a journeyman meterman, on September 4, 1975 suffered a flash electrical burns to his right hand, neck and face. The neck and face injuries healed without any disability.

Claimant saw Dr. Harcourt who diagnosed first and second degree burns on his face, right hand and wrist. On January 26, 1976 Dr. Harcourt examined claimant who was complaining of considerable morning stiffness in his right hand which required heat and passive and active exercises to improve the range of motion. Dr. Harcourt found permanent partial disability to the right fingers. He found claimant medically stationary.

A Determination Order of March 5, 1976 granted claimant 15° for 10% loss of the right hand.

On April 19, 1976 Dr. Corbett examined claimant and found some tightness of the finger joints, with pain in the middle joints. Claimant lacked 1/4 inch flexion in the index and middle fingers. On May 11, 1976 Dr. Corbett found claimant had good extension but had soft tissue scarring and was aggravating this with a "cooked" hand syndrome.

On August 20, 1976 Dr. Corbett again examined claimant and found claimant lacked 5° flexion of the middle finger joint and lacked 1/8 inch of full flexion with both the index and middle fingers.

Claimant testified that most of his difficulties with his hand were in the morning. He has difficulty using a screwdriver and must use his left hand to apply force when needed on his job.

The Referee found claimant a credible witness who diligently tries to improve the condition of his hand and continues to work.

He concluded claimant's need to spend considerable time each morning warming his hand to make it functional as well as his need to continue to "work" the hand during the day indicated an impairment to the right hand equal to 35%.

The Board, on de novo review, finds that claimant has retained at least 75% use of his right hand. The sole criteria for determining scheduled disability is loss of function, therefore, claimant is entitled to no greater award than one for 25% to compensate him for his loss of function of that member.

ORDER

The order of the Referee, dated December 20, 1976, is modified.

Claimant is hereby granted an award of 37.5° of a maximum of 150° for loss of his right hand. This is in lieu of the Referee's order which is affirmed in all other respects.

SAIF CLAIM NO. RC 228129 MAY 18, 1977

AVIS RUSZKOWSKI, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable back injury on January 23, 1970, diagnosed as minimal compression fractures. A Determination Order of December 10, 1970 granted claimant an award of 32° for 10% unscheduled mid and low back disability.

The claim was subsequently reopened and, on July 10, 1973, claimant underwent a laminectomy. In April, 1974 claimant was referred to the Portland Pain Center, the physicians there felt claimant's prognosis for returning to the labor market was good. A Second Determination Order of November 4, 1974 granted claimant an award of 256° for 80% unscheduled disability.

The Fund voluntarily reopened claimant's claim on December 1, 1976 when claimant underwent another laminectomy. In February, 1976 claimant also underwent a triple bypass surgery unrelated to her industrial injury.

On April 1, 1977 the Fund requested a determination. The Evaluation Division of the Board recommended that claimant be granted compensation for temporary total disability from December 1, 1976 through March 9, 1977; it felt that claimant

had been adequately compensated for her loss of wage earning capacity by the award of 90%.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from December 1, 1976 through March 9, 1977.

No. NUMBER MAY 18, 1977

VERLYN SCHNELL, CLAIMANT
Own Motion Determination

Claimant sustained a compensable crushing injury to his right foot on May 13, 1969. The claim was closed on January 20, 1970 with an award for time loss only.

Claimant's claim was subsequently reopened for further medical treatment by a Board's Own Motion Order dated September 20, 1976. Physical examination indicated an almost full thickness ulcer over the ball of the right foot, aggravating claimant's varicose vein condition.

On April 1, 1977 an examination revealed the ulcer had healed with no evidence of recurrence. Claimant was released to work on April 11, 1977.

On April 7, 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 August 17, 1976 (per the Own Motion Order of September 20, 1976) through April 10, 1977; no award for permanent partial disability was recommended.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from August 17, 1976 through April 10, 1977.

DOROTHY STARK, CLAIMANT
Thomas Howser, 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 claimant's claim to it for a condition of autoerythrocyte sensitization for acceptance and payment of compensation, as provided by law.

Claimant sustained a compensable back injury on February 3, 1975. Claimant was seen by Dr. Hagens and was hospitalized for traction. On March 21, 1975 a myelogram was performed which revealed a herniated intervertebral disc at L4; Dr. Hagens made arrangements for claimant to go to Seattle for chymopapain injections.

On May 7, 1975, in Seattle, Dr. Birkland performed a discogram and chymopapain injection on claimant. Upon returning from Seattle claimant experienced symptoms and was again hospitalized and seen for consultation by Dr. Dunn who diagnosed herniated disc at L4-5. On May 29, 1975 Dr. Dunn performed a laminectomy and decompression bilaterally at L4-5 and bilateral transverse process fusion at L4-5 and L5-S1.

Claimant returned home and began experiencing severe spasms and cramping in her right leg; three weeks later she noted skin discoloration and pain in her right leg; she saw very large painful and purple spots on her legs and contacted Dr. Hagens and was hospitalized in July, 1975. Two days before hospital discharge Dr. Gooding noted that claimant was getting lesions above her neck, involving her trunk, neck, face and scalp.

Dr. Gooding referred claimant to the Scripps Clinic in California in November, 1975. Claimant's condition was then diagnosed as autoerythrocyte sensitization; Dr. Cornell of the Clinic, indicated that there is no systemic therapy available for this condition.

On March 4, 1976 a partial denial was issued by the Fund affirming their responsibility for claimant's back condition but denying responsibility for any condition of autoerythrocyte sensitization.

Dr. Gooding referred claimant, in April, 1976, to Dr. Thompson, a psychiatrist, for evaluation. Dr. Thompson diagnosed depressive neurosis; autoerythrocyte sensitization; possible residual organic back problem and possible psychosomatic back

disorder. He found that the depressive neurosis was directly related to claimant's injury in 1975 and he felt psychotherapy would relieve claimant's problems in her back.

On April 20, 1976, in response to inquiries by the Fund, Dr. Cornell indicated that autoerythrocyte sensitization is a chronic intermittent purpura occurring on the extremities and seen almost exclusively in females. Some autosensitization reactions are probably brought about by repeated trauma but this is not true in all patients. Another possibility is an emotional stimulus might lead to the release of a neurohormone which could influence vascular permeability. Dr. Cornell opined, however, that there is no specific etiology for this condition, although it is recognized as a specific dermatological diagnosis. He further expressed his opinion that claimant's vascular problems were probably unrelated to her industrial injury.

On May 28, 1976 Dr. Gooding reported that claimant had a multitude of problems all apparently related to her original back injury and that the condition of autoerythrocyte sensitization is related to claimant's injections and surgeries by the following examples of medical investigations: (1) a high percentage of patients have a history of physical or surgical trauma preceding the onset of this disease, another case states that (2) an injury appears to have preceeded the disease in most cases.

Dr. Gooding concluded that in light of the above investigative reports that the claimant's development of her disease immediately subsequent to her work injury, her chymopapain disc injections and her laminectomy, is related to one and all of the incidents based upon a reasonable medical probability.

The Referee found that whether claimant's condition of autoerythrocyte sensitization is related to her industrial injury requires expert medical testimony. There are two medical opinions expressed in this case, that of Dr. Cornell of Scripps Clinic and that of Dr. Gooding, claimant's treating physician. Dr. Cornell's opinion is based on claimant's one week stay at the clinic. Dr. Cornell believes that the autosensitization reactions are brought about probably by repeated trauma and is further aware of no specific etiology, but he doubts if there is a relationship between this condition and claimant's industrial injury.

Dr. Gooding states clearly and unequivocally his opinion is that claimant's syndrome is related to her injury, the subsequent treatment and the stress caused thereby. Dr. Gooding has treated claimant for years prior to and after the industrial injury.

The Referee concluded that Dr. Gooding's testimony at the hearing was impressive and convincing and he felt his explanation and reasons for his opinion were reasonable and persuasive and, therefore, claimant's condition of autoerythrocyte sensitization was found to be compensable.

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

ORDER

The order of the Referee, dated September 3, 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. 76-1822 MAY 18, 1977

LLOYD BARTU, CLAIMANT
William Cramer, 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 ordered it to pay claimant's attorney the sum of $1,312.50 which represents the attorney fee awarded to claimant's attorney by the Workmen's Compensation Board in their order in WCB Case No. 74-3430, dated November 14, 1975.

Claimant had sustained a compensable industrial injury and his claim was closed by a Determination Order of August 30, 1974 awarding claimant 75° for loss of function of each hand. Claimant appealed and the Referee, subsequently, affirmed the Determination Order. The case was appealed to the Board which increased the award to 150°. An attorney fee of 25% of the increased compensation awarded to claimant was granted to claimant's attorney by the Board's order.

On March 6, 1976 claimant died prior to the expiration of payments on the original award made by the Determination Order and no attorney fees had been paid. The Fund refused to pay the attorney fee after claimant's death.

The parties agreed that claimant died without dependents, thereby terminating the right to permanent partial disability compensation that was yet unpaid by the Fund.

There is no argument in this case that claimant's attorney was successful in obtaining for claimant an additional 25% permanent partial disability award. However, a contingency that the award actually be paid to the claimant or his survivors was not met. This increase in compensation did not become effective until August, 1976 which was after claimant's death.

The Referee found that the general rule was that attorney fees should be based on the services rendered in successfully obtaining compensation and should not be at the mercy of subsequent events over which he has no control. In this case, due to unforeseen circumstances, the claimant died without any dependents and, therefore, no compensation was to be awarded, except death benefits. However, the Referee concluded that the intent of the law is to make a separate award.

The Referee concluded that once the attorney fees are set forth in a proper order of the Board, it becomes the duty of the carrier to pay these fees regardless of other circumstances which may result in the actual payment of the compensation to the claimant. He ordered the Fund to pay claimant's attorney the sum of $1,312.50.

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

ORDER

The order of the Referee, dated January 12, 1977, 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 $100, payable by the Fund.

WCB CASE NO. 76-4038 MAY 19, 1977

CHRIS BRODERICK, CLAIMANT
John Svoboda, 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 80° for 25% unscheduled disability, and allowed the Fund an offset of $341.62 in excessive temporary total disability payments against the additional award of permanent partial disability granted by this order.

Claimant sustained a compensable industrial injury on March 27, 1974. A Determination Order of November 12, 1975 granted claimant 32° for 10% unscheduled disability. An amended Determination Order of November 20, 1975 granted claimant additional compensation for temporary total disability. An Interim Order of February 25, 1976 found claimant was vocationally handicapped effective January 5, 1976. On August 2, 1976 an additional Determination Order granted claimant compensation for temporary total disability from January 5, 1976 through July 7, 1976 and found

claimant to be medically stationary as of January 5, 1976 and made no change in the permanent partial disability previously awarded. Due to the confusion of all of these orders and amended orders, the compensation for temporary total disability was paid to July 22, 1976, an overpayment of $341.

Claimant began a program at Lane Community College to become a forestry technician the winter term of 1975 but after two terms, claimant's grades were not sufficient and the program was discontinued effective October 13, 1975. Finally, a program through vocational rehabilitation was found in a training position as a bulldozer operator. This job was operating a bulldozer on a large sawdust pile paying $3.50 an hour. Claimant did this job from August, 1976 until October, 1976 when claimant's job was terminated because he did not seem to be able to get the right mixture of sawdust, which was essential in the employer's work of making charcoal.

Claimant then, on his own, found a job as a cook's assistant and is presently performing this job which pays $2.45 an hour. Claimant at the time of his injury was making $6.10 an hour.

Medically, claimant was examined by Dr. Schroeder and treated conservatively, but this didn't seem to improve claimant's condition and a myelogram was performed which indicated a herniated disc at the L4-5 level. On June 13, 1975 a lumbar laminectomy at L4-5 on the left was performed.

On July 18, 1975 Dr. Schroeder indicated claimant was suffering from occasional aching in the left leg and he opined that claimant could not return to any form of heavy type of work. In September, 1975 Dr. Schroeder found claimant's condition stationary with minor permanent residual disability from the injury.

The Referee found that claimant does not lack motivation to work despite the vocational rehabilitation failure which resulted from claimant's inability to handle the work correctly, not lack of motivation. Claimant is now restricted from all heavy lifting. The Referee felt claimant has now experienced a loss of wage earning capacity greater than the 10% granted by the Determination Order.

The Referee granted claimant an award of 80° for 25% unscheduled low back disability to compensate claimant 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 November 15, 1976, is affirmed.

WCB CASE NO. 75-5588 MAY 19, 1977

IRENE GRISHAM, CLAIMANT
Doug Hagen, 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 27° for 20% loss of the right foot. The Referee further allowed the Fund to offset the overpayment of temporary total disability compensation against the increased award for permanent partial disability. Claimant contends the award for scheduled disability is inadequate and also that she is entitled to an award for unscheduled disability.

Claimant sustained a right foot injury on August 2, 1973 when she had sore bunions as a result of working on a cement floor, contributed to by ill-fitting shoes.

Subsequently, claimant underwent surgery on August 26, 1974 performed by Dr. Aizawa for excision of neuromas from the 2nd and 3rd metatarsal spaces of the right foot and ganglionic cyst excision; on March 5, 1975 Dr. Aizawa performed an arthroplasty of the proximal interphalangeal joint of the 2nd digit of the right foot and tendon lengthening.

In the winter of 1975 claimant sought medical attention from Dr. Gerow with complaints of her nervous system and belching. Since claimant's injury she has attempted various rehabilitation programs unsuccessfully due to her nerves and belching.

The first Determination Order of October 18, 1974 granted claimant no award for permanent partial disability nor temporary total disability. The Second Determination Order of November 17, 1975 granted claimant 13.5° for 10% loss of the right foot.

The Referee found that claimant was entitled, based upon the medical reports, to an award of 27° for 20% loss of the right foot for loss of function of that member.

Regarding the issue of unscheduled disability, the Referee found claimant had been examined by Dr. Smith, a psychiatrist, who found claimant was not depressed and that her nervousness and belching were not causally related to her compensable injury. There was no contradictory medical evidence offered.

The Referee concluded claimant had failed to prove that she had sustained any unscheduled disability from her industrial injury.

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

ORDER

The order of the Referee, dated November 8, 1976, is affirmed.

SAIF CLAIM NO. GC 188616 MAY 19, 1977

RICHARD MARTIN, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable low back injury on May 22, 1969. He was treated conservatively and his claim was closed by a Determination Order of October 13, 1969 with no award for permanent partial disability.

In November, 1972 Dr. Hazel examined claimant again and on February 23, 1973 performed a laminectomy at L5-S1 level with disc removal. A Second Determination Order of December 7, 1973 granted claimant an award of 35% unscheduled low back disability and 30% loss of the right leg. Claimant's aggravation rights expired on October 13, 1974.

In early 1976 claimant was examined by Dr. Hazel and Dr. Hill and a myelogram was attempted which proved unsuccessful. On October 9, 1976 Dr. Hill performed a bilateral laminectomy at L3-4 and L5-S1 levels.

On January 12, 1977 Dr. Stolzberg did a closing examination. He found claimant had had good results from the latest surgery and claimant was not suffering from any functional disability and his condition was stable.

On March 10, 1977 the Fund requested a determination. The Evaluation Division of the Board recommended that claimant not be granted any further compensation for permanent partial disability as he has lost no further wage earning capacity and the 30% for loss of the right leg was adequate. However, they recommended claimant be granted compensation for temporary total disability from March 2, 1976 through January 12, 1977, less time worked.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from March 2, 1976 through January 12, 1977, less time worked.

GEORGE PLANE, CLAIMANT
Jerry Gastineau, 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 as amended, which granted claimant an additional award of 144° for 45%, giving claimant a total award of 240° for 75% unscheduled disability.

Claimant, an appraiser, sustained a compensable low back strain on March 19, 1974 and was treated by Dr. McIlvaine, a chiropractic physician, and Dr. Matthews, an orthopedist, who referred claimant to Dr. Luce. Dr. Luce, a neurosurgeon, diagnosed spondylosis L4-5 and L5-S1. Claimant was then examined by Dr. Lynch, an orthopedist, who diagnosed degenerative lumbar arthrosis with aggravation. Claimant quit work on December 31, 1974, stating he no longer could do his job because of his physical condition.

Claimant's symptoms continued and on January 28, 1975 he was examined by Dr. Mason at the Disability Prevention Division. Dr. Mason's diagnosis was low back strain, mildly moderate; some nerve root irritation bilaterally in the low back; definite emotional overlay exaggeration and anxiety tension reaction, and obvious intention to get as much of a disability settlement for retirement purposes as possible.

Claimant underwent a psychological evaluation on February 3, 1975 which indicated that claimant felt he had no alternative other than retirement because he believed he couldn't work in his condition. The prognosis for return to gainful employment was very poor because claimant has given up any thought of continuing to work. Dr. Lynch on April 2, 1975 concurred with the conclusions of the Disability Prevention Division and on April 19, 1975 he recommended claim closure. He found claimant had definite residuals from the industrial injury.

A Determination Order of April 23, 1975 granted claimant 96° for 30% unscheduled low back disability.

Claimant was examined by the physicians at the Orthopaedic Consultants on September 29, 1975 who diagnosed chronic lumbosacral sprains superimposed on moderate degree of osteoarthritis of the lumbar spine and obesity. They thought Vocational Rehabilitation Division referral was not necessary for a 64 year old man who obviously was not motivated to make himself available for work. They found claimant capable of performing sedentary activities in sales work for which he has been trained. His loss of function was termed mildly moderate.

The Referee found, after taking into consideration claimant's age, education, training, work potential and the residuals of his industrial injury, that claimant had lost 75% of his wage earning capacity. The Referee felt there was work claimant could do if he were so inclined and that claimant has skills beyond the typical low back syndrome case. Claimant's lack of motivation precluded him from an award for permanent total disability which claimant contended he was.

The Board, on de novo review, finds that the medical evidence clearly indicates claimant's disability is no more than mildly moderate. Furthermore, much of the wage earning capacity which claimant has lost is due to his desire to retire rather than to his industrial injury.

The Board concludes that claimant would be adequately compensated for his loss of wage earning capacity due to his industrial injury by an award of 176° for 55% unscheduled disability.

ORDER

The order of the Referee, dated June 28, 1976, as amended on July 6, 1976, is modified.

Claimant is hereby granted an award of 176° of a maximum 320° for unscheduled disability. This is in lieu of the award made by the Referee's order which is, in all other respects, affirmed.

SAIF CLAIM NO. RC 125625 MAY 19, 1977

FRANK PRICE, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on December 22, 1967. His claim was subsequently closed by a Determination Order of October 27, 1969 which granted claimant 15° for 10% partial loss of the right forearm. By stipulation entered into on April 16, 1970 claimant's claim was reopened for further medical care and treatment. The claim was closed by a Second Determination Order on February 22, 1974 granting claimant an additional 60° for 40% loss of the right forearm, giving claimant a total award of 50% loss of the right forearm. Claimant's aggravation rights have expired.

On May 3, 1976 a stipulation was again entered into reopening claimant's claim for further medical care and treatment. At this time claimant is medically stationary with a medical report indicating no further disability over that previously granted was warranted.

On April 14, 1977 the Fund requested a determination. The Evaluation Division of the Board recommended claimant be granted compensation for temporary total disability from September 13, 1975, as per the stipulation of May 3, 1976, through April 14, 1977, less time worked and to no greater award for permanent partial disability.

The Board concurs with this recommendation.

ORDER

The claimant is hereby granted compensation for temporary total disability from September 13, 1975, as per the stipulation of May 3, 1976, through April 14, 1977, less time worked.

SAIF CLAIM NO. RC 24082 MAY 19, 1977

RUSSELL PRINCE, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on April 22, 1970 suffering a deep laceration with some bone loss from the middle and distal phalanax of his right middle finger. The claim was closed by Determination Order of July 9, 1970 with an award of 6° partial loss of the middle finger. On June 19, 1971 claimant underwent surgery for excision of some scar tissue. The claim was again closed by a Determination Order which granted claimant an additional 2.2°, giving claimant a total award of 8.2° loss of the mid finger. Claimant's aggravation rights expired in July, 1975.

Claimant's claim was reopened on December 15, 1976 when claimant underwent surgery for a fusion of the DIP joint by bone graft. On February 23, 1977 claimant returned to work.

Claimant was examined by Dr. Ross on April 6, 1977 for a closing examination which indicated claimant was working with no problems and the finger was heavily callused from active use. The only disability found was a fusion of the DIP joint in 60° of flexion.

On April 13, 1977 the Fund requested a determination. The Evaluation Division recommends, based on Dr. Ross' closing report, that claimant be granted 40% loss of the mid finger, which is an additional .6°.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted an award of 8.8° for 40% loss of the mid finger.

WCB CASE NO. 76-2371 MAY 19, 1977

CALVIN SNEED, CLAIMANT
David Hittle, Claimant's Atty.
Merlin Miller, Defense Atty.

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted him additional compensation in the amount of $450, representing approximately 10% of the compensation due him from September 4, 1975 through January 12, 1976 and January 30, 1976 through April 27, 1976; awarded claimant's attorney a fee of $250, payable by the employer but dismissed that portion of claimant's request relating to alleged improper conduct for failure to pay medical, telephone and travel expenses.

Claimant presented three issues at the hearing: (1) the carrier's nonpayment of medical expenses following an Opinion and Order of April 26, 1976 remanding claimant's claim for acceptance; (2) late payment of temporary total disability to claimant, and (3) the carrier's failure to reimburse claimant for long distance telephone calls and mileage expenses incurred in regard to his medical treatment.

Claimant had a heart attack on June 5, 1975 which involved extensive medical treatment, including hospitalization. The total billing was $8,998.30. This amount was exclusive of the telephone calls and the mileage charges claimed.

The carrier, on May 26, 1976, issued a draft to claimant in the amount of $4,814.28, this was received by claimant on May 27, 1976, more than 30 days after the issuance of the Opinion and Order on April 26, 1976 and approximately 29 days after the carrier should have received said order.

The carrier indicated it deliberately withheld the payment of medical expenses pending appeal because such expenses were not, at that time, considered as compensation as referred to in ORS 656.313 according to previous Board decisions.

Claimant contends that in his particular case he was harrassed by his creditors which caused him additional injury; he was a heart patient and suffering from extreme emotional and stress problems to which this harassment greatly contributed.

The claimant testified that the hospital and Dr. Lautenbach's office each had assured him it would not refuse him medical treatment for his cardiac condition because of his unpaid bills.

Claimant also has received a lump sum award from another source believed to be social security with which claimant purchased some property, making a down payment of $6,600.

The Referee found that the billings incurred by claimant were for his myocardial infarction and the services rendered were for his exclusive benefit and to save his life. Therefore, if claimant's case is held to be non-compensable claimant is liable for these billings; on the other hand, if claimant's case is found to be compensable claimant would be entitled to full reimbursement for any expenses he paid for, by the carrier.

Furthermore, claimant had in his possession on July 12, 1976 the sum of $6,600 from which he could have made a token payment on his medical bills and for which he might be reimbursed in the future if his claim is held to be compensable. Thus claimant had within his means the ability to stop the harassment from his creditors.

The Referee found, however, that the carrier could not justify its failure to pay compensation for temporary total disability to claimant for one month after the issuance of the Opinion and Order; that this amounted to unreasonable conduct. Therefore, he assessed a penalty of 10% of the compensation due claimant.

The Referee found that claimant was not entitled to reimbursement for the telephone calls and mileage expenses; these expenses fall into the same category as medical expenses and can be withheld pending appeal. Furthermore, it was stipulated that claimant never submitted these sums to the carrier.

The Board, on de novo review, concurs with the Referee's finding that the carrier's conduct in not promptly paying claimant compensation for temporary total disability was unreasonable and that a penalty should be assessed. It also agrees with his finding with respect to the claims for telephone and mileage expenses. However, the Board accepts the ruling of the Court of Appeals that the intent of ORS 656.313 is to require the immediate payment of all compensation due by virtue of an order when the order is entered and compensation, as defined by ORS 656.005(9), includes medical expenses. Wisherd v Paul Koch Volkswagen, Inc., 28 Or App 513. Therefore, the carrier is ordered to pay medical expenses pursuant to the Opinion and Order of April 26, 1976 which remanded claimant's claim to it. Because the carrier was acting in accordance with the Board's interpretation of ORS 656.313 as it applied to medical bills, the Board concludes that no penalties should be assessed for its failure to pay the medical bills.

The claimant's attorney contends the attorney fee awarded by the Referee was inadequate. The Board cannot agree with this contention.

ORDER

The order of the Referee, dated October 28, 1976, is modified.

The medical expenses incurred by claimant following his heart attack on June 5, 1975 shall be paid by the carrier. In all other respects the order of the Referee is affirmed.

WCB CASE NO. 76-2168 MAY 19, 1977

DARELL THOMPSON, CLAIMANT
Dan O'Leary, 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 granted claimant an award of 32° for 10% unscheduled low back disability; the issue was aggravation.

Claimant, a 57 year old meat cutter, suffered left and right foot fractures on March 23, 1971. Claimant has not been gainfully employed since. A Determination Order of October 13, 1972 granted claimant 27° for 20% loss of the right foot and 54° for 40% loss of the left foot. Claimant appealed and Referee Danner, by order dated July 16, 1974, increased claimant's awards to 40% and 80% respectively. These awards were affirmed at the Circuit Court.

On November 6, 1975 claimant was examined by Dr. Garber who hadn't examined claimant for two and a half years; claimant indicated that he thought his condition had deteriorated. Claimant further complained of back pain which he stated began six months earlier. The doctor noted that claimant was considerably overweight. Range of motion of each foot had not changed since the previous examination. X-rays of the lumbar spine revealed mild arthritic and osteoporotic changes. Dr. Garber commented that it was not surprising that claimant would develop some back pain eventually from the limp that he has when walking. The doctor further opined that claimant's condition would get worse as time goes on.

The Referee found that neither claimant's testimony, nor the medical report of Dr. Garber, indicated any worsening of

claimant's feet conditions. Therefore, he affirmed the prior award granted to claimant for these scheduled disabilities.

Concerning the back condition, the Referee found that claimant's back condition caused by the limping was an aggravation of his industrial injury. Claimant's back condition at the present time is stationary, and no treatment has been recommended by Dr. Garber. Therefore, he granted claimant an award of 32° for 10% for his unscheduled back disability.

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

ORDER

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

WCB CASE NO. 75-4405 MAY 19, 1977

EARLINE WILLIAMS, CLAIMANT
Charles Paulson, 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 October 8, 1975.

Claimant sustained a compensable injury on November 13, 1972 and her claim was closed by a Determination Order of March 22, 1973 with no award for permanent partial disability.

Medically, claimant's condition was diagnosed by Dr. Berselli as a right lateral humeral epicondylitis. On July 3, 1973 Dr. Berselli performed a right epicondylar stripping and claimant returned to work on August 20, 1973.

In December, 1973 claimant was hospitalized with neurological, abdominal and hallucinatory symptoms diagnosed by Dr. Flanery as acute intermittent porphria. This condition is a hereditary defect and not related to the industrial injury.

A Determination Order of October 8, 1975 granted claimant an award for 19.2° for 10% loss of the right arm.

The Referee concluded, based upon the medical evidence presented, that the porphyria condition is not work related and that claimant's award for her right arm disability granted by the Determination Order was adequate for her loss of function of that member.

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

ORDER

The order of the Referee, dated December 15, 1976, is affirmed.

SAIF CLAIM NO. KA 580296 MAY 20, 1977

DAN BERG, CLAIMANT
Keith Tichenor, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order Referred for Hearing

On March 29, 1977 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen for further medical care and treatment and time loss benefits his claim for an injury sustained in 1958. In support of this request claimant has attached medical reports from Dr. Smith and Dr. German.

Previously, claimant had filed a claim with his employer, Boise Cascade Corporation, for a new injury sustained on July 30, 1976; this claim was denied and claimant requested a hearing.

The Board, after giving due consideration to this matter, finds that evidence before it at the present time is not sufficient 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 on said request in conjunction with the issue of the denial of claimant's claim for a new injury. The Referee shall determine whether claimant's present condition is a result of his injury of 1958 and, if so, has his condition worsened since the last award or arrangement of compensation for that injury or whether claimant sustained a new injury on July 30, 1976.

Upon the conclusion of the hearing the Referee, if he finds that claimant's problems are related to the 1958 injury, shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendations on claimant's request. If the Referee finds that claimant suffered a new injury on July 30, 1976 he shall enter a final and appealable order.

MILDRED CROUCH, CLAIMANT
Gerald Doblie, Claimant's Atty.
Kirk Johansen, Employer's Atty.
Dept. of Justice, Defense Atty.
Donald Dole, Employer's 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 both the denial by the Fund, dated December 11, 1975, and the denial by Dr. R. Johnson Lumber Company, dated February 18, 1976.

On July 10, 1975 D. R. Johnson Lumber Company placed an advertisement in the newspaper in the "Help Wanted" section asking for a retired man or a retired couple to watch over a veneer mill at Dillard, Oregon in exchange for living accommodations in a trailer parked on the property.

Claimant and her husband answered the advertisement and were accepted. Mr. Dunbar, director of industrial relations for the employer, met them and showed them the trailer where they were to live. The duties of the job were to protect the property from theft, vandalism and fire. No regular hours were assigned. They were told in case of fire to take no action but to call the fire department and in the case of vandalism or theft to call the sheriff. This proper was a mill which had been inoperative since June, 1973.

Claimant and her husband moved onto the site around June 5, 1975. Shortly afterwards Mr. Dunbar came to see how they were doing.

On August 15, 1975 Dr. R. Johnson entered into a lease agreement with Archie and Vivian Clawson for a period between August 1, 1975 and April 15, 1976. The premises were to be used for a green veneer mill. The owner, D. R. Johnson, retained the right to inspect the premises at any reasonable time for repairs which might be needed.

The latter part of August Mr. Clawson inspected the premises prior to entering into the lease. Mr. Johnson had never mentioned to Mr. Clawson what claimant's responsiblities were, only that claimant and her husband were living there and that they were to watch the property.

The Clawsons moved onto the mill site on August 25, 1975. Claimant and her husband testified that they had established a routine whereby they would walk around the property every hour or so during the night. Mr. Clawson never talked to Mr. Johnson

about the claimant and her husband. Before October 13, 1975 Mr. Clawson had not decided whether claimant and her husband were of any value, but after October 13, he decided he did not need them on the property and asked them to leave.

Claimant and her husband contacted an attorney. They did not respond to Mr. Clawson's request for them to move but contacted Mr. Dunbar because he had originally accepted them.

The Clawsons hired a plant foreman on October 13, 1975 and his first job was to get claimant and her husband off the property. Claimant's husband indicated that he would get in touch with Mr. Dunbar and only Mr. Dunbar could authorize them to leave. After the lease was signed, Mr. Dunbar received a call from Mrs. Clawson stating that they had asked claimant and her husband to move; Mr. Dunbar indicated that as far as he was concerned that was their prerogative.

On October 25, 1975 claimant and her husband were on the premises until 3:45 p.m. when they went to town to see a relative. When they returned at 7:15 p.m. they noticed a fire on the west side of the mill. Both claimant and her husband tried to put out the fire with water and buckets. Claimant called the fire department then returned and while fighting the fire, fell into a hole, injuring herself. Following this injury claimant was hospitalized for 14 days, with a diagnosis of acute lumbosacral strain. Claimant and her husband moved into their own trailer, on the same premises, in November, 1975.

The Referee found that the evidence indicated that claimant and her husband were hired as watchmen by Mr. Dunbar for D. R. Johnson Lumber Company and in exchange for these duties were to be provided living quarters and utilities. After the lease was signed any employer rights and obligations were assumed by the Clawsons. If the Clawsons were the employers and the claimant and her husband were employees then the Clawsons had the right to terminate that relationship which they attempted to do and did. The fact that claimant and her husband refused to recognize the Clawson's authority does not continue the relationship.

The Referee concluded that to entitle claimant to receive payment of compensation it was essential that a contract for employment between the injured workman and the employer at the time of the injury exist. Because there was no contract of hire betwee the Clawsons and claimant and/or her husband there can be no liability on the part of the Clawsons and by the terms of the lease claimant and her husband were not performing any services for D. R. Johnson Lumber Company. Therefore, the Referee concluded that claimant was neither an employee of D. R. Johnson Lumber Company nor of Archie and Vivian Clawson. He affirmed both denials.

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

ORDER

The order of the Referee, dated October 20, 1976, is affirmed.

WCB CASE NO. 76-4381 MAY 20, 1977
WCB CASE NO. 76-2268

LAWRENCE DEBORD, CLAIMANT
Tom Hanlon, 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 27, 1976 and the denial letter of March 29, 1974.

Claimant, a 44 year old logger, sustained compensable back and right leg injuries on July 28, 1972. Dr. Baier treated claimant and, on August 28, 1972, indicated an unusual appearance to the proximal tibia suggestive of an old trauma, and the right medical meniscus was badly torn.

On August 29, 1972 Dr. Gill examined claimant and diagnosed fracture of the right ribs, dislocation of the right knee and a crushing injury to the right ankle. Claimant was hospitalized for conservative treatment only. Dr. Gill opined that claimant had sustained a strain of his right knee superimposed on an old injury.

On January 9, 1973 Dr. Gill again examined claimant and found a tear of the medial semilunar cartilage of the right knee and on May 25, 1973 performed an arthrotomy. On January 31, 1974 Dr. Gill saw claimant with complaints of both knees bothering him, the left knee was worse than the right according to claimant.

On March 29, 1974 the Fund denied any responsibility for left leg problems.

On May 21, 1974 claimant was seen at the Division of Vocational Rehabilitation on referral but he was not interested in starting school because he wanted to return to self-employment A Determination Order of May 30, 1974 granted claimant an award of 30° for 20% loss of the right leg.

On July 6, 1974 claimant sustained a compensable injury to his neck and back. On July 22, 1974 Dr. Gill treated claimant for cervical strain.

On October 29, 1974 Dr. Melgard examined claimant and found him suffering from hypertension, separate from his injuries; his current problem was a chronic cervical strain.

On April 15, 1975 Dr. Gill examined claimant for complaints of the cervical spine and pain between the shoulder blades. Dr. Gill concluded that claimant had degenerative arthritis of the cervical spine and mild thoracic scoliosis both, he felt, antedated the injury of July 6, 1974.

A psychologist, Dr. Ackerman, examined claimant during May-July, 1975. His diagnosis was borderline mental retardation, traumatic neurosis, chronic brain syndrome of considerable duration.

The Orthopaedic Consultants examined claimant on March 3, 1976. Claimant complained more of his left knee complaints. Subjective symptoms were out of proportion to the physical findings. Total loss of function of the dorso-lumbar spine was mild, total loss of function of the neck was moderate, loss of function due to the injury, mild. Loss of function of the right knee would be 30% of an amputation level above the knee and would include the previous award of 20%.

A Determination Order of April 27, 1976 granted claimant 112° for 35% unscheduled neck, mid and low back disability suffered on July 6, 1974; it also awarded claimant an additional 15° for 10% loss of the right leg for the injury of July, 1972.

The Referee found that the medical evidence did not support a finding of any left knee disability attributable to the injury of July, 1972. There was evidence that claimant had varus deformity of both knees, not causally related to his industrial injury. Therefore, the Referee affirmed the denial of the left knee condition.

The Referee found that claimant's contention that he is permanently and totally disabled was unsupported by the evidence. Dr. Gill, who has treated claimant since August, 1972, concluded that claimant had degenerative arthritis of the cervical spine and mild thoracic scoliosis both of which preceded the injury of July, 1974. Dr. Ackerman found claimant to be totally disabled however, there is no evidence causally relating claimant's problems to which Dr. Ackerman referred to the industrial injury.

Therefore, the Referee concluded that claimant failed to show by a preponderance of the evidence that he was entitled to any greater award for permanent partial disability than that granted by the Determination Order of April 27, 1976.

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

ORDER

The order of the Referee, dated October 27, 1976, is affirmed.

The Beneficiaries of
JUNG SUN HULS, DECEASED
Lawrence Paulson, Claimant's Atty.
Richard Lang, Defense Atty.
Request for Review by Beneficiaries

Reviewed by Board Members Wilson and Moore.

The beneficiaries of the deceased workman, Mrs. Huls, requests review by the Board of the Referee's order which affirmed the Determination Order of May 7, 1976.

Mrs. Huls' arm became sore in January, 1975 while working for Hearth Craft and she was treated at the Kaiser Permanente Clinic. She was seen by Dr. Barton and referred to Dr. Bradley on February 20, 1975. Dr. Bradley diagnosed right carpal tunnel syndrome. Mrs. Huls quit this job during April, 1975.

Dr. Parsons examined Mrs. Huls during August, 1975 and found full range of cervical motion without limitation or pain. His impression was possible cervical nerve root compression. She was released to return to work but not to lift over 25 pounds.

On November 10, 1975 Mrs. Huls began working for Tektronix and carried out her work in a very good manner until March 20, 1976 when she was admitted to Permanente Hospital with complaints of headaches, tiredness, occasional vomiting and coughing. On March 31, 1975 she died; the diagnosis was infarct, right temporoparietal lobe; subarachnoid hemorrhage due to ruptured middle cerebral artery aneurysm and goiter.

Mrs. Huls' sister testified that the deceased workman had suffered arm and shoulder pain and had been in pain at all times.

The Referee found that the lay testimony was not persuasive in view of the deceased workman's good record while working at Tektronix. The Referee felt that no doubt Mrs. Huls had been a quiet and conscientious worker and possibly even missed medical appointments because she could not bear being off work. However, the Referee refused to speculate on this and affirmed the Determination Order of May 7, 1976 which had posthumously granted Mrs. Huls an award for temporary total disability only.

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

ORDER

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

ANTHONY PEREIRA, CLAIMANT
William Cramer, Claimant's Atty.
William Holmes, 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 18, 1976. Claimant contends he is also entitled to an unscheduled disability award.

Claimant, a 39 year old parts manager and former mechanic, suffered a compensable right eye injury on July 3, 1975. Claimant was seen by Dr. East, an opthalmologist, who diagnosed penetrating trauma to the left eye with corneal lacerations and total aniridia. Claimant underwent corrective surgery. In Dr. East's closing report he indicates distance vision without glasses at 20/200, with glasses at 20/80 and with glasses and contacts at 20/60. He felt that claimant's visual acuity would not significantly improve.

A Determination Order of March 18, 1976 granted claimant an award of 70° for 70% loss of the right eye.

On April 28, 1976 Dr. East reported that the best corrected visual acuity in the right eye was 20/60 with glasses or contact lens but that claimant was unable to wear the contact lens while doing his work. The doctor indicated claimant's visual acuity on the job was 20/80 at a distance and J-5 at near. Dr. East stated that the loss of central vision was 55% in the right eye.

The claimant contends that he was entitled to additional permanent disability because of his multiple vision, loss of peripheral vision in the right eye, weakness and strain propensity of both eyes and because of super sensitivity to light, fumes and dust to both eyes.

The Referee concluded, based on the Board's ruling in Matthew T. Russell that he was precluded from awarding any additional disability as to the right eye per se and/or its affect on the left or combined vision.

The claimant further contends that he suffers from nausea and headaches caused by his eye problems. The claimant testified that his nausea and headache problems were not as severe as when he was still doing mechanic work and that they occur once a week. The Referee concluded that these problems were neither frequent enough nor sufficiently severe to be characterized as "disabling" which would justify an award for unscheduled disability.

The Referee affirmed the award of 70% loss of the right eye granted by the Determination Order.

The Board, on de novo review, agrees with the Referee's conclusion that claimant has not suffered an injury to the unscheduled area of his body. However, the Referee in his order of September 24, 1976 relied upon the Board's prior ruling in Matthew T. Russell that ORS 656.214 discloses a legislative intention to allow compensation only for the loss of normal monocular vision as defined in ORS 656.214 (2) (h) in reaching his conclusion that he could not award any additional disability to the right eye per se and/or to its affect on the left eye or combined vision.

The Court of Appeals reversed the Board's order [as well as the judgment order of the circuit court, which held that claimant's eye injuries were unscheduled and compensable under ORS 656.214 (5)]. It stated that loss of monocular vision is not the exclusive type of compensable eye injury. The language in ORS 656.214 (1) (a) providing that "'Loss' includes * * * partial loss of use" covers the type of permanent partial eye disability which claimant sustained. It held that residual non-acuity eye injury is compensable to the extent authorized by statute (100%) and, as a corollary, that Snellen-measured loss of monocular vision is not the exclusive type of eye injury loss contemplated as compensable by the legislature. In the Matter of the Compensation of Matthew T. Russell, Claimant v SAIF, filed May 2, 1977.

In view of this ruling the Board has no alternative but to remand this matter to Referee Kirk Mulder with instructions to hold a hearing and take evidence on the extent of claimant's residual eye injury in conformity with the ruling entered by the Court of Appeals.

ORDER

The matter is remanded to the Referee for the purpose of holding a hearing and receiving evidence on the extent of claimant's residual eye disability.

WCB CASE NO. 76-5398 MAY 20, 1977

LUCINE T. SCHAFFER, CLAIMANT
Brian Welch, Claimant's Atty.
Marshall Cheney, Defense Atty.
Order

On May 4, 1977 the Board received from claimant's attorney a motion to supplement the record in the above entitled matter by including the hospital record relating to claimant's admission to St. Charles Medical Center on March 9, 1977 and her hospitalization through March 12, 1977. The motion was accompanied by an affidavit from claimant's counsel stating that the six

pages of hospital records sought to be included in the record were not available at the time of the hearing and that the records are relevant and material to the question of whether or not claimant was medically stationary during the periods of time at issue at the hearing. The records from St. Charles Medical Center were attached.

The employer, Edward Hines Lumber Company, was served a copy of the motion to supplement the record and the affidavit of claimant's counsel and the attached medical records on April 29, 1977. On May 12, 1977 the employer responded, stating it opposed claimant's motion for the reason that the period of hospitalization was after the hearing and was not relevant to claimant's condition at the time of the hearing.

After due consideration the Board concludes that the motion to supplement the record and include the hospital record pertaining to claimant's admission and hospitalization at St. Charles Medical Center between March 9 and March 12, 1977 must be denied.

IT IS SO ORDERED.

WCB CASE NO. 76-3003 MAY 23, 1977

JOHN LESSAR, CLAIMANT
Brian Welch, Claimant's Atty.
Marshall Cheney, 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 granted claimant an award of 128° for 40% unscheduled disability.

Claimant, a 63 year old turbine operator, sustained a compensable right shoulder injury on November 27, 1975. A Determination Order of June 4, 1976 granted claimant an award of 32° for 10% unscheduled disability.

Claimant's injury was diagnosed as a dislocation of the right shoulder; subsequently, surgery for closed reduction was performed. Thereafter, claimant underwent physical therapy and an exercise program.

On April 15, 1976 Dr. Corrigan found claimant's disability to be mild and felt claimant was capable of returning to his occupation. However, claimant was more interested in retiring than returning to work.

Claimant was examined by Dr. Voiss, a psychiatrist, on May 10, 1976. His opinion was that claimant's inability to return to work was caused by an underlying fear of death, precipitated by an injury. Claimant's delay in receiving treatment at the time of his injury, the extent of his injury, the remarks of Dr. Corrigan claimant alleged he made and his age, all combined to precipitate a very clear phobic reaction with respect to his employment. Dr. Voiss felt that even if claimant could overcome his fears and go back to work the possibility of a serious, if not fatal, accident would be very great.

Claimant has a 10th grade education. He has worked for this employer for 38 years, the last 30 years as a turbine operator.

The Referee found that the physical residuals to claimant's right shoulder were described as mild. However, the materially related psychopathology precluded claimant's return to work as a turbine operator and this would, at claimant's age, constitute a considerable loss of earning capacity.

The Referee concluded that claimant was not permanently and totally disabled as a result of the injury but that considering claimant's age, education, work experience, physical residuals and psychopathology claimant was entitled to an award of 128° for 40% unscheduled disability.

The Board, on de novo review, can't agree that claimant is entitled to an award of 40% for his loss of wage earning capacity. The Board finds that claimant has made no attempt whatever to return to work but has, in fact, retired as he desired to do. Therefore, claimant's loss of wage earning capacity is not due to his psychological or physical problems, rather due to voluntary choice of retirement.

The Board concludes that the Determination Order of June 4, 1976 adequately compensated claimant for his unscheduled shoulder disability.

ORDER

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

The Determination Order of June 4, 1976 is affirmed in its entirety.

No. NUMBER MAY 23, 1977

MELVIN E. LUDWIG, CLAIMANT
Own Motion Order Referred for Hearing

On March 18, 1977 claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an injury sustained on January 27, 1970. Claimant had contacted the employer and its carrier informing them of his request.

On March 21, 1977 the carrier, The Travelers Insurance, informed the Board that they were attaching medical reports which, in their opinion, did not relate claimant's latest medical treatment and surgery to his injury of January 27, 1970. The carrier further stated that they had been paying claimant's medical bills including the latest surgery under the provisions of ORS 656.245.

The Board, after giving due consideration to this matter, concludes that at the present time it does not have sufficient evidence to make a determination on claimant's request and, 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 claim should be reopened for payment of the benefits provided by law.

Upon conclusion of the hearing the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendation on claimant's request.

WCB CASE NO. 75-4419 MAY 24, 1977

LOUIE ANDERSON, CLAIMANT
Rolf Olson, 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 granted claimant an award of 160° for 50% unscheduled low back disability.

Claimant suffered an injury while lifting on April 22, 1975; he noticed back and left leg pain. He worked only part of one day after this injury and has not worked since. X-rays revealed advanced degree of degenerative and post-traumatic osteoarthritis in his back. In June, 1975 Dr. Lawton felt claimant could not tolerate any more heavy labor.

A Determination Order of October 10, 1975 granted claimant an award of 64° for 20% unscheduled low back disability.

In early 1976 claimant was examined by the doctors at the Orthopaedic Consultants who diagnosed low back strain superimposed on pre-existing osteoarthritis. They did not think claimant could return to his prior employment but he could work in a sedentary type job. Total loss of function due to this injury was considered mild but total loss of function was moderately severe.

Claimant was referred to the Division of Vocational Rehabilitation but it was found that a retraining program was not feasible because of claimant's age, educational deficiency, poor aptitude for new learning and his work experience. Claimant has not attempted to find gainful employment since the injury and does not feel he is able to.

The Referee found that claimant cannot return to the type of welding work he performed at the time of his injury. There also appears to be some question as to how much of claimant's actual disability is the result of the industrial injury and how much to the pre-existing degenerative osteoarthritis condition which, by itself, is quite severe. The Orthopaedic Consultants had found loss of function due to this injury was mild.

The Referee concluded that claimant was retirement oriented, claimant had also failed to seek out any form of employment subsequent to April, 1975. He further concluded that although this does not mean that claimant cannot work, nevertheless, claimant has become precluded from returning to a large segment of the labor market and he has sustained a loss of wage earning capacity which would justify an award of 160° for 50% unscheduled disability.

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

ORDER

The order of the Referee, dated October 22, 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. 76-6091 MAY 24, 1977
WCB CASE NO. 76-6092

LARRY BARKER, CLAIMANT
Allan Coons, Claimant's Atty.
Dept. of Justice, Defense Atty.
Eldon Caley, Employer's Atty.
Own Motion Order Referred for Hearing

On November 9, 1976 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 an industrial injury suffered on April 8, 1967 while in the employ of Douglas Fir Plywood, whose workmen's compensation coverage was furnished by Firemen's Fund Insurance Company. Claimant's claim was closed by a Determination Order mailed February 3, 1971 which awarded claimant 94° for partial loss of the right arm by use for an unscheduled disability. Claimant's aggravation rights expired on February 3, 1976.

On October 13, 1975 claimant suffered a compensable injury while employed by Hanna Nickel Smelting Company, whose workmen's compensation coverage was furnished by the Fund. This claim was initially closed by a Determination Order mailed May 28, 1976 which awarded claimant compensation for time loss only; a Second Determination Order was issued on March 17, 1977 which awarded claimant additional compensation for time loss. On November 9, 1976 claimant requested a hearing, contending that the Determination Orders were prematurely entered and that claimant was entitled to further medical care and time loss benefits or, in the alternative, that the award of compensation was inadequate.

Claimant's counsel has requested that the own motion issue be consolidated with the issues involved in the request for hearing on the October 13, 1975 injury. Therefore, the Board refers claimant's request that it exercise its own motion jurisdiction and reopen his claim for the April 8, 1967 claim to the Hearings Division and, more specifically to Referee John F. Drake, with instructions to hold a hearing, and take evidence on the issue of whether claimant has aggravated his 1967 injury at the same time as he receives evidence with respect to the 1975 injury.

Upon conclusion of the hearing the Referee, if he finds that claimant's present condition is a result of his 1967 injury and has worsened since the last arrangement or award of compensation received therefor, shall cause a transcript of the proceedings to be prepared and submitted to the Board with his recommendations on that matter only. With respect to the issues relating to the 1975 injury, the Referee shall, based upon the evidence received, enter a final and appealable order.

SAIF CLAIM NO. FC 139143 MAY 24, 1977

PETER GATTO, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable low back injury on July 23, 1968 which was later diagnosed by Dr. McGowan as acute low back strain with possible disc injury with sciatic neuritis. Claimant's claim was first closed on April 1, 1969 with no award for permanent partial disability.

Dr. Cohen hospitalized claimant in July, 1973 for complaints of back pain. Claimant was subsequently examined by the Back Evaluation Clinic in February, 1974; moderate loss of function caused by this injury was found. Claimant had retired in May, 1973 upon the advice of his cardiologist. Claimant has Paget's disease, left pelvis and hip, psoriasis, diabetis, obesity, in addition to his cardiac disease. A Second Determination Order of March 27, 1974 granted claimant an award for 70% unscheduled low back disability. By a stipulation, entered on October 8, 1974, claimant was granted an additional 30%, giving him a total of 100% unscheduled disability.

Another stipulation, entered on October 8, 1976, reopened claimant's claim for further medical treatment and time loss benefits. In a closing report of March 8, 1977 Dr. Cohen indicated that claimant's condition had not improved but he was not a candidate for further surgery due to his heart condition.

On March 25, 1977 the Fund requested a determination. It was the recommendation of the Evaluation Division of the Board that claimant be granted additional temporary total disability from September 25, 1976 through March 8, 1977 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 September 25, 1976 through March 8, 1977.

SAIF CLAIM NO. PB 127047 MAY 24, 1977

ANDREW GRAVES, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable fracture of the right leg involving the articular surfaces of the knee injury on June 1, 1965. An order dated June 15, 1966 granted claimant an

award of 65% loss of function of the right leg. Claimant's aggravation rights have expired.

The Fund voluntarily reopened claimant's claim for reconstruction surgery to the right knee which was performed by Dr. Larson on December 30, 1975. This surgery provided no relief and, on September 14, 1976, Dr. Larson resurfaced the lateral part of the knee joint. In his closing report of April 20, 1977 Dr. Larson indicated claimant was medically stationary and that the right knee was now less physically impaired than it was in 1966.

On May 2, 1977 the Fund requested a determination. The Evaluation Division of the Board recommended that claimant be granted additional compensation for temporary total disability inclusively from December 29, 1975 through April 20, 1977 but no additional award for permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability inclusively from December 29, 1975 through April 20, 1977.

WCB CASE NO. 76-1965 MAY 24, 1977

EDWARD KEECH, CLAIMANT
James Lewelling, Claimant's Atty.
Roger Luedtke, Defense Atty.
Order

On August 25, 1976 the claimant requested the Board review the Referee's order entered in the above entitled matter. On September 16, 1976 the Board dismissed the request on the grounds that it was not timely filed pursuant to ORS 656.289(3).

On March 17, 1977 the Circuit Court for the County of Lincoln set aside the Board's order and remanded the matter to the Board to review the Opinion and Order of the Referee entered on July 21, 1976.

On May 13, 1977 claimant requested the Board to remand the above entitled matter to a Referee for the purpose of taking additional testimony. His motion was based upon an affidavit of claimant's attorney and certain exhibits attached thereto.

On May 16, 1977 employer responded in opposition to the motion, alleging that there was nothing set forth in the affidavit or in the attached exhibits which explained why certain witnesses were not present to testify at the hearing or why the claimant's attorney did not request a Referee to hold the record open until such evidence could be submitted.

The Board, after giving full consideration to the circumstances in this matter, concludes that the motion is not well taken and should be denied.

IT IS SO ORDERED.

SAIF CLAIM NO. GC 76726 MAY 24, 1977

KENNETH VERNON KNAPP, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on June 7, 1967 to his right knee. The original diagnosis was prepatellar bursitis, right knee. On August 24, 1967 Dr. Borman excised the right medial meniscus. Claimant continued receiving conservative treatment until July 25, 1968 when Dr. Hazel performed another arthrotomy. Claimant's claim was closed by a Determination Order of March 26, 1969 with an award of 44° for 40% loss of the right leg. Claimant appealed and, after a hearing, was granted an additional 22° for 20% loss of the right leg by an order dated February 10, 1971.

Claimant's claim was reopened when he was hospitalized on April 24, 1975 for a right geometric knee replacement. On March 8, 1976 Dr. Heusch inserted a second knee prosthesis and on March 15, 1977 found claimant to be medically stationary but with significant permanent partial disability.

On April 5, 1977 the Fund requested a determination. The Evaluation Division of the Board recommends claimant be granted compensation for temporary total disability from April 22, 1975 through March 15, 1977 and an additional award of 15% for 16.5° loss of the right leg.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from April 22, 1975 through March 15, 1977 and an award of 16.5° for 15% loss of the right leg. This is in addition to and not in lieu of the awards previously granted to claimant.

MADELINE MCDANIEL, CLAIMANT
Dan O'Leary, Claimant's Atty.
Michael Hoffman, 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 30, 1975 and the partial denial of July 25, 1975. Claimant contends that she should be allowed to recover the costs related to her uterin surgery; be allowed further compensation for temporary total disability through April 20, 1976; and granted a greater award for permanent partial disability.

Claimant sustained a compensable injury on March 14, 1975 when she slipped and fell on her buttocks. The diagnosis was traumatic spinal strain involving the cervical, thoracic and lumbar spine, mild cerebral concussion and strain of the right shoulder. Claimant first was treated conservatively and was then seen by Dr. Schmidt who filed a report for uterus retroverted and irregular in size and causally related this condition to the claimant's industrial injury.

Dr. Schmidt found claimant suffering from a disease called endometriosis and surgery was indicated. Dr. Schmidt testified that claimant's problem stems from a swollen ovary which was not caused by claimant's fall but was aggravated by it. Regardless of the industrial injury claimant would have had to have the surgery which was performed. The doctor further indicated that the ligaments from the uterus run to the back and that the fall could have contributed to claimant's condition.

On July 25, 1975 the carrier denied responsibility for the endometrioma surgery as being non-work related.

Dr. McCall, in his report of October 23, 1975, indicated that the surgery corrected the endometriosis problem and that the endometriosis was in no way connected with claimant's injury.

A Determination Order of December 30, 1975 granted claimant an award for 32° for 10% unscheduled low back, right shoulder and neck disability.

In a medical report, dated January 30, 1976, Dr. Hazel stated that he had treated claimant for the low back, shoulder and neck pain from her industrial injury and that claimant could not, at that time, return to her regular occupation as a cook but she was ambulatory.

In a report of June 3, 1976 Dr. Hazel said he did not think that further treatment would be of benefit to claimant and

that the award of 10% granted by the Determination Order was generous.

The Referee found that in a chart note entry, dated December 8, 1975, Dr. Hazel had indicated claimant was medically stationary and apparently this produced the Determination Order although in his report of January 30, 1976 he said claimant could not return to her regular job as a cook. The Referee concluded that claimant was offered no further medical treatment and had been granted the proper amount of compensation for temporary total disability.

The Referee found that the medical evidence did not support a finding that her endometriosis condition was causally related to her industrial injury and he affirmed the partial denial.

The Referee found that the award granted by the Determination Order adequately compensated claimant for her loss of wage earning capacity resulting from her neck, right shoulder and low back disability.

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

ORDER

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

WCB CASE NO. 76-2891 MAY 24, 1977

RONALD NARANJO, CLAIMANT
James Nelson, Claimant's Atty.
Daryll Klein, 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 96° for 30% unscheduled disability.

Claimant received multiple compensable injuries on May 28, 1975 when he was involved in a truck accident. Claimant's injuries were diagnosed as laceration of the right wrist, acute sprain of the right wrist, bruises and abrasions of the nose and abrasions of both arms and legs. Later, claimant complained of left shoulder problems as well as the low back problems.

A Determination Order of April 16, 1976 granted claimant no award for permanent partial disability.

The employer contends that claimant's back involvement is unrelated to the industrial injury. Dr. Matthews' first diagnosis was persistent low back strain superimposed on degenerative changes which he later felt were unrelated to the industrial injury. However, Dr. Luce diagnosed degenerative disc disorder, L5 mild and transitional L5 vertebra with articulating right transverse process related to traumatic aggravation resulting in residual mechanical imbalance. He felt this relationship was causally related to the industrial injury. Claimant complained to Dr. Kasper of back problems while under active treatment for his left shoulder condition.

The Referee found that claimant had proven that his low back condition was causally related to the industrial injury of May 28, 1975. Claimant's testimony was credible and persuasive.

The Referee further found that claimant's primary occupation had been that of truck driver and because of his back condition he cannot return to this type of work. He is now working as a bartender five hours a day. The Referee concluded that claimant lost 30% loss of his wage earning capacity and was entitled to an award of 96° to adequately compensate him for this loss.

The Referee concluded that claimant had failed to prove that he was entitled to any compensation for loss of wage earning capacity for his left shoulder condition. Although claimant does experience periodic pain and discomfort in the left shoulder the Referee found that it was not materially disabling.

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

ORDER

The order of the Referee, dated October 20, 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 employer.

WCB CASE NO. 75-5525 MAY 24, 1977

JOHN ZELEZNIK, CLAIMANT
David Vandenberg, Claimant's Atty.
Philip 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 December 2, 1975.

Claimant sustained a compensable injury on July 30, 1971 when a fan fell on him injuring his right hip and leg. Claimant was treated conservatively for contusions and an acute lumbo-sacral strain and was immediately released to work.

In May, 1974 claimant was hospitalized for a lumbar myelogram. Dr. Weinman recommended claimant undergo an Chymopapain injection. Claimant went to Seattle where this was done by Dr. Dunn. In March, 1975 Dr. Luce recommended a lumbar laminotomy and consideration of a two level fusion. Dr. Wilson concurred but claimant refused the surgery.

Claimant returned to work; the final diagnosis was degenerative disc disease L5-S1 but the doctor felt claimant could work.

A Determination Order of December 2, 1975 granted claimant an award of 48° for 15% unscheduled disability.

On February 27, 1976 Dr. Weinman, after examining claimant again, felt that claimant's structural scoliosis might partially explain the low back pain of which claimant was complaining. He believed claimant's impairment was mildly moderate. Claimant is still seeing Dr. Wilson. Claimant's chief complaint relates to his left leg which he testified is painful all the way to the toe and becomes numb. Claimant, in July, 1975, returned to work for the employer, feeding the hot press.

The Referee found that unscheduled disability is measured by the loss of wage earning capacity but is not limited to one field of industry. Claimant can perform his present job adequately and efficiently, even though there is no question claimant does suffer physical limitations because of his injury, and this indicates claimant still retains substantial general capacity to work.

The Referee concluded that claimant had been adequately compensated by the award of 48° granted by the Determination Order of December 2, 1975 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 May 24, 1976, is affirmed

DONALD ZIVNEY, CLAIMANT
Allen Knappenberger, 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 May 19, 1976. Claimant contends this award is inadequate.

Claimant sustained a compensable injury on August 20, 1975; he came under the care of Dr. Howell on August 29, 1975. Claimant was then seen by Dr. Vassely on August 25, 1975 who diagnosed a tear in the left medial meniscus with displacement and a locked knee. On September 4, 1975 an arthrotomy was performed.

On February 25, 1976 Dr. Vessely reported that claimant, at that time, had very minimal complaints and had returned to his foreman's job in his occupation. He had no significant subjective instability, pain, locking, swelling or effusion. Examination revealed a full range of motion. Dr. Vessely found claimant medically stationary with a mild permanent partial disability between 3-5%.

A Determination Order of May 19, 1976 granted claimant an award of 15° for 10% loss of the left leg.

Claimant had had an injury with his left knee in 1970 but the Fund had accepted the injury of August, 1975 as a new injury. Claimant testified that he had had instability problems with his left leg ever since the 1970 injury.

The Referee concluded that the medical reports do not indicate any greater loss of function of claimant's left leg than that granted by the Determination Order of May 19, 1976. He affirmed the Determination Order.

The Board, on de novo review, agrees with the Referee's conclusion. It is noted that the only issue before the Referee was extent of permanent disability.

ORDER

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

The beneficiaries of
GEORGE GRONQUIST, DECEASED
Larry Dawson, 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 ratified, affirmed and republished the Opinion and Order entered on January 23, 1975 and awarded claimant's attorney a fee of $2,150 payable by the Fund.

After a hearing, the Referee entered an order on November 6, 1973 dismissing claimant's claim on the ground that her claim for her deceased husband's occupational disease was not filed within 180 days after his death [ORS 656.807(2)]. The Board affirmed this order. On August 31, 1974 the Circuit Court for Multnomah County remanded the matter to the Referee to determine if the death was caused by an occupational disease and if claimant had filed her claim within 180 days of the date claimant was informed of her possible claim rather than 180 days from the date of her husband's death.

After a hearing, based on the court's remand, was held on January 2, 1975 the Referee, on January 23, 1975 found that claimant had learned that decedent's death had been caused by an occupational disease called asbestosis less than 120 days prior to the filing of her claim; the decedent contracted asbestosis during his lifetime by exposure to asbestos and the defendent's failure to accept or deny the claim was unreasonable delay entitling claimant to penalties. The Referee's order was affirmed by the Board and the circuit court.

On April 5, 1976 the Court of Appeals reversed the judgment order of the circuit court and remanded the claim to the Workmen's Compensation Board, stating that claimant was entitled to a hearing on the question of whether or not she had good cause for her failure to file a claim within 180 days because ORS 656.807(4) gives to claimant the rights provided under ORS 656 265(4)(c).

This is the history of the case up to the date of the hearing before the Referee whose order is presently before the Board on review.

At the last hearing claimant testified that she did not obtain a copy of the autopsy report for a period of time because she thought claimant had died of cancer. Claimant did read the autopsy report a few days after Christmas, 1972 and filed her claim on January 22, 1973. Decedent had died on June 7, 1972.

The Referee concluded that claimant had established good cause for her failure to file her claim within 180 days as she was not aware of a possible claim until more than 180 days had elapsed.

Claimant's counsel contends that he is entitled to an attorney fee for all his work subsequent to the judgment order of the circuit court entered September 26, 1975. The Fund contends the Referee has no authority to fix fees for work performed by the attorney at the Court of Appeals level.

The Referee concluded that if he had authority to fix attorney fees for a hearing on remand from the circuit court then he also would have authority to fix such fees for a hearing on a remand from the Court of Appeals. Based upon a study of the novelty and complexity of the issues and the benefit to claimant the Referee awarded claimant's attorney a fee of $2,150.

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

ORDER

The order of the Referee, dated November 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 Fund.

WCB CASE NO. 75-4737 MAY 25, 1977

MELVIN GROTH, CLAIMANT
Alan Lee, 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 claimant's low back claim to it for acceptance and payment of compensation, as provided by law.

Claimant, a ranch worker, sustained a compensable cervical sprain while unloading hay. Dr. Campagna treated claimant conservatively and found him medically stationary on July 2, 1971 with minimal neck disability. A Determination Order of July 15, 1971 granted claimant no award for permanent partial disability.

On July 24, 1974 claimant sustained a compensable cervical dorsal sprain and again was seen by Dr. Campagna who found post-traumatic cervical cephalgia.

Claimant was referred to the Disability Prevention Division, the physicians diagnosed mild recurrent cervical-dorsal strain and found his disability to be mild.

On March 11, 1975 claimant saw Dr. Campagna, complaining of neck pain whenever he turned his head to the left. On May 12, 1975 claimant saw Dr. Campagna, complaining of arm numbness and pain between the shoulders. A protruded disc was found and, on June 2, 1975, a C6-7 laminectomy and disc removal surgery was performed.

A Determination Order of November 20, 1975 granted claimant 48° for 15% unscheduled neck and upper back disability.

On December 5, 1975 claimant was examined by Dr. Laubengayer, an orthopedist, who diagnosed myalgia with back pain and opophysitis. He felt claimant's problems were the result of the 1971 injury.

Claimant testified that there were no low back or leg complaints following the 1970 incidents but that he had had low back soreness and leg discomfort and instability following the 1974 accident together with severe neck pain.

In his deposition of September 14, 1976, Dr. Laubengayer indicated that if claimant did not report low back problems for over a year after the 1974 incident that he would change his opinion about the relationship between that incident and claimant's problem. Also, his opinion connecting the 1975 low back problem with the 1970 incident would be different if claimant had had no low back symptoms following the 1970 incident.

The Referee found that the weight of the evidence indicated no connection between the 1970 incident and the 1975 low back problems. However, the Referee found that claimant had established a connection between the low back problem and the 1974 accident, and he remanded the low back condition resulting from the 1974 incident to the Fund for such payment of benefits to which claimant was entitled by law.

The Board, on de novo review, finds that claimant has not proven by the preponderance of the medical evidence that his low back problems are causally related to either the 1974 or 1970 industrial injuries. The medical evidence indicates that claimant reported no low back problems for a year after the industrial injury. During this year period claimant was being treated continuously by Dr. Campagna who doesn't mention any low back problem until September, 1975. Therefore, there is no medical evidence to causally relate claimant's low back condition with his industrial injuries.

ORDER

The order of the Referee, dated December 14, 1976, is reversed.

TOM HARRIS, CLAIMANT
Robert Burns, 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 granted claimant an award of 112° for 35% unscheduled disability. Claimant contends the award is inadequate.

Claimant sustained a compensable back injury on September 29, 1972. He was seen by Dr. Manske, a chiropractor, who diagnosed subluxation of L2 through L5 with very severe muscle and ligament strain of the adjacent areas. On January 17, 1973 claimant was examined by Dr. Logan, an orthopedic surgeon, who diagnosed acute lumbosacral strain with left sciatic nerve root irritation. He treated claimant conservatively.

In July, 1973 Dr. Johnson performed a lumbar laminectomy with removal of herniated intervertebral disc L5-S1, right and nerve root decompression at S1. In his closing examination report of November 7, 1973 Dr. Johnson found claimant to be medically stationary and estimated his disability at 5% impairment of the whole man.

A Determination Order of December 17, 1973 granted claimant an award of 48° for 15% unscheduled disability.

Dr. Johnson examined claimant on November 1, 1974 and found aggravation of a lumbar strain syndrome. He hospitalized claimant for bedrest which did not improve claimant's condition. A myelogram was negative. Dr. Johnson recommended referral to the Division of Vocational Rehabilitation for training in lighter employment.

On December 1, 1975 Dr. Pasquesi examined claimant and diagnosed chronic lumbosacral instability with causalgia type sciatic pain. Dr. Pasquesi found claimant to be medically stationary but needed continued palliative care. Dr. Pasquesi also recommended referral to the Division of Vocational Rehabilitation and limited claimant's lifting to 25 pounds and eliminated all work requiring repetitive stooping, bending and twisting of the trunk and overhead work. Dr. Pasquesi rated claimant's impairment at 35% of the whole man.

On January 16, 1976 Dr. Logan concurred with the percentage of disability rated by Dr. Pasquesi.

On February 17, 1976 claimant was advised to contact Dr. Toon at the Disability Prevention Division for assistance in

returning to work. Claimant called Dr. Toon and informed him that he was not interested in coming to the Center for such assistance. There was no further contact between the Division of Vocational Rehabilitation and claimant.

A Second Determination Order of March 16, 1976 granted claimant an additional award of 32° for 10% unscheduled disability a total of 60° for 25% unscheduled disability.

Claimant's work experience has been in heavy work only. He has worked as a carpenter and in landscaping. His job with this employer paid claimant $2.75 an hour. Claimant now works for Clearpine Moulding as an off-bearer earning $4.56 an hour.

The Referee found that claimant is now, by medical advice, precluded from any heavy lifting, repetitive bending, stooping or twisting or overhead work, therefore, claimant is now excluded from a large segment of the labor market available to him prior to his industrial injury. The Referee concluded claimant was entitled to an award of 112° for 35% unscheduled disability to adequately 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 December 16, 1976, is affirmed.

WCB CASE NO. 76-3004 MAY 25, 1977

TIMOTHY LOCKETT, CLAIMANT
W. A. Franklin, 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 June 11, 1976. Claimant contends he is permanently and totally disabled.

Claimant, a rotoblast operator, sustained a compensable injury on October 15, 1975. He felt a pain on the left side of his back and down his left leg. Claimant saw Dr. Cohen the following morning who diagnosed a strain of the left lumbar muscles and hospitalized claimant for conservative treatment. On December 10, 1975 Dr. Cohen indicated claimant was stationary with some permanent partial disability; he recommended no further treatment.

On February 27, 1976 claimant was examined by Dr. Mason at the Disability Prevention Division who diagnosed chronic lumbosacral strain and gross emotional overlay. Dr. Mason recommended a job change and that claimant should avoid lifting, bending and twisting stresses.

A psychological evaluation on March 17, 1976 revealed a long history of rather severe emotional problems. Claimant was quite depressed and preoccupied with his physical symptoms and full of anxiety. Dr. May concluded claimant was afraid of dying and this last episode of back problems probably marks the end of claimant's employability.

A Determination Order of June 11, 1976 granted claimant an award of 32° for 10% unscheduled low back disability.

The Referee found that claimant's injuries resulting from the industrial injury were not severe, nor do they indicate an inability of claimant to work. The medical evidence indicates that claimant has had emotional problems for many years but the preponderance of this evidence reveals that the accident did not affect these emotional problems.

The Referee concluded that claimant had failed to prove that he is entitled to a greater award for his permanent partial disability than that awarded by the Determination Order of June 11, 1976.

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

ORDER

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

SAIF CLAIM NO. AB 52 MAY 25, 1977

JOHN MICEK, CLAIMANT
Dell Alexander, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On August 3, 1976 the Board received a request from the Fund to exercise its own motion jurisdiction, pursuant to ORS 656.278 and cancel the claimant's award of permanent total disability.

Because, at that time, the Board had insufficient evidence before it to make a determination on the Fund's request, it issued an order on October 6, 1976 referring the matter to the Hearings Division with instructions to hold a hearing and take evidence on claimant's condition and its relationship, if any, to the industrial injury of 1963.

A hearing was held on February 24, 1977 before Referee Albert Menashe whose order of March 21, 1977 recommended that claimant's award for permanent total disability not be terminated as claimant is still so handicapped that he cannot regularly perform any work at a gainful and suitable occupation.

The Board, after de novo review of the transcript of proceedings and a thorough study of the recommendation of the Referee, adopts the Referee's recommendation which is attached hereto and by this reference made a part of the Board's order.

ORDER

The Referee's recommendation is hereby adopted by the Board.

Claimant's attorney is hereby granted as a reasonable attorney fee, the sum of $350, payable by the Fund.

SAIF CLAIM NO. GC 23899 MAY 25, 1977

ELMER MISTEREK, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left foot on June 22, 1966 and was examined by Dr. Steele who diagnosed fractures of the tips of great toe and second toe with laceration of great toe and partially evulsed nail of second toe. On November 20, 1967 a Determination Order granted claimant an award for 10% loss of the left foot. Claimant appealed.

After a hearing the Referee affirmed the Determination Order by an order dated June 7, 1968. The Board and the circuit court both affirmed the Referee.

Claimant filed a claim for aggravation and, after a hearing on June 2, 1970, the Referee granted claimant an award for 10% loss of use of the left foot, giving claimant a total of 20% loss of the left foot.

The Fund later reopened claimant's claim for further medical care and treatment; the claim was closed by a Determination Order of July 6, 1973 with no further award for permanent partial disability. Claimant appealed.

After a hearing, by order dated December 12, 1973, the Referee remanded claimant's claim to the Fund for acceptance and payment of compensation, commencing the date of claimant's recommended surgery. Surgery was performed on January 2, 1974; subsequently, claimant was referred by Drs. Aizawa and Steele to the Portland Pain Rehabilitation Clinic where claimant was enrolled from March 16 to March 26, 1976.

The Orthopaedic Consultants, on February 18, 1977, performed a closing examination. X-rays taken of the left foot revealed amputation of the distal portions of the first and second toes. The physicians found complete loss of the distal phalanx of the great toe and partial loss of the distal phalanx of the second toe. The physicians felt that claimant was severely disabled but that a major portion of this severity was on a psychological basis; the loss of function due to the injury was mild. Claimant's treating physician did not respond to an inquiry for his comments concerning these findings.

On March 28, 1977 the Fund requested a determination. The Evaluation Division of the Board recommended claimant be granted additional compensation for temporary total disability from January 2, 1974 through February 18, 1977 but no additional award for permanent disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 2, 1974 through February 18, 1977.

WCB CASE NO. 76-5308 MAY 25, 1977

BENJAMIN NICHOLS, CLAIMANT
Allen T. Murphy, Claimant's Atty.
Jim Gidley, Defense Atty.
Own Motion Order Referred for Hearing

On March 23, 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 an injury sustained in August, 1970. In support of his request, claimant attached medical reports from Dr. Jisko and Dr. Lahti and other documents. Claimant submitted copies of the request, reports and other documents to the carrier.

On April 29, 1977 the Board wrote the carrier informing it that it had 20 days within which to respond stating its position with regard to claimant's request.

On May 2, 1977 the carrier responded, stating that it objected to the reopening of claimant's claim as his aggravation rights had expired.

The Board, after giving due consideration to this matter, concludes that at the present time it does not have sufficient evidence before it to make a decision and, 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 in August, 1970 and, if so, whether claimant's condition has worsened since the last award or arrangement of compensation.

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.

SAIF CLAIM NO. SC 175364 MAY 25, 1977

FLORA DALE BOLES OWENS, CLAIMANT
Hal Coe, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On March 18, 1977 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 an injury sustained on March 15, 1969. In support of her request claimant attached a medical report from Dr. Corson dated February 22, 1977.

On April 26, 1977 the Board advised the Fund of claimant's request and requested it to respond within 20 days indicating its position.

On May 9, 1977 the Fund responded, stating it was currently paying claimant's medical and doctor bills under the provisions of ORS 656.245 and that the medical evidence submitted did not justify additional benefits to claimant.

The Board, after due consideration of this matter, concludes that the medical evidence does not show a worsening of claimant's condition since the last arrangement of compensation in December, 1975, therefore, claimant's request for the Board to reopen her claim must be denied.

IT IS SO ORDERED.

SAIF CLAIM NO. YC 26000 MAY 25, 1977

GLEN PAYNTER, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his low back on July 5, 1966. Claimant returned to his job in the lumber mill wearing a low back support. Claimant's claim was closed by a Determination Order which granted claimant no award for permanent partial disability.

By Board's Own Motion Order of October 6, 1976 claimant's claim was reopened. X-rays revealed almost complete loss of joint space at L4-5 and some arthritic changes. Claimant has adapted well to his condition and has lost very little time from work due to this injury.

The Evaluation Division of the Board recommended claimant be granted no award for permanent partial disability but be awarded compensation for temporary total disability for one day on September 10, 1976 and one-half day on November 24, 1976.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability for one day on September 10, 1976 and one-half day on November 24, 1976.

SAIF CLAIM NO. YA 75007I MAY 25, 1977

JOHN SLONECKER, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained severe open fractures of his right distal tibia and fibula on August 18, 1959 when he was run over by a "cat". On April 25, 1960 a bone graft was performed which proved unsuccessful; a second bone graft was subsequently performed. On September 7, 1971 a patellectomy was performed, thereafter, on September 5, 1972 claimant's claim was closed by a Determination Order granting 50% loss function of the right leg.

Post-traumatic and degenerative arthritis of the right ankle developed and, on April 30, 1975, claimant underwent an ankle fusion. Thereafter, claimant developed a non-union and continued to have pain in the ankle joint and was forced to walk with a brace. On April 14, 1976 claimant underwent surgery for exploration of the fusion site and excisional biopsy of the lesion of the third metatarsal.

On April 15, 1977 the Fund requested a determination. The Evaluation Division of the Board recommended claimant be granted compensation for temporary total disability from April 29, 1975 through April 15, 1977 and an additional award for 25% loss of the right leg.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from April 29, 1975 through April 15, 1977 and an award of 25% loss of the right leg. This award is in addition to, not in lieu of, awards previously granted to claimant.

WCB CASE NO. 75-2110 MAY 27, 1977

JOSEPH BRAY, CLAIMANT
Richard Cottle, Claimant's Atty.
Fred Aebi, Defense Atty.
Request for Review by Claimant
Cross-Request by the Employer

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of that portion of the Referee's order which granted claimant an award of 160° for 50% unscheduled low back disability, contending he is permanently and totally disabled.

The employer cross-requests review by the Board, contending it was not responsible for claimant's condition on or after April 2, 1973, that the Referee erred in granting claimant 160° and that the Order on Remand, dated August 6, 1973, should be reinstated and reaffirmed.

This is a case involving two employers and one carrier, The Home Insurance Company. Claimant had originally been injured in both September and October, 1971 while employed by Rogue River Orchards. This injury claim was closed by a Determination Order of December 27, 1973 with no award for permanent partial disability.

Claimant alleged he suffered a new injury on March 27, 1972 while in the employ of Pinnacle Packing Company, which claim was denied on June 1, 1972. On December 21, 1972, after a hearing, the Referee affirmed the denial but directed Rogue River Orchards to pay claimant compensation for temporary total disability from October, 1971 to June 10, 1972 and pay for the treatment to claimant's back from September 17, 1971 to June 10, 1972.

Claimant appealed this order and the Board affirmed it but the Circuit Court for Jackson County, on April 25, 1975, remanded the matter to determine if claimant was medically stationary on June 10, 1972. After a hearing the Referee ordered the Rogue River Orchards to pay compensation from June 10, 1972 until termination under the statute.

On April 2, 1973 claimant injured his back while working for Nye and Naumes Packing Company; a denial was issued but never appealed. Dr. Thompson had indicated that this was not a new injury but rather a continuation; he further expressed his opinion that claimant was medically stationary from the 1971 injuries as of January 1, 1974.

The Home Insurance Company paid compensation for temporary total disability to claimant to April 2, 1973.

Dr. Matthews testified at the hearing that he had examined cliamant in August, 1972 and September, 1975 and claimant's back problems were the result of progressive degeneration and not due to injury.

The Referee found the findings and conclusions on compensability of the Rogue River injuries were res judicata. Furthermore, the injury claimant alleged he suffered while employed by Nye and Naumes was not a new injury, therefore, the Home's responsibility extended beyond April 2, 1973.

The Referee concluded that The Home Insurance Company had been unreasonable in delaying the payments of compensation to April 2, 1973 and assessed penalties and awarded attorney fees; however, it was not acting unreasonably when it failed to pay post-April 2, 1973 compensation as there was a legitimate question as to its liability for this period.

At the second session of hearing in this case, films were shown showing claimant bending and pushing while mowing a lawn, throwing and twisting. The Referee concluded that although claimant's credibility did not deserve full credit, the testimony of witnesses and the medical evidence established that claimant had suffered substantial permanent loss of wage earning capacity. Prior to the 1971 injuries claimant was consistently able to do heavy labor; afterwards he could not return to this type of work.

The Referee concluded that claimant was entitled to an award of 160° to adequately compensate him for his loss of wage earning capacity.

The Board, on de novo review, affirms the conclusions of the Referee. The Board finds no medical evidence to support claimant's contention that he is permanently and totally disabled.

ORDER

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

WCB CASE NO. 76-2773 MAY 27, 1977

LOLA M. CARRINGTON, CLAIMANT
Lyman Johnson, 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 awarded her 48° for unscheduled disability.

Claimant, a 60 year old bookkeeper, suffered an industrial injury in April, 1975 when she fell on a stairway and injured her back. She has not worked since the date of her injury.

Claimant is 5'2" tall and weighs 195 pounds, she was examined by Dr. Robinson who diagnosed a lumbosacral strain and treated claimant conservatively for degenerative back disease which had been made symptomatic by her injury. At the time of her injury claimant weighed approximately 240 pounds, having lost 46 pounds since the injury. Dr. Robinson states that claimant is obese.

Dr. Miller found no neurological deficits and also stated that claimant must lose weight. Dr. Carroll agreed with this opinion.

Claimant's claim was closed by a Determination Order dated April 14, 1976 which granted her compensation for time loss only.

The medical evidence indicates that claimant has pain in the lumbar back extending down both legs. Claimant stated that at the present time she could not bend easily to pick up things nor could she easily straighten up after bending for prolonged periods of time; also she is unable to lift any appreciable weight. Claimant does very little of her necessary housekeeping duties and cannot ride in a car for more than one hour without being required to get out of the car and walk around for a few minutes, nor is she able to stand for longer than 15 minutes nor can she walk more than two blocks at a time.

Films were taken of claimant which indicated that she was able to lift grocery sacks, able to sit and do bookwork for a day, weed her garden and was also able to move easily from a sitting to standing and from a standing to a sitting position.

Dr. Robinson was of the opinion that claimant would never work again, however, he felt that this was because of her degenerative arthritis, obesity and hypertension, he felt that the injury triggered her present complaints and the three aforementioned conditions combined to render her permanently unable to work.

The Referee, after viewing the film and considering claimant's testimony, concluded that she exaggerated the extent of her limitations, that she had more ability to lift and bend than she admitted. He did find, however, based on claimant's testimony and the medical evidence, that prior to the injury claimant had been free of disability and complaints.

With respect to Dr. Robinson's expressed opinion, the Referee found no medical evidence that the injury had any affect on claimant's obesity or hypertension; to the contrary, there was medical evidence that if claimant had not been obese her situation would have been helped substantially. The medical evidence did indicate that the injury triggered and made symptomatic the degenerative arthritis and, therefore, this would be compensable however, there is no showing that any one of the three facts mentioned by Dr. Robinson by and of itself would result in claimant's inability to work.

The Referee concluded that because claimant's symptoms were purely subjective and because she tended to exaggerate her complaints, she had failed to establish that she is totally unable to work as a result of her injury. Using the sole test for determining the extent of unscheduled disability which is loss of wage earning capacity, the Referee concluded that there was very little question that claimant would, in the future, be unable to engage in heavy work, which was the type of work she was able to do prior to her injury and that the elimination of that type of work had a direct effect upon her earning power. He granted claimant an award of 48° for 15% unscheduled low back disability.

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

ORDER

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

WCB CASE NO. 76-896 MAY 27, 1977
WCB CASE NO. 76-1601

FRED DANIEL, CLAIMANT
David Vandenberg, Claimant's Atty.
Roger Luedtke, 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 awards totalling 37.5° for 25% loss of the right leg previously granted claimant and increased claimant's award of 15° for 10% loss of the left leg to 37.5°. Claimant contends these awards are inadequate.

Claimant sustained a compensable left knee injury on October 19, 1970 when he bumped it against a tree. On January 7, 1972 claimant sustained a compensable injury to his right knee, twisting it while walking in deep snow. In July, 1975 Dr. Lilly performed surgery on claimant's right knee and in January, 1976 on the left knee.

A Determination Order of November 23, 1971 granted claimant no award of compensation for the left leg. A stipulation of September 12, 1973 granted claimant compensation for 5% loss of the left leg. A Second Determination Order of July 21, 1976 granted claimant an award of compensation for 5% , giving claimant an aggregate award of compensation for 10% loss of the left leg.

A Determination Order of June 16, 1972 granted claimant compensation for 15% loss of the right leg. By the same stipulation of September 12, 1973 as mentioned above, claimant was granted an additional award for 10% loss of the right leg.

Following claimant's injuries he received vocational rehabilitation training and obtained a certificate as a drafting technician. Thereafter, claimant obtained employment as a draftsman but in June, 1974 claimant gave up the job due to difficulty with his eyes. Claimant was then examined by Dr. Lindley, an optometrist, who indicated claimant had an extremely high amount of astigmatism which limited the clearness of his vision, he further indicated that the highly detailed work claimant performed as a draftsman brought about the symptoms. Dr. Lindley stated that less detailed occupation would probably eliminate claimant's discomfort.

Claimant had been a faller and bucker at the time of his industrial injuries, earning in excess of $6 per hour. As a draftsman claimant earned $2 an hour.

Subsequent to leaving the drafting job claimant went to work in July, 1974 as a cook. But this job required a great deal of standing. Claimant quit and went to work as a watchman at Boys' Ranch but this job required walking 200-300 yards every half hour and he quit in January, 1976.

Claimant then went to work as a security guard which required about 2 miles of walking every other hour on hard surfaces. Dr. Lilly recommended that claimant quit and he did. Since quitting this job claimant has been unemployed.

Claimant testified that he finds his two legs about equally impaired. On May 1, 1973 Dr. Lilly reported both knees normal but that claimant had a mild amount of retropatellar crepitus. On June 7, 1976 Dr. Lilly reported, after claimant's two surgeries, that claimant had full range of motion with mild subpatellar crepitus. He found claimant's condition stationary, claimant had some permanent disability and was a good candidate for rehabilitation.

The Referee found that both claimant's testimony and Dr. Lilly's medical reports reflect a similar degree of impairment between the two legs. The Referee concluded that claimant had established that he has had 25% loss of use of both the left and right leg. He affirmed the awards for the right leg and granted claimant an additional award for 15% loss of the left leg.

The Board, on de novo review, affirms the order of the Referee. However, the Disability Prevention Division might desire to evaluate claimant and determine if he now has a vocational handicap due to his problems with his vision.

ORDER

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

WCB CASE NO. 76-524 MAY 27, 1977
WCB CASE NO. 76-525

JUANITA LARSON, CLAIMANT
Donald Miller, 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 her 52.5° for 35% loss of the right leg and 128° for 40% unscheduled lower and upper back disability. Claimant contends both awards are inadequate.

Claimant, a nurses aide, sustained a compensable back injury on May 12, 1971 and was thereafter treated conservatively by Drs. Goodwin, Seres, Rusch, Pasquesi and the physicians at the Orthopaedic Consultants. The concensus of medical opinion is that claimant should not return to her previous employment which involved heavy lifting. A Determination Order of January 26, 1976 granted claimant 48° for 15% unscheduled disability for this back injury.

On January 11, 1973 claimant slipped on icy steps coming to work and injured her right knee. Dr. Rusch performed an arthrotomy in April, 1974.

A Determination Order of January 26, 1976 granted claimant 22.5° for 15% loss of the right leg.

Claimant's current knee problem apparently is the primary cause of claimant's giving up her employment with this employer. She testified that since the operation her knee feels like its going to give out, it stiffens and will not bend.

The Referee found that the record and claimant's testimony established that claimant's knee injury precipitated the termination of her employment. Claimant contends it is a combination of her knee and back condition; this is unsupported by the medical evidence.

The Referee found that claimant has sustained a greater loss of function of her right leg than that for which she had been awarded by the Determination Order. He increased her award by 30°.

The Referee found that claimant had only one contact with the Division of Vocational Rehabilitation and has tried no employment possibilities on her own and seems unmotivated to do so. Claimant is not precluded from all fields of employment, therefore, she is not permanently and totally disabled.

Claimant, based upon the medical evidence, is unable to return to her previous employment as a nurses aide because she is precluded from heavy lifting. Therefore, her loss of wage earning capacity is greater than 48°; the Referee granted her an increase of 80° for her unscheduled back disability.

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

ORDER

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

WCB CASE NO. 76-1664 MAY 27, 1977

JAMES PHILLIPS, CLAIMANT
Richard Kropp, 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 that portion of the Referee's order which remanded claimant's claim for aggravation to the employer for acceptance and payment of compensation from February 10, 1976 until closure pursuant to ORS 656.268. Claimant contends he is entitled to compensation for temporary total disability commencing March, 1975, the date he became totally disabled.

Claimant sustained a compensable injury to his back in April, 1973, diagnosed as acute lumbosacral strain; claimant was treated conservatively. A Determination Order of December 20,

1973 granted claimant 32° for 10% unscheduled back disability. This award was increased to 112° by the Referee's order entered on August 30, 1974. This was the date of the last award or arrangement of compensation.

Claimant testified that the pain in his back and lower extremities has gradually worsened since August, 1974. By the summer of 1976 claimant had right leg numbness, cramps in the right foot and left leg pain much more severe and extensive than in August, 1974.

In 1976 Dr. Becker referred claimant to Dr. Poulson who indicated claimant had not worked since his injury in 1973 and that something had to be done if claimant were to function at all. On August 18, 1976 Dr. Poulson performed a lumbar laminectomy and discectomy.

Dr. Poulson felt that the April, 1973 industrial injury was a contributing factor to the herniated disc which had required surgery; furthermore, he said that he would not have operated in August, 1976 if he hadn't felt that claimant's condition had worsened.

The Referee found uncontradicted evidence that claimant's condition had worsened since his last award of compensation in August, 1974 and, eventually, led to surgery. He remanded claimant's claim to the employer to accept and to commence payment of compensation to claimant on February 10, 1976, the date claimant filed his claim for aggravation.

The Board, on de novo review, adopts the Referee's order. There was no medical evidence submitted to substantiate claimant's contention that he was entitled to compensation for temporary total disability commencing in March, 1975 or at any time prior to February 10, 1976.

ORDER

The order of the Referee, dated January 27, 1977 is affirmed.

WCB CASE NO. 76-2275 MAY 27, 1977

DARLENE PRODEHL, CLAIMANT
George Snyder, 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 reopened claimant's claim as of January 13, 1976 for further medical care and treatment

and for the payment of compensation for temporary total disability commencing on that date, and directed that claimant be enrolled in a weight reduction program in addition to receiving further medical treatment.

The order also directed the Fund to apply to the Disability Prevention Division of the Board to reconsider their previous handling of this matter, requesting that they assist claimant in a weight reducing program and furnish additional medical care and treatment for the purpose of rehabilitation; and in the event the Disability Prevention Division refused the responsibility remained with the Fund to do these things. If claimant did not appear to be properly cooperating in a weight reduction program the Fund could apply for termination or reduction of benefits.

Claimant cross-requested Board review, contending that the Referee's order was erroneous in that it did not award compensation for temporary total disability between May 6, 1975 and January 12, 1976.

Claimant is 5'2" tall and, at the time of the hearing, weighed 210 pounds. She is 31 years old and testified that she has been heavy for the majority of her adult life. Claimant suffered a compensable injury to her low back on August 20, 1974 and her claim was closed by a Determination Order dated May 27, 1975 which awarded claimant 32° for 10% unscheduled low back disability.

Claimant complains of both neck and back problems and states she is unable to work and finds it very difficult to do her housework. Claimant's occupation was that of a nurses' aide. Claimant's husband testified that since her claim was closed claimant has sought medical treatment and has been paying her own medical bills; also that pressure had been placed upon them by collection agencies for the payment of such bills. Claimant did attempt to return to work for Chase Bag Company, but stated she was forced to discontinue because of increasing back pain.

Claimant's primary treating physician was Dr. Krall, a chiropractor, who continued to treat claimant up to the time of the hearing. Claimant had an underlying spondylolisthesis which pre-existed her industrial injury. Dr. Zimmerman, who examined claimant upon referral, found there was a pre-existing congenital abnormality which predisposed claimant to degenerative arthritis and low back pain; he also commented upon her obesity and recommended a weight loss program.

The Orthopaedic Consultants examined claimant and the physicians there diagnosed a chronic lumbosacral strain superimposed on the previously mentioned congenital anomaly. They recommended that the chiropractic manipulations cease since they were causing an increase in psychosomatic overlay and also recommended a weight reduction program. It was thought that

perhaps claimant's problem could be alleviated through the performance of a fusion, however, it could not be done until claimant lost substantial amount of weight.

On March 16, 1976 the Fund denied claimant's claim for aggravation, stating that claimant's major problem was one of weight and was not a result of her accidental injury.

The Fund cited cases and Board opinions supporting the proposition that because most of the doctors who had either examined and/or treated claimant concluded that much of her back problems were due to her overweight condition and, therefore, that it was relieved from further liability. However, the Referee concluded, based upon the opinions to the contrary produced by and on behalf of claimant, that he would apply the generally accepted law that the employer accepts the workman as he is with any prior infirmaties or disabilities.

The Referee was convinced that the claimant did have an additional disability; however, in view of her overweight problem and the difficulty in attributing and determining whether the disability was due to the overweight condition or the physiological factors, claimant should attempt to undergo some type of weight program for reducing her weight.

The Referee concluded that the claim should be reopened for the purpose of placing claimant on a weight-reducing program and for such other necessary medical care. He also concluded she should be paid time loss during the weight program because claimant might reduce her present level of disability by such weight reduction program alone. He further concluded that claimant had been temporarily and totally disabled since January 13, 1976, the date claimant was examined by the physicians at the Orthopaedic Consultants.

Claimant contends that her temporary total disability should commence on the day after it was terminated by the Determination Order, alleging that she had never been medically stationary.

The Board, on de novo review, finds that the preponderance of the evidence indicates that claimant's present condition is due to her obesity, that claimant has shown no real interest in losing any substantial amount of weight; therefore, placing claimant on a weight reduction program would serve little purpose. Unless a person actually is concerned and willing to lose weight no weight reduction program will be effective.

Because of claimant's overweight condition the recommended surgery cannot be performed even though the evidence indicates that such surgery might alleviate claimant's present back problems.

The Board concludes that the denial by the Fund on March 16, 1976 was a proper denial; that claimant has failed to prove by a preponderance of the evidence that her present condition is a result of her industrial injury of August 20, 1974.

ORDER

The order of the Referee, dated November 29, 1976, is reversed.

The denial of claimant's claim for aggravation made by the Fund on March 16, 1976 is approved.

WCB CASE NO. 76-1903 MAY 27, 1977

DAVID SCHWARZ, CLAIMANT
Tom Hanlon, Claimant's Atty.
Douglas Kaufman, 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 granting claimant 160° for 50% unscheduled back disability. Claimant contends that he proved that he is within the odd-lot category and, the employer having failed to overcome his prima facie case, therefore, claimant is permanently and totally disabled.

Claimant, a 43 year old millwright, suffered a compensable injury to his back on June 17, 1975 while he, together with another employee, was letting down a gearhead from above. Claimant felt immediate sharp pain in the right hip and low back area but he kept working, believing the pain would gradually go away. On August 12, 1975 he consulted Dr. Kattenhorn who diagnosed an acute strain of the back. After claimant failed to respond to conservative treatment he was referred to Dr. Schuler on August 28, 1975.

Claimant was also referred to Dr. Hazel at the Oregon City Orthopedic Clinic who reported on February 27, 1976 that claimant had spondylolisthesis with chronic low back strain but that he did not require further medical care and treatment. Dr. Hazel stated that he would be willing to let claimant return to his regular work schedule or to a modified work schedule. Claimant did not believe that he would be able to do this and Dr. Hazel agreed that he probably could not under those circumstances, however, claimant's condition was medically stationary.

On March 17, 1976 Dr. Schuler indicated that he would not recommend any surgery or other procedures for claimant at that time. He expected claimant to have symptoms from time to time and it probably would not be in claimant's best interest to return to millwright work. He also recommended claim closure; he felt that claimant could do light type work and rated his permanent disability between mild and moderate.

On April 5, 1976 a Determination Order awarded claimant time loss from August 28, 1975 through March 15, 1976 and 32° for 10% unscheduled low back disability.

After the claim had been closed claimant again consulted Dr. Schuler, stating that he did not feel he could go back to his old job, that he was still having pain in his back. A neurological examination was negative and Dr. Schuler felt claimant should seek assistance from the Division of Vocational Rehabilitation. He prescribed Tylenol #3 for claimant's pain.

A report from Natalie Larson, a vocational specialist, indicated that the service coordinator had closed claimant's file on May 13 because claimant had indicated his desire to continue in his fishing tackle business and, therefore, job placement efforts did not seem feasible.

Both claimant and his wife testified that claimant was having no problems prior to his industrial injury but since then he has only been able to work two or three hours at a time and is in constant pain which varies according to the activity in which he is engaged. Claimant had operated a fishing tackle business on a part-time basis prior to his industrial injury, since his injury claimant operates it on a full-time basis. He insists that this is the only type of work that he is able to do.

The Referee found that although claimant had suffered an injury on June 17, 1975 he did not file his claim until September 11, 1975 and due to this delay the employer delayed accepting the matter, however, this delay was unreasonable inasmuch as they did not pay claimant any compensation for temporary total disability until November 11, 1975 and then only from August 28, the day that claimant last worked, to September 24, 1975. Thereafter, the employer paid no compensation for temporary total disability until December 3, 1975 when it paid the claimant up to date. After December 3, 1975 the employer required the claimant to drive round trip from his home in Rockaway to the plant, a distance of approximately 13 miles, every two weeks to pick up his compensation check.

The Referee assessed penalties and attorney fees for the delay in payment of compensation despite the fact that claimant himself had delayed in filing his claim after suffering the injury.

With regard to the employer's policy of requiring claimant to travel a substantial number of miles to the plant every two weeks in order to pick up his compensation check, the Referee concluded that this bordered on resistance, however, claimant had made no great protest nor did he insist that the checks be sent to him nor make any showing that any real hardship had been caused by the employer's policy. The Referee, stating that he was not necessarily approving this type of action on the part of the employer, nevertheless, found no evidence that would justify a finding of unreasonable resistance or unreasonable action on the part of the employer in the payment of compensation for temporary total disability after December 3, 1975.

On the issue of extent of claimant's permanent partial disability, the Referee found that, although claimant stated that he could not go back to work because of his injury and, therefore, was forced to resort to his own business in which he had engaged on a modified scale prior to the injury, there is evidence that claimant lacked motivation to return to work. He found that this lack of motivation on the part of claimant was not so much a desire not to work but rather a preference to establish and work in his own fishing tackle business.

The Referee found claimant undoubtedly was suffering considerable discomfort and his permanent partial disability would affect his future earning capacity, but because claimant is able to produce a considerable amount of fishing tackle which he sells up and down the Oregon coast and as far east as Bend, Oregon, he cannot be considered permanently and totally disabled. Not only is claimant able to produce the fishing tackle but he has made no effort to attempt any other type of work.

Based upon the testimony of claimant and his wife and the medical evidence, the Referee found that claimant was entitled to an award in excess of 32° for his loss of wage earning capacity. If his fishing tackle business should fail claimant would have to seek light type work and, based upon his age, training and education and work background, he would have difficulty in finding such type of work and would probably have to accept a low paying job.

The Referee increased claimant's award from 32° to 160°, and ordered the employer to pay a 25% penalty on all compensation for temporary total disablity due from August 28 to December 3, 1975 and to pay compensation for temporary total disability from July 28, 1975 to August 28, 1975 with no penalties applied on this portion of the compensation paid to claimant. He also awarded claimant's attorney a fee of $750 payable by the employer and also an attorney fee in the sum of 25% of claimant's additional permanent partial disability to a maximum of $1250, payable out of such compensation as paid.

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

The Board does not approve of the employer's policy which requires claimant to come to the plant to pick up his compensation check. The Board wishes to state quite clearly its policy that if a workman is required to travel any distance of more than a few blocks to pick up his compensation check he is entitled to mileage at the same rate as would be applicable if he was required to travel for medical examinations. Furthermore, if a workman objects to driving any substantial distance to receive his compensation checks the Workmen's Compensation Law does not allow the employer to retain the compensation check; if the workman wants his check sent directly to him the statute

requires that it be done. If the workman doesn't object to picking up the check he still is entitled to be reimbursed for the miles he was required to travel.

ORDER

The order of the Referee, dated September 20, 1976, is affirmed.

WCB CASE NO. 76-1820 MAY 27, 1977

LEWIS SHARP, CLAIMANT
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 January 15, 1976.

Claimant sustained a compensable injury on or about May 22, 1975 but continued to work; his right hand began to bother him more and he saw Dr. Sloop at the Permanente Hospital in July, 1975. No permanent impairment was found. The diagnosis was periarthritis, secondary to chronic trauma.

On November 25, 1975 claimant was examined by the physicians at the Orthopaedic Consultants. They diagnosed mild chronic strain of the right hand and wrist and a severe anxiety tension syndrome. The physicians found claimant to be medically stationary, further active treatment was undesirable. Claimant could return to his occupation but with some limitations. They found claimant's greatest disability to be his anxiety tension syndrome which he has had for many years; the disability to his hand and forearm due to this injury was minimal.

A Determination Order of January 15, 1976 granted claimant time loss only.

Claimant returned to see Dr. Rarey, a chiropractor, who, according to claimant, had cured him after his 1966 injury which resulted in claimant being unable to work for seven years. In February, 1976 Dr. Rarey examined claimant again and found his condition had deteriorated. Dr. Rarey had stated earlier that he could differentiate between claimant's acute condition and his previous chronic problem.

On March 3, 1976 the Fund denied reopening claimant's claim.

Claimant saw Dr. Gritzka who diagnosed traumatic right lateral humeral epicondylitis with extensor tendon tenosynovitis. Dr. Gritzka found claimant's physical impairment related only to the right elbow and represented 25% physical impairment based on loss of physical function of the whole right arm. On August 4, 1976 Dr. Gritzka said that claimant's present difficulty concerning his right elbow and wrist were related to the industrial injury of May 22, 1975.

Dr. Gritzka testified at the hearing and admitted that much of his diagnosis was based upon facts told to him by claimant who had not seen him for eleven months after the alleged injury. Dr. Gritzka testified that claimant's impairment was less than the 25% which he had estimated on June 30, 1976, however, his diagnosis remained the same.

The Referee found that claimant had not borne his burden of proving that he had sustained any loss of function of his right hand and, therefore, affirmed the Determination Order of January 15, 1976.

The Board, on de novo review, finds that the medical evidence indicates a minimal loss of function of claimant's right arm. The physicians at the Orthopaedic Consultants found minimal disability; Dr. Gritzka found it to be somewhere below 25%.

The Board concludes that claimant is entitled to an award of 19.2° for 10% loss of the right arm.

ORDER

The order of the Referee, dated November 3, 1976, is reversed.

Claimant is granted an award of 19.2° for 10% loss of the right arm. This is in addition to the award for time loss made by the Determination Order of January 15, 1976.

WCB CASE NO. 76-3236 MAY 31, 1977

LEVERT CARR, CLAIMANT
Allen Reel, 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 granted claimant an award of 37.5° for 25% loss of the right leg. Claimant contends this award is inadequate.

Claimant, a professional football player, sustained a compensable right knee injury during a game played on October 2, 1974. Claimant was examined by Dr. Rusch who diagnosed ligamentous injury right knee, more specifically, a torn media collateral ligament, torn posterior capsule, torn anterior and posterior cruciate ligaments.

Claimant, thereafter, returned to his home in Ohio and was treated extensively there by Dr. Yassine.

A Determination Order of May 3, 1976 granted claimant an award of 22.5° for 15% loss of the right leg.

The medical evidence presented indicates claimant is now incapable of returning to professional football; he is now a sales manager for General Tire and Rubber Company.

Therefore, the Referee concluded, based on the medical evidence, that the loss of function of claimant's right leg was 25% and he increased the award made by the Determination Order accordingly.

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

ORDER

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

No NUMBER MAY 31, 1977

FREEMAN GARRISON, CLAIMANT
Own Motion Determination

Claimant sustained a compensable injury on May 2, 1968 while working as a construction worker and a chimney flue collasped and fell on him.

Claimant was examined by Dr. Matthews who diagnosed shoulder and arm distress of unknown etiology.

A Determination Order of August 28, 1969 granted claimant compensation for temporary total disability and temporary partial disability only.

Claimant's claim was reopened for additional medical care and claimant was treated by Dr. Massey. On August 9, 1976 a transaxillary resection of the left first rib was performed. Dr. Massey indicated, following this surgery, that claimant had made an excellent recovery and had returned to work.

On May 13, 1977 the employer requested a determination. The Evaluation Division of the Board recommended claimant be granted additional compensation for temporary total disability from August 8, 1976 through September 20, 1976 but no award for permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from August 8, 1976 through September 20, 1976.

SAIF CLAIM NO. AC 167511 MAY 31, 1977

HOWARD PALMER, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his low back on January 13, 1969. He was examined by Dr. Bolin who, on January 24, 1969, diagnosed spondylolisthesis L5.

A Determination Order of August 18, 1969 granted claimant an award for 5% unscheduled disability.

The claim was reopened for further medical treatment and claimant was examined by Dr. Melgard who, on December 31, 1969, diagnosed spondylolisthesis and a possible herniated disc.

A Second Determination Order of January 20, 1971 granted claimant an additional award for 5% unscheduled disability.

Claimant's claim was again reopened for further medical care and claimant was examined by Dr. Poulson who, on August 1, 1975, diagnosed spondylolisthesis with degenerative lumbosacral disc. On October 8, 1975 a Gill procedure and interbody fusion was performed.

In his closing report of March 24, 1977, Dr. Poulson indicated claimant was medically stationary with a 10% impairment of the low back secondary to two ankylosed discs.

On April 15, 1977 the Fund requested a determination. The Evaluation Division of the Board recommended claimant be granted compensation for temporary total disability from October 1, 1975 through March 24, 1977 and an additional award for 10% unscheduled low back disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from October 1, 1975 through March 24, 1977 and 32° of a maximum 320° for unscheduled low back disability. This is in addition to previous awards of compensation granted to claimant.

WCB CASE NO. 76-4684 MAY 31, 1977

GARY NAETHE, CLAIMANT
Pamela McCarroll Thies, Claimant's Atty.
James D. Huegli, Employer's Atty.
Stipulation and Order of Dismissal

This matter having come on regularly upon stipulation of the parties, the claimant appearing by and through his counsel, Pamela McCarroll Thies and the employer acting by and through their counsel, James D. Huegli, and it appearing to the Workmen's Compensation Board that this matter has been fully compromised between the parties and that this order may now be entered,

NOW, THEREFORE, IT IS HEREBY ORDERED that claimant be and is hereby awarded permanent partial disability in the amount of 100% unscheduled disability, said increase amounting to 128° or 40% over the previous unscheduled disability award. Said increase amounts to a total of $8960.

IT IS FURTHER ORDERED that from this increase 25% shall be paid to claimant's counsel, Pamela McCarroll Thies as a reasonable and proper attorney fee, said award not to exceed $2,000.

IT IS FURTHER ORDERED that claimant's appeal to the Workmen's Compensation Board from the Referee's Opinion and Order be and is hereby dismissed.

IT IS SO STIPULATED:

WCB CASE NO. 76-3916 JUNE 2, 1977

RODNEY AULT, CLAIMANT
J. David Kryger, Claimant's Atty.
Roger Luedtke, 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 July 21, 1976 which had awarded claimant 48° for 15% unscheduled disability.

Claimant sustained a compensable back injury on October 9, 1975 while employed as a warehouseman. Claimant was examined

by Dr. Hogan who diagnosed acute sacroiliac strain, right. Subsequently, claimant experienced exacerbation of his back condition and saw Dr. Buza on November 4, 1975. Dr. Buza diagnosed lumbar 4 radiculopathy on the right and probable herniated disc L3-4 on the right. On November 20, 1975 claimant underwent a lumbar laminectomy.

Dr. Buza continued to see claimant and on January 14, 1976 found claimant could return to light type work. On April 30, 1976 Dr. Buza recommended claimant do no heavy lifting but with this restriction could return to full time employment.

A Determination Order of July 21, 1976 granted claimant 48° for 15% unscheduled disability.

The Referee found that the medical evidence indicated claimant had suffered only a minimal impairment following his surgery although claimant's injury now precluded him from doing any heavy lifting. The claimant's work background consists of 20 years working as a route salesman, a job which requires heavy lifting and, since 1972, as a grocery selector which also requires heavy and repetitive lifting.

The Referee concluded that claimant's inability to find employment related to many factors other than his physical disability; among them, the general economic conditions at the present time. The Referee found that the Determination Order of July 21, 1976 adequately compensated claimant for his loss of wage earning capacity.

The Board, on de novo review, finds that claimant has now been precluded from any heavy lifting type occupations and most of claimant's working experience has been in heavy lifting type jobs to which he can no longer return. Therefore, claimant has lost more wage earning capacity than that for which he was compensated by the Determination Order.

The Board concludes claimant is entitled to an award of 80° for 25% unscheduled disability to adequately compensate him for his loss of wage earning capacity.

ORDER

The order of the Referee, dated November 30, 1976, is reversed.

Claimant is hereby granted an award of 80° of a maximum of 320° for 25% unscheduled disability. This award is in lieu of the award granted by the Determination Order of July 21, 1976.

Claimant's attorney is granted as a reasonable attorney fee a sum equal to 25% of the compensation granted by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 75-3964 JUNE 2, 1977

WILLIAM BEAN, CLAIMANT
Gary Jones, Claimant's Atty.
Philip 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 denial of claimant's claim.

Claimant contends he suffered a compensable injury on or about December 6, 1974 when he "popped" his welding hood or mask down in front of his face which ultimately required surgery for an acute cervical disc.

The Referee, in a very thorough and well explained order, found that claimant had failed to establish that he had sustained a compensable injury arising out of and in the course of his employment.

The Board affirms the order of the Referee and adopts as its own his Opinion and Order of May 13, 1975, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

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

WCB CASE NO. 76-2877-SI JUNE 2, 1977

WALTER BISHOP, CLAIMANT
WEYERHAEUSER COMPANY
James Huegli, Claimant's Atty.
Norman F. Kelley, Defense Atty.
For Reimbursement From Second Injury Fund

Hearing was held in the captioned matter at Klamath Falls, Oregon on December 2, 1976 before Referee John F. Drake. The petitioner, Weyerhaeuser Company, was represented by James D. Huegli. The Workmen's Compensation Board was represented by Norman F. Kelley.

The matter came on as an appeal by Weyerhaeuser Company from the determination order of the Board entered May 11, 1976 in Claim No. 126 in reference to the injury and disability sustained by Weyerhaeuser's employee, Walter L. Bishop. The determination order set out that:

> "We find that the pre-existing disability is related to the subsequent disability but is not causally related to this injury.
>
> "IT IS THEREFORE ORDERED that you be paid 35 percent of the actual claim costs, but that you receive no relief of any other costs related to this injury" (Joint Exhibit 5).

Walter L. Bishop sustained an injury on February 2, 1972 for which on October 26, 1972 he was awarded 15% permanent low back disability (Joint Exhibits 1 and 2). Mr. Bishop returned to work for Weyerhaeuser following recuperation from this injury. On March 18, 1974, he sustained another industrial injury, for which on January 19, 1976 he was awarded 50% permanent low back disability (Joint Exhibits 3 and 4). Following hearing on appeal of the latter determination order, he was awarded permanent total disability, apparently not appealed.

The Board's Administrative Order 3-1973, relating to rules for the payment of second injury benefits under ORS 656.622, recites the purpose:

> "Employers are provided an incentive to hire, rehire or retain persons who have a known permanent disability."

The fact that in the instant case the injured workman was in the employ of Weyerhaeuser at the time of his 1972 injury and remained in the company's employ at the time of the second injury in 1974 reflects the employer's cooperation to achieve such purpose. Rule IV.D. of the Administrative Order provides:

> "The subsequent accident must be attributable fully or partially to the pre-existing disability of his injured employe or another of his employes."

Rule VI. provides:

> "The closing and evaluation division will determine the percentage of relief of increased costs attributable to the pre-existing condition."

No standard or formula is set out defining the basis on which the Evaluation Division will make its determination as to the percentage of relief to be granted. Board Counsel Kelley argues that the Evaluation Division has developed an expertise out of their experience in rating the extent of disability of injured workmen, and that while much of their evaluative process is

essentially subjective their conclusions are, nonetheless, consistent and appropriate. He further argues, in effect, that the Evaluation Division's determination in respect to the extent of second injury reimbursement should be presumed correct because the Evaluation Division's expertise has equal application in this area.

Counsel's argument may have general merit, but not to the extent that the Evaluation Division's determination should be sustained if, as I find to be the case here, the weight of evidence in the record demonstrates that the determination is erroneous. In the instant case, the limitation of reimbursement to 35% appears to have been based on the finding by the Evaluation Division that "the pre-existing disability is related to the subsequent disability but is not causally related to this injury." (I assume that "injury" in this context is used as the equivalent of "accident" as the latter word is used in Rule IV.D.) Subsequent to the entry of the determination order, Weyerhaeuser received a June 18, 1976 report from Dr. W.R. Lilly, the orthopedist who had been Mr. Bishop's treating physician. Dr. Lilly stated,

> "To answer the questions in your letter of June 8, 1976, I do believe the injury of February 2, 1972 had something to do with the second injury which occurred on March 18, 1974. In fact, he may have had a small herniation of the disc at L-5 - S-1 that occurred in February 1972 which then herniated more causing more symptoms, after the injury of March 1974. Also, he had excision of a large herniated disc at the L-4 - 5 level in 1972, which makes a person more likely to have a herniated disc at adjacent levels.
>
> "In summary, I do believe the first injury in 1972 would make it more likely that he would herniate another disc at an adjacent level, and in fact, there may have been a small herniation of the disc at L-5 - S-1 actually occurring in February 1972" (Joint Exhibit 37B).

On November 18, 1976, Mr. Huegli, the employer's counsel, wrote to Dr. Lilly inquiring whether his opinion conformed with a description of the relationship between the two injuries as set out in precise terms in the letter of inquiry (Joint Exhibit 38). Dr. Lilly confirmed his opinion, by his letter of November 29, 1976, in language substantially similar to that set out in Mr. Huegli's letter to him, namely,

> "Reference your letter of November 18 on Walter Bishop. I do believe that the fact that Mr. Bishop had a herniated disc, which

resulted in excision of same on February 9, 1972, made him more prone to have additional low back trouble in the future.

"I therefore believe that the second back injury is related to the first. I think his [sic] statement in your letter of November 18th is accurate. In other words, I agree that if Mr. Bishop had not had the first industrial injury, the second injury resulting in a recurrent herniated nucleus pulposus probably would not have occurred. Also, Mr. Bishop probably would not be permanently and totally disabled if he had not had the second injury occur" (Joint Exhibit 39).

At the hearing, Mr. Kelley presented a detailed analysis of the medical record relating to both the first and second injuries sustained by Mr. Bishop, in support of his contention that Dr. Lilly's conclusion as to relationship was in error. Irrespective of the seeming logic of Mr. Kelley's analysis, I feel that I am bound by the opinion of Dr. Lilly in the absence of other persuasive controverting opinion from a qualified medical expert. I do not find Dr. Lilly's opinion weakened by the fact that counsel for Weyerhaeuser presented to the doctor for his consideration a "pre-packaged" opinion. If such procedure had resulted in persuading the doctor to change his basic medical opinion by reason of the lay opinion of the employer's counsel, I would have a different attitude towards the doctor's ultimate response, but I do not think that is the case in this instance. The doctor's two reports, above quoted, are in substantial parallel and are not in conflict with earlier expressions by Dr. Lilly which appear in the record.

The conclusion expressed in the determination order that the pre-existing disability is not causally related to the second injury is, in my judgment, substantially refuted by the opinion of Dr. Lilly. Dr. Lilly's ultimate conclusion is not, however, stated in absolute terms. He opines that but for the first industrial injury the herniation of the nucleus pulposus "probably" would not have occurred and but for the second injury Mr. Bishop "probably" would not be permanently and totally disabled. I construe Dr. Lilly's comment as providing a margin of error of around 10%. I would accordingly recommend 90% reimbursement to Weyerhaeuser, on the theory that 100% reimbursement should be provided only in circumstances where causal relationship is shown in substantially absolute terms, as, for instance, if a workman should fall because of the failure of a prosthesis worn as a result of a leg amputation from an earlier industrial injury.

I propose that the Board enter the following:

RECOMMENDED ORDER

IT IS HEREBY ORDERED that Weyerhaeuser Company be paid 90% of actual claim costs in lieu of the 35% directed to be paid by the Board's determination order of May 11, 1976 in Claim No. 126.

ORDER ON REVIEW

Reviewed by Board Members Wilson, Moore and Phillips.

On December 21, 1976 Referee John F. Drake recommended that the Board order that Weyerhaeuser Company be paid 90% in actual claim costs in lieu of the 35% directed to be paid by the Board's Determination Order of May 11, 1976 in Claim No. 126.

The Board, after de novo review, accepts the recommendation of the Referee and adopts as its own the findings of fact and conclusions of law set forth in the recommended order dated December 21, 1976 and the addendum thereto, a copy of which is attached hereto and, by this reference, made a part of the Board's order.

WCB CASE NO. 76-2314 JUNE 2, 1977

BEVERLY CUMPSTON, CLAIMANT
Hugh Cole, 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 for back and lower extremity disability to it for acceptance and payment of benefits as provided by law.

Claimant, a 35 year old checker for Safeway stores, in the latter part of 1975, gradually developed low back and extremity symptoms, including difficulty in standing up straight.

She was examined by Dr. Woolpert in early 1976 who diagnosed chronic strain in the lower extremities and referred her to Dr. Andersen. Dr. Andersen suspected claimant's complaints were functional in nature. Claimant was subsequently hospitalized.

On January 29, 1976 Dr. Woolpert indicated that claimant had a rather difficult combination of chronic strain of the lower extremities related to work activity and aggravated by her working

posture and stance. In the latter part of 1975 the store had changed its method of checking, claimant contends this was the beginning of her difficulties.

Claimant was examined by the Orthopaedic Consultants on June 18, 1976; the physicians found no positive confirmed objective physical findings; there were functional complaints and the possibility of collagen disease, not work related. They further found that claimant's current complaints were indirectly related to her clerking job which had contributed to her functional complaints.

A psychological evauation conducted on June 22, 1976 indicated claimant had emotional disturbance with a strong possibility of a functional component influencing some physical health problems; it was felt claimant was not really motivated to return to work.

The Referee found, based upon the medical evidence presented, that claimant had proven she had suffered a compensable back and lower extremity strain. There was no evidence introduced that claimant's condition arose from any other source. The fact that claimant's condition could be partly or wholly functional in nature does not make it any less compensable.

The Referee remanded claimant's claim to the carrier for acceptance.

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

ORDER

The order of the Referee, dated October 21, 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. 75-1753 JUNE 2, 1977

RONALD BLAKESLEY, CLAIMANT
Rod Kirkpatrick, 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 remanded claimant's claim to the Fund to be reopened as of December 13, 1974 for payment of benefits, as provided by

law, and set aside the Third Determination Order of August 5, 1975. Claimant contends that the Fund should pay compensation for temporary total disability for all periods involved, less time worked, and should pay the entire amount of claimant's attorney fees.

Claimant contends that his claim was prematurely closed and that he was not medically stationary at the time of the Second Determination Order of January 16, 1975 which awarded compensation for temporary total disability from April 12, 1974 through October 25, 1974, less time worked. Claimant relies upon Dr. Stumme's report of January 3, 1975 which indicated he had seen claimant on December 13, 1974 for repeat nerve conduction study and the results were consistent with the carpal tunnel syndrome on the right and he anticipated surgery in the future.

The Referee found that claimant was entitled to penalties and attorney fees because the Fund failed to submit medical reports to the Evaluation Division prior to the entry of the Determination Order which constituted a disregard for its statutory obligations. When the Fund finally did submit the report of Dr. Stumme the Evaluation Division reopened the case as of December 13, 1974.

Further medical reports were submitted from the physicians at the University of Washington to support the claimant's contention he is not medically stationary. Therefore, the Referee set aside the Determination Order of August 5, 1975, as amended September 19, 1975, which had awarded claimant 15° for 10% loss of his right forearm.

The Referee found that on September 11, 1975 the Fund had paid claimant compensation for temporary total disability from December 13, 1974 through June 9, 1975, less time worked.

The Referee, in his opinion, assessed the Fund a penalty equal to the sum of 25% of the compensation for temporary total disability due claimant and awarded attorney fees because of the Fund's failure to process the claim properly which constituted unreasonable resistance.

The Referee also awarded claimant's attorney an attorney fee equal to 25% of the compensation for temporary total disability payable as a consequence of his reopening claimant's claim.

The Board, on de novo review, agrees with the Referee's conclusions. However, the Referee neglected to order the Fund to pay the penalties he found justified so his order must be amended by this order.

ORDER

The order of the Referee, dated July 16, 1976,is amended to include the follow paragraph:

"The Fund shall pay claimant additional compensation, as a penalty, a sum equal to 25% of the compensation due claimant for temporary total disability due from December 13, 1974 through June 9, 1975."

The order of the Referee, dated July 16, 1976, is affirmed in all other respects.

WCB CASE NO. 76-4429 JUNE 2, 1977

DELBERT FAIN, CLAIMANT
Gerald Doblie, 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 affirming the Determination Order dated August 13, 1976 which awarded claimant compensation for time loss and 19.2° for 10% loss of his left arm.

Claimant questions that he was medically stationary at the time of the second claim closure and, if not, contends he is in need of additional medical care and treatment or, in the alternative, the award for permanent disability was inadequate.

Claimant injured his left arm on April 11, 1974 and received treatment from Dr. Donahoo, an orthopedic physician, who diagnosed a strain and recommended conservative treatment only.

In February, 1975 Dr. Young, an orthopedic physician, examined claimant; he indicated that the injury suffered by claimant would be disabling for a period of time possibly up to a year but that claimant would have a sufficient recovery. Although some problems might be present, nevertheless, claimant would be able to work on a completely functional basis. He recommended no additional specific treatment.

The claim was closed, based upon Dr. Donahoo's examination of claimant in April, 1975, with an award for time loss only. At that time Dr. Donahoo noted that claimant "remains adamantly symptomatic. He has not worked since September. I believe there is a strong functional component to his present illness".

On December 1, 1975 Dr. Streitz, also an orthopedic physician. examined claimant. He felt that there were only minor objective findings, however, he recommended exploratory surgery to determine the extent of the injury and, primarily, to reassure the patient that all efforts were being made to take care of his disability. Dr. Donahoo disagreed but deferred to Dr. Streitz. Thereafter, the matter was reopened, pursuant to stipulation,

and exploratory surgery was performed. On April 6, 1976 Dr. Streitz indicated claimant could return to work on April 12, he was medically stationary and although he might have some discomfort in the future there would be no damage done by working; to the contrary, it might be beneficial to the elbow.

Based on Dr. Streitz's report, the Disability Prevention Division of the Board determined that the claimant did not have a vocational handicap and claimant was not accepted for retraining. The claim was then closed by a Second Determination Order which awarded claimant 10% loss of the left arm.

After closure claimant complained of problems and was examined by Dr. Vessely on September 29, 1976. He found that claimant tended not to want to use his arm and that there was a significant functional overlay with respect to claimant's examination.

Claimant has not worked nor made any attempt to look for work since September, 1974 when he was involved in a motorcycle accident and suffered a fractured pelvis, fractured right wrist and multiple lacerations and abrasions.

Claimant denied that any of the residuals of the motorcycle accident caused him not to seek work but he did admit that his right leg and head bothered him. Claimant contends that, at the present, his inability to work is solely due to his elbow condition, the result of the industrial injury.

The Referee found that the facts presented did not support claimant's contention. Dr. Vessely's report indicates deliberate restriction of movement as well as subjective complaints unverified by objective findings. All of the physicians who have examined and/or treated claimant also indicated that the conditions involved should not cause the continuing problems alleged by claimant. The Referee found that claimant's lack of credibility at the hearing supports the suspicion that malingering and secondary gain factors might very well be present.

The Referee found no evidence that claimant had a vocational handicap. Claimant's condition was no different at the time of the hearing than it was at the time that such services were earlier refused claimant. The film introduced by the employer showed no evidence of claimant's inability to engage in work activities.

The Referee concluded, based upon Dr. Vessely's report, that there was no basis for reopening the case for additional medical treatment, that the claimant was not in need of vocational rehabilitation and he was medically stationary at the time of the Determination Order of April 13, 1976 which he affirmed.

The Board, on de novo review, agrees with the findings and conclusions of the Referee made upon the facts which were

properly before him. However, the Board would caution the Referee not to comment on whether or not a claimant has a vocational handicap nor to make a finding of whether or not claimant is in need of vocational rehabilitation. That is solely within the province of the Disability Prevention Division of the Board, and can be properly presented to the Referee only upon the issues set forth under the provisions of OAR Chapter 436-61-060(2).

ORDER

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

WCB CASE NO. 76-4429 JUNE 2, 1977

DELBERT FAIN, CLAIMANT
Gerald Doblie, Claimant's Atty.
Roger Warren, Detense Atty.
Order

On April 25, 1977 claimant, by and through his attorney, filed a motion requesting the Board to reopen the hearing in the above entitled matter for the purpose of taking additional evidence.

On May 4, 1977 the employer responded in opposition to the motion.

The Board, after considering the grounds upon which the motion was based and the grounds offered in opposition presented by the employer, concludes that it would not be justified in reopening the hearing.

ORDER

Claimant's motion to reopen the hearing in the above entitled matter for the purpose of taking additional evidence is hereby denied.

No NUMBER JUNE 2, 1977

LELA DURFEE GAITHER, CLAIMANT
Robert Hagen, Claimant's Atty.
Dept. of Justice, Detense Atty.
Own Motion Order

On October 20, 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 an injury suffered on April 22, 1970.

Due to insufficient evidence before it at that time the Board, on November 19, 1976, referred the matter to the Hearings Division with instructions to hold a hearing and take evidence on the merits of claimant's request and, thereafter, to furnished the Board with a recommendation.

On April 6, 1977 a hearing was held before Referee Raymond S. Danner. On May 18, 1977 Referee Danner submitted his advisory opinion to the Board together with the transcript of the proceedings.

The Referee found, based on the extensive medical evidence and the claimant's own testimony, that the evidence was insufficient to support the claim for aggravation and, therefore, he recommended that claimant's request be denied.

The Board, on de novo review of the transcript of the proceedings and the recommendation of the Referee, agrees with the Referee's advisory opinion, which is attached hereto and, by this reference, made a part hereof.

ORDER

Claimant's request that the Board reopen her April 22, 1970 claim pursuant to ORS 656.278, is hereby denied.

WCB CASE NO. 76-3138 JUNE 2, 1977

EMILIO GARCIA, CLAIMANT
Allan Coons, Claimant's Atty.
Dept. of Justice, Defense Atty.

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 6, 1976 which awarded claimant compensation for temporary total disability only.

Claimant was working as a hod carrier on August 25, 1975 when he fell from a scaffolding, sustaining small laceration of the scalp and tenderness between his spine and interscapular strain. The diagnosis made by Dr. Redfield was mild cerebral concussion and interscapular strain. Claimant returned to work on September 3, 1975. On October 8, 1975 claimant was terminated with this employer for alleged lack of work.

On March 12, 1976 Dr. Redfield examined claimant for employment as a bus driver and found him qualified, however, for some time claimant had had complaints of upper back muscles bothering him when subjected to severe strain and, therefore, Dr. Redfield advised claimant not to return to work as a hod carrier.

On August 30, 1976 Dr. Redfield recommended claimant avoid all occupations requiring heavy sustained back stress.

Claimant contends that he is entitled to an award for permanent partial disability because of his loss of wage earning capacity resulting from his inability to return to heavy manual labor.

The Referee found that neither the medical evidence nor the testimony taken at the hearing supported claimant's contention. Dr. Redfield's reports indicated no objective evidence. The Referee found that after his industrial injury claimant had been capable of performing a physically demanding job for some four to five weeks. The Referee concluded claimant had sustained no permanent partial disability from his industrial injury.

The Board, on de novo review, finds that claimant cannot now do heavy manual labor and, therefore, has suffered a minimal amount of loss of wage earning capacity because this segment of the labor market available to him before his injury is no longer within his physical capabilities.

The Board concludes that claimant is entitled to an award of 32° for 10% unscheduled disability to compensate him for his loss of wage earning capacity.

ORDER

The order of the Referee, dated December 30, 1976, is reversed.

Claimant is hereby granted an award of 32° for 10% unscheduled disability.

Claimant's attorney is hereby granted as a reasonable attorney fee a sum equal to 25% of the compensation granted by this order, payable out of said compensation as paid, not to exceed the sum of $2,300.

WCB CASE NO. 76-2406 JUNE 2, 1977

KENNETH HOLMES, CLAIMANT
John Ryan, Claimant's Atty.
James Huegli, 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 of 28.8° for 15% loss of the right arm. The employer contends that the award

of compensation for time loss only granted by the Determination Order should be reinstated.

Claimant sustained a compensable injury on May 17, 1975 and he was examined by Dr. Carter who diagnosed a laceration of the left ear, cerebral concussion and second degree burn on the right inner wrist area. Two weeks later it was indicated claimant had a mild epicondylitis of the right elbow. Dr. Carter stated that the epicondylitis was not related to the original injury.

Claimant testified that since the injury he has had headaches, dizziness and blurred vision. He further indicated that the dizziness and visual problems occur only occasionally and last only a few seconds. Claimant further testified that his headaches were not frequent and he had not had any for the last couple of months.

The only condition claimant is presently suffering symptoms from is the recurring epicondylitis. Claimant testified he keeps working until his symptoms become severe then he gets an injection from Dr. Carter or Dr. Schwartz. The employer has paid for these injections.

The Referee found claimant to be credible and even though the medical evidence was sparse he found that claimant's award should be commensurate with his subjective complaints. He concluded claimant was entitled to an award of 15% loss of the right arm.

The Board, on de novo review, disagrees with the conclusions reached by the Referee. Dr. Carter related that claimant's present problems of epicondylitis was not causally related to claimant's industrial injury, and there is no medical evidence to the contrary. The Board concludes that just because the carrier voluntarily paid for the injections such action does not bind them to continue to pay for a condition which the evidence clearly indicates was unrelated to the industrial injury.

ORDER

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

The Determination Order of August 26, 1975 is reaffirmed.

WCB CASE NO. 75-1727 JUNE 2, 1977

RUSSELL LEWIS, CLAIMANT
Gary Galton, Claimant's Atty.
Dennis VavRosky, Defense Atty.
Own Motion Order

On March 16, 1977 the Board received a request from claimant to exercise its own authority pursuant to ORS 656.278 and reopen claimant's claim for a compensable injury suffered on April 12, 1968. Claimant's claim was closed on or about April 17, 1969, it was later reopened and, ultimately, claimant received, pursuant to an Opinion and Order entered on September 30, 1975, an award for 100% loss of use of his left leg. This order was affirmed by the Board and the Circuit Court for Multnomah County.

The request was accompanied by medical reports from Dr. Langston and Dr. McKillop which indicate that claimant was hospitalized and surgery was performed for a total knee replacement on January 17, 1977. Claimant states that the carrier has agreed to pay claimant's causally-related medical expenses under the provisions of ORS 656.245 but has refused to voluntarily reopen the claim for the payment of compensation for temporary total disability.

The claimant requests the Board to remand claimant's claim for acceptance and for payment of all benefits, as provided by law, including temporary total disability from July 28, 1976 or, in the alternative, based upon Dr. Langston's report, from January 17, 1977 until the claim is closed pursuant to ORS 656.278 or ORS 656.268.

Both claimant's counsel and counsel for the carrier submitted briefs and the Board, after due consideration of this matter, including full review of the briefs, concludes that claimant's motion to reopen his claim for the 1968 injury should be allowed and that all medical billings and expenses relating to claimant's hospitalization and surgery should be paid by the carrier. There is some question as to the exact period of claimant's hospitalization, therefore, the Board concludes that claimant is entitled to the payment of compensation for temporary total disability from the period he was actually hospitalized and for the period of convalescence thereafter relating to the surgery.

ORDER

Claimant's claim is remanded to the employer, Transwestern Express and its carrier, Transport Indemnity Company, to be accepted and for the payment of compensation, commencing January

17, 1977, the date claimant was hospitlized for surgery, and until his claim is closed pursuant to the provisions of ORS 656.278.

The carrier shall pay all medical bills and expenses incurred by claimant as a result of his hospitalization and surgery.

Claimant's attorney is granted as a reasonable attorney fee a sum equal to 25% of the compensation for temporary total disability paid claimant, payable out of said compensation as paid, to a maximum of $500, and to a sum equal to 25% of any award for permanent partial disability which may be granted by an own motion determination issued pursuant to ORS 656.278, said sum to be paid out of such compensation payable as paid, the total fee shall not exceed $2,000.

SAIF CLAIM NO. ZA 928712 JUNE 2, 1977

KENNETH MASON, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on June 5, 1962 to his left leg. A Determination Order of October 29, 1962 awarded claimant 15% loss of function of his left leg.

On September 21, 1976 Dr. Stevens found that claimant's knee was deteriorating and recommended quadriceps exercises. On September 27, 1976 Dr. Casey requested the claim be reopened for further medical care.

In a report dated April 5, 1977 Dr. Stevens indicated that he had recommended, on February 2, 1977, an arthrogram followed by the appropriate surgery for the claimant. Claimant called the next day and cancelled.

On May 3, 1977 the Fund requested a determination. It was the recommendation of the Evaluation Division of the Board that claimant be granted an additional award of 15% loss of the left leg and additional compensation for teporary total disability from October 5, 1976 through February 2, 1977.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from October 5, 1976 through February 2, 1977 and for 15% loss of the left leg. This is in addition to the awards previously granted claimant.

WCB CASE NO. 76-4086 JUNE 2, 1977
WCB CASE NO. 76-4578

JACK C. RUTHERFORD, CLAIMANT
Frank Susak, 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 reversed an Own Motion Order entered by the Board pursuant to ORS 656.278 on July 9, 1976.

The Own Motion Order had remanded claimant's claim to the Fund for acceptance and for the payment of compensation, as provided by law, commencing September 17, 1975, the date claimant was first hospitalized, and until closure was authorized pursuant to ORS 656.278. The Fund was given the right to request a hearing on the order and did so (WCB Case No. 76-4086-E); the claimant also requested a hearing, protesting the failure of the Fund to continue to pay compensation for temporary total disability pursuant to the Own Motion Order (WCB Case No. 76-4578). A consolidated hearing was held and the Referee received evidence on both requests.

Claimant had suffered a compensable injury in 1968, his claim had been closed and his aggravation rights had expired when, on February 3, 1976, he requested the Board to exercise its own motion jurisdiction and reopen his claim, alleging that his condition had worsened. Claimant furnished medical reports from Los Gatos, San Francisco and San Jose, California which covered the periods between September, 1975 and June, 1976; after copies of these reports were furnished to the Fund, it refused to reopen the claim. Thereafter, the Own Motion Order was entered.

After the entry of the Board's Own Motion Order the Fund began making payments of compensation for temporary total disability (actually claimant only received two payments) and wrote claimant's family physician in Los Gatos requesting medical information. The Fund made appointments for claimant to be examined by the Orthopaedic Consultants in Portland, Oregon on August 16, 1976 and again on September 8, 1976. It sent claimant a round trip airline ticket and some expense money. The checks were not returned nor did claimant keep the appointments.

At the hearing, claimant appearing in a wheelchair, testified that he is living in Selma, California with the help of the Federal Farm Home Loan Agency; that he has three children between the ages of 5 and 7, he is destitute and had to borrow money from his blind mother to make the trip to Portland. At the present time claimant spends approximately two hours a day in bed and two or three hours sitting in a chair. He must use

crutches and/or a cane because his legs do not function very well. At the present time he is receiving spinal injections twice a month from a Dr. Ching, who is located in Fresno, California, and he sees Dr. Lackner, his family physician, once a month.

Claimant testified that he could not come to Portland because it was impossible for him to travel alone. Claimant knew that the tickets were waiting for him at the local airport but he did not go there and get them because he did not have any transportation. Claimant's wife, who speaks very little English, is presently attending night school attempting to learn English.

The Referee found that claimant's wife could have driven him to the airport, also that claimant's counsel had assured the Fund that claimant would appear for the examination and he found no convincing reason why claimant did not pick up and use the airline ticket.

The Referee found that the Fund could, with the consent of the Board, suspend compensation until claimant submitted to a current medical examination pursuant to the provisions of ORS 656.325. He found that claimant and his doctors have had an utter disregard for the rights of the Fund; what actually was transpiring, in his opinion, raised such speculation that an independent medical examination was mandatory. Claimant, according to the Referee, has not cooperated since he was able to get time loss reinstated.

The Referee concluded that although it could be argued that the Fund should pay compensation for temporary total disability pending its appeal, because it had not obtained the consent of the Board, pursuant to ORS 656.325, to terminate payments of compensation, it also could be argued that ORS 656.313(2) isn't valid. If it isn't a valid statute claimant would have to pay back the compensation for temporary total disability which he had received.

The Board, on de novo review, finds that claimant is unable to travel by himself, is totally without funds and has been unable to work since July, 1976. Claimant lives in California, yet not once did the Fund attempt to set up an appointment for claimant to see a qualified physician practicing in the area in which claimant lived. The Fund waited until approximately two weeks before the hearing before it asked the Board for permission to suspend payment of benefits to claimant.

The Board finds that, although assessment of penalties is not justified, the Fund had absolutely no right to unilaterally terminate payment to claimant of the compensation for temporary total disability ordered by the Own Motion Order, dated July 9, 1976.

With respect to the Referee's comments concerning the constitutionality of ORS 656.313(2), the Board calls the Referee's attention to the fact that the statute is presumed by a state agency to be valid.

The Board concludes that all of the benefits which were ordered payable by the Fund to Claimant in the Own Motion Order of July 9, 1976 should be reinstated and paid until the claim is closed pursuant to ORS 656.278.

ORDER

The order of the Referee, dated December 16, 1976, is reversed.

The Board's Own Motion Order dated July 9, 1976 is reinstated in its entirety.

WCB CASE NO. 75-4025 JUNE 2, 1977
WCB CASE NO. 76-4537

JOSEPH UHRIG, CLAIMANT
Allan Murphy, Claimant's Atty.
Daryll Klein, 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 granted claimant an award of permanent total disability.

Claimant sustained the first injury involved in this case on July 13, 1974 when he developed immediate sharp low back pain while employed as a laborer. He was examined by Dr. Newton whose diagnosis was lumbosacral strain superimposed upon an old disc disease and strain of the right hip. Claimant was treated conservatively. The claim was closed by a Determination Order on October 17, 1975 which granted claimant compensation for time loss only.

The second injury occurred on February 25, 1975 when claimant, while carrying a water pump up some stairs, experienced severe back pain. Claimant was examined by Dr. Smith on March 17, 1975 who noted that the lumbar spine X-rays taken in 1962, 1972 and 1974 showed a progression of degenerative spondylosis and osteoarthritis changes of the spine. Claimant had suffered prior industrial injuries: (1) On September 12, 1972 he injured his low back, right buttock and thigh, (2) in May, 1973 he injured his neck and (3) in January, 1974 he suffered an injury to his left knee and low back.

On March 31, 1975 Dr. Rieke reported claimant had been advised to stop working because he was physically unable to continue. Dr. Rieke noted that claimant had attempted to continue working on various jobs, each lighter than the previous, but should refrain from any physically taxing job.

On June 25, 1975 claimant was examined by the Orthopaedic Consultants; the physicians diagnosed chronic lumbosacral strain superimposed upon severe progressive lumbosacral osteoarthritis and possible nerve root compression at the L4-5 level on the right. The physicians concluded loss of function to the back was moderate, due to the injury, mild.

On August 5, 1975 a service coordinator with the Disability Prevention Division indicated claimant had made several attempts to return to various jobs, most of them had been unsuccessful. The coordinator stated claimant had at last accepted retirement and he closed his file on claimant.

On September 16, 1976 a Determination Order granted claimant 40% unscheduled disability.

Claimant was examined by Dr. Smith on May 13, 1976 and recommended a myelogram. Without a myelogram he would consider claimant's condition to be a probable chronic lumbar sprain with possible nerve root compression mild to moderate degree of severity. On the basis of the osteoarthritis he concluded claimant's physical impairment was mild to mildly moderate.

Claimant underwent a myelogram on June 26, 1976; Dr. Smith's final diagnosis, after this myelogram, was spondylotic caudal radiculopathy; aggravated by trauma. Cervical spondylosis C4-5 and C5-6.

Dr. Rieke testified at the hearing. He stated that claimant's back has continued to get worse and in March, 1975 he was forced to recommend that claimant cease working because his condition was deteriorating and the work was aggravating this deterioration.

Claimant is now 64 years of age. His present symptoms include low back pain which goes down into the right leg at times. He cannot sleep at night for more than 5 hours at a time. Films were offered as evidence at the hearing which showed claimant fishing from the river bank; he was seen bending over to within 1/2 inch of the ground and he aided in putting a small boat into the water.

The Referee found claimant does not have a high school education; almost all of his working life has been in the construction field. Until claimant was told to cease working by his physician he showed motivation to work and should not, therefore, be punished for following the advice of his physician.

The Referee found that claimant had made his prima facie case that he comes within the odd-lot category of the work force. Therefore, the burden shifted to the employer to show suitable work that is regularly and gainfully and continuously available to claimant.

The employer elicited the evaluation of the International Rehabilitation Associates, Inc., which reported that in light of claimant's limited skills, limited experience and reduced physical endurance even part-time or volunteer work for claimant was not feasible.

The Referee concluded that the employer has not sustained its burden of showing suitable work available to claimant on a regular and gainful basis and, therefore, claimant is permanently and totally disabled.

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

ORDER

The order of the Referee, dated November 12, 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. 75-5516 JUNE 2, 1977

JOHN G. YOUNG, CLAIMANT
Keith Tichenor, 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 claimant's claim for aggravation.

Claimant sustained a compensable back injury on September 15, 1970 which ultimately required surgery. Claimant has had residual back dysfunction, bowel and bladder dysfunction and psychological problems. A Determination Order granted claimant an award of 50% unscheduled disability. This was appealed and the Determination Order was affirmed by the Referee; however, by its Order on Review of May 27, 1975, the Board increased the award to 70% unscheduled disability. This was the last award or arrangement of compensation. (*See footnote on page 3).

Claimant was given a psychological examination in 1972 by Dr. Kilgore. After another examination in November, 1975 Dr. Kilgore indicated that claimant's psychological condition at that time was stationary and the same as when treatment was terminated in 1972. However, Dr. Kilgore stated that, after reviewing the psychological evaluations and tests, claimant was permanently and totally disabled. Claimant will probably never again return to gainful employment.

The Fund sent interrogatories to Dr. Curren who, in answer thereto, stated that claimant's urological problems have steadily worsened, at least from the history given to him by claimant.

Dr. Klump's report of April 13, 1976 and Dr. Curren's report of May 3, 1976 attribute claimant's 1976 urinary problems to the 1970 industrial injury.

In a report of August 27, 1976 Dr. Lehman commented that claimant's condition has not changed appreciably since his previous examinations of claimant.

The Referee found that the lay and medical evidence presented was too inconclusime to establish a claim for aggravation since the last award or arrangement of compensation.

The Referee further found that claimant had testified that he had been hospitalized in January and February, 1976. Claimant was confined for some period of time and was totally disabled while so confined; however, it was not established that the flareup in claimant's urological difficulties was more than transitory or that it resulted in a continuing worsening of claimant's disability.

The Referee affirmed the denial of claimant's claim.

The Board, on de novo review, agrees that the denial of claimant's claim for aggravation should be affirmed. However, the Board finds that if claimant actually was hospitalized in connection with his compensable injuries, he is entitled to receive compensation for temporary total disability for the period he was in the hospital.

ORDER

The order of the Referee, dated November 1, 1976, is affirmed.

Upon submission of proof of hospitalization relating to the industrial injury the Fund shall pay to claimant compensation for temporary total disablity for such period of confinement.

*Footnote by Board Member Moore:

While it does not affect affirming the Referee's order, I specifically do not concur with his statement "I construe the date of entry of the Board's order on Review as being the last arrangement of compensation" (Page 2 Opinion and Order) by reason of Board's opinion in the Matter of the Compensation of John A. Mayer, Board Order on Review dated May 21, 1973, the last award of compensation in this case was the date of

Referee John R. McCullough's Opinion and Order of November 14, 1974 and it is from that date that aggravation must have occurred.

No NUMBER JUNE 3, 1977

GENEVIEVE DUMIRE, CLAIMANT
Dan O'Leary, Claimant's Atty.
Bob Joseph, Defense Atty.
Order on Reconsideration

By a Board's Own Motion Order dated May 9, 1977 the Board remanded claimant's claim for an industrial injury suffered on May 23, 1966 to the employer and its carrier for the payment of benefits as provided by law.

On May 12, 1977, the carrier, Liberty Mutual Insurance Company, informed the Board that subsequent to the Board's order it had received additional medical information which the Board should consider. Therefore, the carrier requested the Board to reconsider its Own Motion Order. Additionally, the carrier requested, if the Board's order is not changed, it be advised the date on which Liberty Mutual should commence payment of compensation.

The Board, after giving due consideration to this matter and reading all of the attached medical reports supplied by the carrier, concludes that the motion for reconsideration should be denied. The date the carrier should commence the payment of compensation to claimant is the date of the Own Motion Order, namely, May 9, 1977.

IT IS SO ORDERED

WCB CASE NO. 76-2677 JUNE 6, 1977

ROBERT BARNHARDT, CLAIMANT
Hayes Patrick Lavis, Claimant's Atty.
Jack Mattison, 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 set aside the disputed claim settlement entered on February 27, 1976 and ordered all monies tendered on that agreement be returned to the employer.

Claimant sustained a compensable injury on January 28, 1974; a Determination Order of June 5, 1974 granted claimant compensation for temporary total disability only. Claimant has not worked since the injury. The claimant's physical problems were not great but the psychological problems were severe.

Claimant appealed the Determination Order and, at the hearing on January 20, 1976, the employer denied the entire claim. On February 27, 1976 a stipulation was signed by the parties which settled the matter on a disputed claim basis [ORS 656.289 (4)]. After the Referee approved this stipulation claimant received $17,300.

Claimant now contends that a promise of a job or retraining were made to him collateral to this settlement; when nothing further happened concerning a job or a retraining program, claimant refused to accept the check given to his attorney by the carrier. The attorney still has the uncashed check.

Claimant testified that the money was unimportant to him; if he could get back to work that was everything. He testified he could make more money by working than he could in any other way. Claimant's former attorney who still holds the check (claimant hired another attorney to represent him at this hearing) stated that he had explained the matter to the claimant and he thought there was an agreement on the terms of the settlement.

The Referee found the evidence indicated that the disputed claim settlement should be set aside. Claimant was under the impression that work would be provided to him by the employer or a retraining program instituted. The employer denies this contention, indicating there was no such understanding. The Referee found that this misunderstanding by claimant plus the doubtful circumstances of the denial of the claim created a situation which required, in the best interest of justice, that the disputed claim be set aside.

The Board, on de novo review, finds that the disputed claim settlement was entered into with the full knowledge and understanding of all the parties involved. Claimant was represented by an attorney who stated that he had informed claimant of the entire terms of the settlement and that claimant said he fully understood them and agreed to sign said stipulation. There was absolutely no mention in the stipulation that the employer would provide claimant with a job or a retraining program.

Therefore, the Board concludes that the disputed claim settlement entered into on February 27, 1976 should not have been set aside.

ORDER

The order of the Referee, dated September 14, 1976, is reversed.

The disputed claim settlement of February 27, 1976 is hereby reinstated and reaffirmed in its entirety.

SAIF CLAIM NO. C 165155 JUNE 6, 1977

WILBUR CHRISTIANI, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his back on April 11, 1968. Claimant had had minor back pain for a number of years. His claim was first closed by a Determination Order on August 15, 1969 with an award for 16° for 5% unscheduled disability.

After a hearing, an order of June 19, 1970 granted claimant an award of 110° for 35% unscheduled disability in lieu of that awarded by the Determination Order.

Claimant filed a claim for aggravation and the Board, by an order dated June 9, 1976, remanded the claim to the Hearings Division to hold a hearing on the merits of claimant's claim. After a hearing, an Own Motion Order of February 28, 1977 remanded claimant's claim for aggravation to the Fund for payment of benefits commencing January 29, 1976.

On April 19, 1977 the Fund requested a determination. The Evaluation Division of the Board found, based on the medical evidence, that claimant has not sustained any greater loss of wage earning capacity than that for which he had been granted. It recommended that claimant receive additional compensation for temporary total disability from January 29, 1977 through April 7, 1977.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 29, 1977 through April 7, 1977.

WCB CASE NO. 76-1762 JUNE 6, 1977

FRANCIS EASTBURN, CLAIMANT
Tom Hanlon, Claimant's Atty.
Douglas Kaufman, 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 awards of 128° for 40% unscheduled low back disability and 22.5° for 15% loss of the left leg. Claimant contends he is entitled to penalties and attorney fees for unreasonable delay and refusal by the employer to pay compensation for temporary total disability from August 24, 1975 to March 9, 1976 and to a greater award for permanent partial disability, including permanent total disability.

The employer cross-appeals for review by the Board, contending claimant is not entitled to an award of 40% for his unscheduled disability.

Claimant sustained a compensable injury to his back on August 22, 1975. On August 25 claimant went to see Dr. Kattenhorn who treated claimant with therapy which did not improve claimant's condition. Dr. Kattenhorn, thereafter, referred claimant to Dr. Scheinberg. Dr. Scheinberg indicated, on October 28, 1975, that claimant had chronic left lumbar cycle strain. He recommended claimant avoid heavy lifting. On March 19, 1976 Dr. Scheinberg found claimant's condition medically stationary, with a mild and moderate lumbosacral strain and no further treatment was required.

Claimant had suffered a back injury in the Army which he testified had cleared up. In 1972 he had a back and neck injury but denies any further problems from that injury and, in 1974, he hurt his back again but testified it was only a minor strain and he was off work but two weeks.

Claimant testified that he wants to work but that the employer had no light work for him. The employer denied this and indicated that bench work was available which would require very little heavy lifting.

The Referee found that the evidence did not support claimant's contention for penalties and attorney fees for unreasonable delay in the payment of temporary total disability. However, he found that the employer requires claimant to come into the office of the employer and pick up his checks. Claimant indicates this is a form of harrassment having to drive three miles to get his check and sometimes having to wait 30 or 40 minutes.

The Referee further found that the evidence indicates greater impairment of claimant's back than the 48° awarded by the Determination Order of April 9, 1976; however, the medical evidence falls short of supporting claimant's contention that he is permanently and totally disabled.

The Referee concluded that claimant was entitled to an award of 128° for 40% unscheduled back disability to adequately compensate him for his loss of wage earning capacity. He found the award of 22.5° for loss of the left leg was adequate.

The Board, on de novo review, affirms the order of the Referee. The Board established the policy that if a workman is required by the employer to travel any distance of more than a few blocks to pick up his compensation check he is entitled to mileage at the same rate as would be applicable if he was required to travel for medical examinations. Furthermore, if a workman objects to driving any substantial distance to receive his compensation checks, the Workmen's Compensation Law does not allow the employer to retain the compensation check; if the workman wants his check sent directly to him the statute requires it be done. If the workman doesn't object to picking up his check he is still entitled to be reimbursed for the miles he is required to travel. In the Matter of the Compensation of David Schwarz, Claimant, WCB Case No. 76-1903, Order on Review entered May 27, 1977.

ORDER

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

No NUMBER JUNE 6, 1977

EDDIE HAROLD HOLSTE, CLAIMANT
Gary Susak, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order Referred for Hearing

On May 12, 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 injury suffered in 1948. In support of his claim claimant attached copies of several medical reports and other documents.

By letter of May 18, 1977 the Board advised the Fund that it had 20 days within which to state its position regarding claimant's request.

On May 18, 1977 the Fund responded, stating that claimant's symptoms are related to osteoarthritic changes and degenerative disc changes due to the normal aging process.

The Board, after giving due consideration to this matter, finds that the evidence before it is insufficient, therefore, it refers the matter 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 industrial injury of 1948 and, if so, whether claimant's condition has worsened since his last award or arrangement of compensation.

Upon the conclusion of the hearing the Referee shall cause a transcript of the proceedings to be submitted to the Board together with his recommendations.

No NUMBER JUNE 6, 1977

JESSE MARKHAM, CLAIMANT
John McCourt, Claimant's Atty.
Own Motion Order

On March 8, 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 injury sustained on April 25, 1969. On March 17, 1977 the Board informed claimant's attorney that a current medical report was necessary to indicate claimant's condition had worsened since the last award or arrangement of compensation. On May 2, 1977 the Board was furnished a copy of a medical report from Dr. Eckhardt.

On May 13, 1977 the carrier responded to claimant's request, stating they were providing the necessary treatment under the provisions of ORS 656.245 and that Dr. Eckhardt's report had not clarified whether claimant's condition had worsened.

The Board, after giving full consideration to this matter, concludes that the medical treatment claimant is receiving can be provided under the provisions of ORS 656.245. However, if the recommended surgery is performed in the future claimant would also be entitled to compensation for time loss for the period of his hospitalization and surgery.

ORDER

The motion to reopen claimant's April 25, 1969 claim is, at this time, denied.

No NUMBER JUNE 6, 1977

HUEY MORTON, CLAIMANT
G. Howard Cliff, Defense Atty.
Own Motion Order Referred for Hearing

On May 16, 1977 the employer, through its carrier, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and to re-evaluate the Board's Determination Order of October 7, 1975 which granted claimant an award of permanent total disability. In support of its request, the employer attached a copy of a medical report from Dr. Schuler, dated November 9, 1976, which indicated claimant's complaints were subjective in nature with no objective findings.

The Board, after giving full consideration to this matter, concludes that the evidence presently before it is not sufficient to enable it to make a determination of whether the request is justified, therefore, the matter is referred to the Hearings Division with instructions to hold a hearing and take evidence on the merits of the employer's request.

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 employer's request.

WCB CASE NO. 75-4723-E JUNE 6, 1977

IVAN REDMAN, 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 found claimant to be permanently and totally disabled.

Claimant, a high school teacher, suffered a compensable injury on January 5, 1968 when he tripped on a stool and injured his left knee. Claimant subsequently underwent a medical meniscectomy on January 15, 1968. A Determination Order of July 1, 1968 granted claimant an award of 15% loss of the left leg.

On April 10, 1969 claimant sustained another knee injury when he slipped. Claimant was examined by Dr. Slocum who diagnosed an internal derangement related to the original injury and aggravated by the latter incident.

Claimant requested a hearing; on September 14, 1970 an Opinion and Order granted claimant a total award for 75% loss of the left leg.

In late 1970 claimant saw Dr. Slocum who, at that time, diagnosed right hip disarticulation; old internal derangement of the knee; osteoarthrosis, cervical spine and degenerative joint disease, acromioclavicular joint, left aggravated by crutch walking.

On May 7, 1971 claimant underwent a fusion and discectomy at C5-6. In April, 1972 claimant was hospitalized with a diagnosis of mild cervical strain with considerable functional overlay.

The claim was again closed on August 10,1972 with an award for 20% unscheduled neck and left shoulder disability.

In August, 1973 claimant was given a psychological evaluation by Dr. Holland who diagnosed neurotic depression of mild intensity; the prognosis for claimant's returning to work was poor.

In October, 1973 another psychiatrist, Dr. Parvaresh, agreed with Dr. Holland's diagnosis. He felt that claimant's poor marital relationship contributed a great deal to his problems.

Because of neck pain claimant was hospitalized again in April, 1974. In May, 1974 he underwent a cervical laminectomy. Dr. Smith, on September 11, 1974, felt that the permanent disability from the cervical spine was moderate.

In July, 1976 claimant was examined by the Orthopaedic Consultants. The physicians felt that there was no loss of function of the low back, mild loss of function of the neck and the loss of function of the left knee was mild.

The Referee found considerable evidence that claimant's motivation was suspect. However, the determination of permanent impairment claimant has suffered and its effect upon his wage earning capacity involves more than just the factor of motivation. The Referee found no attempt on claimant's part to avoid work and draw compensation. He taught school for more than two years after the injury, although with great difficulty. Claimant, since 1959, has had to use a prothesis because of the amputation of his right leg. He has neck and shoulder problems and spends most of his waking hours in a wheelchair.

The Referee concluded that claimant can no longer regularly work at a gainful and suitable occupation. Therefore, although claimant is not prima facie in the odd-lot status because of his education, training and intelligence, he is permanently and totally disabled, based on the evidence presented in this case.

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

ORDER

The order of the Referee, dated November 17, 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. 75-1348 JUNE 6, 1977

IVAN REDMAN, CLAIMANT
Allan Coons, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by the Fund

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests review by the Board of that portion of the Referee's amended order which ordered it to furnish claimant an operable prosthetic device by paying for the repair of his inoperable prosthetic device, including medical expenses incurred in connection therewith, and reimbursing claimant and Medicare for the sums paid to Oregon Artificial Limb Company.

Claimant suffered a compensable injury to his left knee on January 5, 1968. Claimant's right leg had been amputated as a result of a hunting accident in 1959. Thereafter, he wore an artificial right leg, alternating with the use of crutches. Claimant has the following alternatives available to him to enable him to be ambulatory: (1) a prosthetic device for his right leg, if operable, (2) crutches and (3) a wheelchair.

Claimant underwent two surgeries for his cervical spine following his industrial injury to his left knee which were related to the industrial injury. Thereafter, claimant was, and still is, unable to utilize crutches to any extent because they aggravate his cervical condition. Claimant, following the surgery, was limited to the use of a wheelchair because he did not have an operable prosthetic device. Claimant's inability to be ambulatory has a bad affect upon his left leg and cervical condition. The operable prosthetic device would aid claimant in obtaining relief from his injury.

Dr. Short indicated on November 6, 1975 that a prosthetic device would be better for claimant's neck and remaining leg than crutches.

The Fund contends that the need for the prosthetic device arises out of a non-industrial injury; however, the combination of the industrial injuries to his left leg and neck now make it a medical necessity that claimant have an operable prosthetic device in order to reduce the effects of his industrial injuries.

The Referee found, based upon the evidence and claimant's own testimony, that the need for a prosthetic device was the result of a combination of claimant's industrial disabilities. Claimant's two surgeries have precluded him from using crutches and without the prosthetic device claimant is limited to the use of a wheelchair.

Therefore, the Referee concluded that the Fund was obligated to furnish claimant with an operable prosthetic device and pay for any necessary repair thereto.

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

ORDER

The order of the Referee, dated November 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 $300, payable by the Fund.

WCB CASE NO. 76-4031 JUNE 6, 1977

LUCY SINK, CLAIMANT
R. Ladd Lonnquist, 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 the payment of compensation for temporary total disability from October 6, 1976 and until closure is authorized.

Claimant sustained a compensable injury on January 26, 1976 when she experienced severe back pain at work. Claimant was examined by Dr. Card, a chiropractor, who diagnosed moderate strain-sprain injury of the left lumbosacral region with concommitant myodyskinesia. On February 9, 1976 Dr. Card released claimant to work with caution; she only worked one day and has not worked since.

On March 15, 1976 Dr. Pasquesi examined claimant and diagnosed lumbosacral strain of six weeks duration. On April 10, 1976 Dr. Card, who was still treating claimant, reported claimant was recuperating from varicose vein surgery. He noted that claimant's strain was directly related to the type of work claimant performed.

On July 2, 1976 Dr. Pasquesi diagnosed chronic lumbar instability superimposed on previously fused left sacrioliac joint. Dr. Pasquesi felt claimant's condition was chronic and that she had 10% impairment of the whole man. On July 17, 1976 Dr. Card concurred with Dr. Pasquesi's opinion.

A Determination Order of July 29, 1976 granted claimant an award of 32° for 10% unscheduled disability.

On October 6, 1976 claimant consulted Dr. Rinehart who found and reported that claimant's disability was due to fatigue spasm of the back muscles and that claimant was presently totally disabled with respect to any gainful activity. On October 20, 1976 Dr. Rinehart reported that claimant's disability, in all probability, originated with her injury of January, 1976.

Claimant currently sees Dr. Rinehart twice a week for therapy. Claimant has not sought employment before or after consulting with Dr. Rinehart.

The Referee found that Dr. Rinehart's report constituted the only current medical evidence offered. The Fund offered absolutely no evidence to contradict Dr. Rinehart's opinion. Therefore, he concluded that claimant's condition had worsened since the last award of compensation (July 29, 1976) and he remanded her claim to the Fund for acceptance and payment of compensation, as provided by law.

The Board, on de novo review, affirms the order of the Referee. The Board also found no medical reports to rebut Dr. Rinehart's opinion and the Fund did not see fit to furnish the Board with a brief on its position with regard to its appeal.

ORDER

The order of the Referee, dated December 2, 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.

JOHN WAHLBRINK, CLAIMANT
Richard Sly, 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 for 160° for 50% unscheduled disability.

Claimant sustained a compensable low back injury on September 1, 1972; the diagnosis was acute lumbar strain with spina bifada occulta at L5 with some disc narrowing between L4-5. Claimant returned to work on November 27, 1972 but did continue to have problems. A Determination Order of April 27, 1973 awarded claimant 16° for 5% unscheduled low back disability.

On October 28, 1973 claimant was hospitalized for intermittent low back pain which was so disabling claimant could not work. Claimant was treated conservatively. A Second Determination Order of July 25, 1974 granted claimant an additional 16°.

Claimant, on September 9, 1974, was examined by Dr. Baskin who diagnosed chronic lumbosacral strain and conservative treatment was given. Claimant did not improve and Dr. Baskins recommended hospitalization. Claimant was hospitalized and with bed rest his condition did improve; he was released to return to work on January 6, 1975. In his report of January 23, 1975 Dr. Baskin indicated claimant should change jobs.

Claimant was subsequently seen by the physicians at the Orthopaedic Consultants who found severe functional interference during the examination and recommended a psychological evaluation. They also found unilateral spondylolysis on the right and spina bifida occulta of S1.

A Third Determination Order of April 23, 1976 granted claimant an additional 16° giving claimant a total of 48° for 15% unscheduled low back disability.

Claimant is 34 years old and a high school graduate. At the time of his injury he was earning $8.80 an hour. Claimant testified he does feel he could do light work on a sustained basis if he could be sure that heavy jobs would not be forced upon him. Claimant had tried going back to his regular work on many occasions since his injury, unsuccesfully.

The Referee found that claimant has been treated and/or examined by several doctors and did not get along with all of them. The medical evidence is consistent, however, that claimant can no longer do heavy work or work which involves repetitive lifting and/or stooping, twisting or bending.

The Referee concluded that claimant can not return to his regular occupation; he was a highly skilled and highly paid tradesman who can no longer compete with his fellow workmen, therefore, he has suffered a substantial loss of wage earning capacity. The Referee granted claimant an award of 160° for 50% unscheduled disability.

The Board, on de novo review, affirms the very generous award made by the Referee. The Fund failed to file a brief which might have persuaded the Board to make a different determination of claimant's disability.

ORDER

The order of the Referee, dated November 26, 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 Fund.

WCB CASE NO. 76-1107 JUNE 6, 1977

RICHARD WORSHAM, CLAIMANT
Gary Rossi, Claimant's Atty.
Paul Roess, 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 24, 1975. Claimant contends he is permanently and totally disabled.

Claimant, a 51 year old millworker, sustained a compensable injury on May 29, 1973 when he slipped off a step and fell back into a trash bin. Claimant was examined by Dr. Lindsay who diagnosed acute lumbosacral strain, degenerative joint disease, L5, S1. Claimant was released for work on June 10, 1973.

Dr. Hockey examined claimant on July 19, 1974; claimant had been off work since January 3, 1974. Claimant had not been hospitalized nor undergone surgery. Dr. Hockey noted no back spasm and minimal tenderness in the left lumbar area.

Claimant was examined at the Disability Prevention Division on September 17, 1974; gross emotional overlay exaggeration was present and the doctors at the Division recommended a job change. On September 19, 1974 claimant underwent a psychological evaluation which revealed claimant to be greatly over-

focused and preoccupied with physical complaints. It was thought that psychological factors were hindering claimant's return to gainful employment.

Dr. Lynch, who examined claimant on November 22, 1974, diagnosed lumbosacral degenerative arthritis; he thought claimant was disabled from returning to any of his past occupations.

Claimant has a 7th grade education. He worked for a dairy for 14 years, in a brick plant, and an aircraft plant. Claimant has not worked since May, 1974 when he worked at an office job.

The Referee found that although Dr. Dunn concluded claimant could not return to normal labor and Dr. Lynch said claimant was disabled from any occupation to which he had previously been employed, there was evidence of gross emotional overlay exaggeration. The medical evidence indicates that many of claimant's complaints are out of proportion to the actual objective medical findings. The total evidence does not support claimant's contention that he is permanently and totally disabled under the "odd-lot" doctrine.

The Referee concluded that the preponderance of the evidence did not support the granting of an award greater than that of 160° granted by the Determination Order of November 24, 1975.

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

ORDER

The order of the Referee, dated September 3, 1976, is affirmed.

No NUMBER JUNE 7, 1977

DONALD VALENTINE, CLAIMANT
Own Motion Order

On March 11, 1977 claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen his claim for an injury sustained on September 30, 1969. Claimant's request was accompanied by an order by an administrative law judge of the Social Security Administration.

On April 6, 1977 the Board informed claimant of its need for current medical reports from his treating physician to support his request.

Claimant's request was sent to the carrier who, on May 19, 1977, responded enclosing a medical report from claimant's

treating physician, Dr. Smith, stating that Dr. Smith indicated that there was no essential change in claimant's condition since his claim was closed; therefore, the carrier denied reopening claimant's claim.

The Board, after giving full consideration to this matter, concludes that, based upon Dr. Smith's report, claimant's request to reopen his claim should be denied.

IT IS SO ORDERED.

WCB CASE NO. B 32-6418 JUNE 8, 1977

DENNIS HANKINS, CLAIMANT
Order

On April 18, 1977 the Board received from claimant a request to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an injury suffered on November 14, 1966. Claimant's claim was closed on a "medical only" by an order dated September 18, 1967. Claimant's claim has never been closed pursuant to ORS 656.268.

Reports from Dr. Ellison, who is presently treating claimant, indicate that the recent worsening of claimant's condition is a predictable consequence of his original injury. He expressed his opinion that surgery is necessary to repair the right wrist which was injured on November 14, 1966. Dr. Ellison also stated that the longer the surgery was postponed the less chance there would be of successful results.

On May 4, 1977 the carrier, Employers Insurance of Wausau, was informed of claimant's request and furnished copies of said request and also the material received from Dr. Ellison. On May 6, 1977 the carrier responded stating that it would proceed to investigate the claim. Nothing has been done since that date.

The Board, after consideration of the request and the medical reports furnished in support thereof, concludes that the claim should be reopened for the surgery recommended by Dr. Ellison and that payment of compensation for temporary total disability should commence from the date the claimant enters the hospital for the recommended surgery.

ORDER

Claimant's claim for an industrial injury suffered on November 14, 1966 is hereby remanded to the employer, Willamette National Lumber Company, and its carrier, Employers Insurance of Wausau, to be accepted and for the payment of compensation as provided by law, commencing on the date the claimant is hospitalized for the surgery recommended by Dr. Ellison and until the claim is closed pursuant to the provisions of ORS 656.268.

SAIF CLAIM NO. A 67413 JUNE 9, 1977

ARTHUR CHAFFIN, CLAIMANT
Peter Hansen, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order Referred for Hearing

On May 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 claims for injuries sustained in 1958 and 1964. Attached to his request were medical reports from his treating physician indicating the need for further medical care.

On May 31, 1977 the Fund responded to the request, stating there were two carriers involved in claimant's claims; the former SIAC and Georgia Pacific Corporation. The Fund suggested a hearing be held to resolve the responsibility for further medical care and treatment.

The Board, after due consideration, concludes that this matter should be referred to the Hearings Division with instructions to hold a hearing and take evidence on the merits of claimant's request to reopen his claims for injuries sustained in 1958 and 1964 and, if claimant's condition is related to either injury and has worsened since the last award of compensation, who has the responsibility for claimant's present condition.

Upon conclusion of the hearing the Referee shall cause a transcript of the proceedings to be made and submitted to the Board together with his recommendation.

WCB CASE NO. 76-4400 JUNE 9, 1977

MARION CHASE, CLAIMANT
Nicholas Zafiratos, 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 his claim for an industrial injury.

Claimant, a volunteer fireman, was riding on a fire-truck in route to a fire when the truck hit a slick spot in the highway, ran off the road and overturned. Claimant received substantial injuries.

Claimant's claim was denied by the Fund because the fire district had not included claimant's name on the master list as required by the provisions of ORS 656.031 (4). ORS 656.031 (1) provides, in essence, that all firemen, policemen, ambulance drivers, rescue boat operators and deputy sheriffs other than those employed full time shall be known as volunteer personnel and shall not be considered as workmen unless the municipality has filed the election provided by that section.

The fire district did file the required election, it furnished the Fund with a list of names of those employed as volunteer personnel. ORS 656.031 (4) states, in part, that only those persons whose names appear upon such a list prior to their personal injury by accident are entitled to benefits of ORS 656.001 to 656.794. However, the evidence clearly indicates that the list provided to the Fund did not include claimant's name.

The Referee found no ambiguity in the statute involved. Although it was extremely unfortunate for claimant that the fire district did not include his name on the list submitted to the Fund, there is no relief available to claimant because of this.

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

ORDER

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

WCB CASE NO. 76-4520 JUNE 9, 1977

THOMAS COOK, CLAIMANT
Jerome Bischoff, 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 claimant's claim.

Claimant alleges he suffered an industrial injury to his right eye on July 10, 1975. He worked the rest of that day but complained that evening of dirt particles in his eye. Claimant continued working until his hernia operation in August, 1975. After his convalescence from that operation claimant said he had no money to consult a doctor concerning his eye problem. Claimant was terminated from his employment on October 16, 1975. On January 2, 1976 claimant filed a claim for his alleged injury. Before that time claimant had never told his employer that he wanted treatment for his eye although he had called the Fund several times.

Claimant saw Dr. Burpee, an eye surgeon, on November 12, 1976, reporting an injury at work. Dr. Burpee found three problems, a refractive error requiring correction with glasses; a cataract in the right eye and a mildly elevated pressure in the right eye. Whether or not claimant's cataract and increased pressure in the right eye was secondary to the industrial injury was uncertain. Such conditions could or could not be caused by such an injury. It was impossible for Dr. Burpee to be certain of the etiology of these conditions.

The Referee found that the refractive error in the eye which needed correction by glasses was unrelated to the alleged injury and the only medical evidence of whether or not claimant's cataract condition and increased pressure in the right eye were secondary to the alleged injury was Dr. Burpee's report and he was uncertain.

The Referee concluded claimant had failed by a preponderance of the evidence to establish that he had suffered a compensable industrial injury and he affirmed the denial of claimant's claim.

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

ORDER

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

SAIF CLAIM NO. B 161566 JUNE 9, 1977

RICHARD CUMMINS, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on December 3, 1965 to his right knee and left foot. Four days later surgery was performed for removal of torn medial meniscus, repair of the medial collateral ligament and pes anserinus transfer. On August 25, 1966 Dr. Degge found claimant's condition medically stationary. The claim was closed on September 7, 1966 with an award to claimant for 70% loss of the right leg and 20% loss of the left foot.

In 1967 claimant returned to Dr. Degge with complaints in the left knee and right foot; Dr. Degge found a slight additional motion loss in the right knee. A stipulation was approved on October 27, 1967 which granted claimant additional awards for 10% loss of the right leg and 10% loss of the left foot.

On December 11, 1975 claimant returned to Dr. Degge with further complaints and the claim was reopened and on January 27, 1976 Dr. Degge performed surgery for repair of torn tissue and reefed the ligaments to restore stability.

On April 25, 1977 the Fund requested a determination. The Evaluation Division of the Board recommended awarding additional compensation for temporary total disability from December 6, 1975 through February 7, 1977 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 December 6, 1975 through February 7, 1977.

WCB CASE NO. 74-4381 JUNE 9, 1977
WCB CASE NO. 76-2268

LAWRENCE DEBORD, CLAIMANT
Tom Hanlon, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

On May 31, 1977 the Board received a request from claimant to reconsider its Order on Review entered in the above entitled matter on May 20, 1977.

Claimant, by and through his attorney, alleges: (1) that the aforesaid Order on Review stated that there was no evidence causally relating claimant's problems to the industrial injury when actually there was such evidence, (2) that the Board did not address a question raised in claimant's brief on review, to-wit: "If claimant's motivation is a part of his permanent psychopathology then is it necessary for claimant to prove motivation?", (3) that the Order on Review spoke only in terms of injury and affirmance of the Determination Order of April 27, 1976, whereas there were two compensable injuries and two Determination Orders.

The Board, after thorough consideration of the bases for claimant's request, concludes that if the Board was in error in finding no evidence causally relating claimant's problem to the industrial injury this error can be properly addressed on appeal; the Board did not address itself to the question of whether it was necessary for claimant to prove motivation if his motiviation was a part of his permanent psychopathology because it was convinced that there was no substantial evidence to support a finding that claimant's psychopathology was related to his

industrial injuries, and both the Referee's Opinion and Order and the Board's Order on Review clearly state that there were two injuries and two Determination Orders, one injury was in the scheduled area and the other in the unscheduled area and although the Determination Orders were entered on the same date each related to a separate injury.

ORDER

The Motion for Reconsideration of the Order on Review entered in the above entitled matter on May 20, 1977 is hereby denied.

WCB CASE NO. 76-6683 JUNE 9, 1977

ROY DOSTER, CLAIMANT
Michael Strooband, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

On June 2, 1977 the Board received from the State Accident Insurance Fund a request for Board review of the Opinion and Order of the Referee entered in the above entitled matter and also a motion for stay of the payment directed by the Referee in said order, on the grounds and for the reason that the Referee misconstrued the recent case of Mary M. Jones v Emanual Hospital.

The Board, after consideration, feels the motion should be denied.

IT IS SO ORDERED.

WCB CASE NO. 76-1179 JUNE 9, 1977

J. CARROLL DUFF, CLAIMANT
Robert Burns, 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 the 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. 75-5356 JUNE 9, 1977

RICHARD EDWARDS, CLAIMANT
R. Ladd Lonnquist, 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, and assessed a penalty against it in the sum of 25% of the compensation due and owing claimant.

The Fund contends: (1) that no remuneration was paid to claimant for services rendered by him and (2) that claimant did not come under the control of the employer, the City of Portland and Portland Opportunities Industrialization Center.

Claimant had been working as a machinist over a period of years for three different employers. In 1974 claimant became unemployed after looking for work with no success. Claimant heard about the CETA program and made inquiries.

Claimant first applied for training in April, 1975 and was accepted for CETA training in early September. Portland Community College cooperated in this program by offering counseling and determining the qualifications and abilities of the candidates. Initially, the program paid nothing but after one week claimant went into the second phase of the program and then came into contact with the Portland Opportunities Industrialization Center. This training plan worked out for claimant was to train him as a qualified welder capable of holding a skilled job in the welding profession with a qualified promise for employment if he successfully completed this course.

On November 14, 1975 claimant sustained an injury to his first and big toe, i.e. a compound fracture of the left great toe with partial amputation of the toe.

The Referee found that the evidence indicated claimant was paid a stated amount per hour, based on the minimal hourly wage for his attendance at class. If claimant missed time from class he lost compensation, this also was computed on the hourly wage basis. The Referee further found that the City of Portland was the responsible party and that it had delegated various administrative functions to others, e.g., Portland Opportunities Industrialization Center.

The Referee found claimant was under the control of the employer. Claimant was directed by the employer with respect to his activities, his progress was observed and he could be terminated

from the program by the employer for poor attendance, lack of progress and misconduct. The city cannot avoid its responsibility as an employer by delegating authority to other agents on its behalf.

The Referee concluded that the employer had an obligation to properly process the claim whether it felt the claim had merit or not. The failure to do so constituted unreasonable delay; the Referee assessed a penalty against the employer in the sum of 25% of the compensation for temporary total disability owed to claimant, and awarded attorney fees.

The Board, on de novo review, concurs with the findings and conclusions reached by the Referee, principally because the evidence indicates claimant was under the control of the employer and must be considred as a subject workman.

ORDER

The order of the Referee, dated December 15, 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 Fund.

WCB CASE NO. 76-6542 JUNE 9, 1977

MARTIN HUNT, CLAIMANT
James Vick, 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. 76-5274 JUNE 9, 1977

WILDA MCCLOSKEY, CLAIMANT
Hayes Patrick Lavis, 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 of December 30, 1976 which affirmed the denial of claimant's claim for aggravation.

Claimant sustained a compensable injury on August 20, 1972 when she was badly burned by a large caldron of boiling water. Her claim was closed by a Determination Order of April 26, 1973 with time loss only. Claimant appealed and the Referee in his order of July 31, 1973 found no medical evidence to support an award for permanent partial disability.

Claimant contends that the order of July 31, 1973 was unfair to her and that she had, at that time, suffered some permanent partial disability; also, that because she did not receive any award for permanent partial disability and because her condition is now worse she now is entitled to an award for permanent partial disability.

Claimant testified that she has a tightness around her abdomen and reaching, stretching and twisting cause her to feel a burning and tightness in the area of the scarring.

The only medical report introduced at this hearing was from Dr. Honl, dated December 14, 1976.

The Referee found, based upon claimant's testimony and the documentary evidence presented, that claimant had failed to support her burden of proving her condition had worsened since the last award or arrangement of compensation. Her complaints at the time of the hearing were the same as those she had made at the first hearing.

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

ORDER

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

WCB CASE NO. 76-5036 JUNE 9, 1977

VICTOR STADEL, 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 Third Determination Order of September 8, 1976. Claimant contends he is permanently and totally disabled.

Claimant sustained a compensable injury on September 7, 1971 while lifting a five gallon can of concrete. His injury was diagnosed by Dr. Gerow as acute lumbar muscle spasm. On October 23, 1971 Dr. Vandenberg performed surgery for urinary retention due to reflex pain and spasm from a recent hemorrhoidectomy and rectal pressure due to large stool compression. Claimant quickly recovered from surgery but continued to have lumbar back problems. He was examined by Dr. Wade who recommended claimant be retrained to do work which did not involve lifting or prolonged standing, both of which caused claimant to have low back pain.

In June, 1972 the Back Evaluation Clinic found degenerative disc instability at L4-5 level superimposed on chronic lumbar strain. The physicians felt claimant should lose weight; he could not return to his former job but he was employable.

During June, 1972 claimant was terminated by this employer because he was unable to return to that job.

In June, 1973 Dr. Pasquesi examined claimant and noted that claimant had not significantly improved in approximately twenty months. He found claimant overweight also but disagreed with the Back Evaluation Clinic because he found a rather marked restriction of motion and considerable pain. Dr. Pasquesi felt claimant could work and estimated his combined impairment at 15%.

A Determination Order of August 9, 1973 granted claimant an award of 80° for 25% unscheduled disability.

In March, 1975 claimant was examined by the physicians at the Orthopaedic Consultants who diagnosed chronic lumbar and lumbosacral strain, extensive osteoarthritis of the lumbar and lumbosacral spine and degenerative disc disease. They recommended no further treatment and found claimant medically stationary. They further found claimant could not return to his prior occupation but was capable of some occupation. The loss of function of claimant's back due to this injury was found to be mild.

Dr. Gerow, claimant's treating physician, disagreed and found claimant permanently and totally disabled.

A Second Determination Order of April 14, 1975 granted claimant an additional 40%, giving claimant a total of 208° for 65% unscheduled low back disability.

During May, 1976 another attempt to assist claimant through vocational rehabilitation was abandoned because of claimant's poor physical condition. The counselor, Mr. Arnold, commented on this third attempt, that claimant's impairments were of such severity that he was unable to engage in gainful employment.

In June, 1976 Dr. Gerow again reiterated that claimant was permanently and totally disabled. In July, 1976 claimant was examined by Dr. Goodwin, an orthopedic surgeon, who found moderate low back disability due to this injury but he felt claimant could do some work.

A Third Determination Order of September 8, 1976 granted claimant no additional compensation.

In October, 1976 claimant was examined by Dr. Cherry who found claimant to be permanently and totally disabled.

Dr. Parcher, the Fund's medical director, found claimant well conditioned into a status of being permanently disabled.

The Referee thought that Dr. Parcher might be suggesting that the pre-existing personality alone was not disabling; the continuing back problem alone was not disabling; but these combined with solicitous doctors, among other things, had completely disabled claimant for life.

The Referee found that despite claimant's testimony to the contrary, claimant is unwilling to work and appears to not even want to think about it.

The Referee found that claimant's disability from this injury was rated as mild to moderate. Claimant has refused surgery that might relieve some of the symptoms caused by pre-existing conditions. Therefore, he concluded that claimant was not entitled to any further award for permanent partial disability and he affirmed the Determination Order of September 8, 1976.

The Board, on de novo review, finds that Dr. Gerow, claimant's treating physician from the beginning, Dr. Cherry, Dr. Clarke and Dr. Parvaresh all had found claimant to be permanently and totally disabled.

The Board concludes that claimant has proven by a preponderance of the evidence that he is now precluded from engaging in any gainful and suitable employment on a regular basis and is now permanently and totally disabled.

ORDER

The order of the Referee, dated January 21, 1977, is reversed.

Claimant is to be considered as permanently and totally disabled from and after May 1, 1977.

Claimant's attorney is awarded as a reasonable attorney fee for his services in connection with this Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said increased compensation as paid, not to exceed $2,300.

WCB CASE NO. 75-4824 JUNE 9, 1977

DANIEL VANDERHOEF, CLAIMANT
Fred Allen, 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 October 23, 1975. Claimant contends the award is inadequate, also, he states that he has suffered the loss of use of his arms, has vision distortion and headaches.

Claimant sustained a compensable injury on November 4, 1974 when he was hit by a log which rolled from a truck. He fractured his left scapula, fractured the L2 and L3 vertebral bodies, fractured the right mastoid process, suffered multiple fractures of some facial bones and had nerve damage involving the 2nd, 3rd, 4th and 6th nerves to the right eye.

On November 13, 1974 claimant had surgery for the facial fractures; an open reduction surgery of the left zygomatic fracture and a closed reduction of the left mandible fracture.

Claimant was examined by Dr. Adams in December, 1974 who found compression fracture of the 2nd and 3rd and 3rd and 4th lumbar vertebra. Claimant returned to work driving a truck in early 1975.

Claimant was examined by Dr. Flaxel, an ophthamologist, in July, 1975 who found an enlarged pupil of the right eye which caused light sensitivity.

Dr. Gombart examined claimant for the Interstate Commerce Commission and found him normal and healthy and fit to work as an interstate truck driver.

Claimant testified to numbness in the face, watering of the right eye and stated that when he gets tired he developed double vision.

The Referee found with regard to the visual complaints, the facial numbness and headaches that these conditions were not disabling.

The Referee found no evidence of disability to claimant's shoulders and legs.

The Referee concluded that claimant's complaints can't be reconciled with the fact that claimant, at the time of the hearing, had been working, and was working, a ten to twelve hour day regularly. Also the examination for the Interstate Commerce Commission had found claimant to be in normal condition and fit to work.

The Referee concluded that claimant had been adequately compensated by the award granted by the Determination Order of October 23, 1975 which had granted claimant 32° for 10% unscheduled low back disability.

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

ORDER

The order of the Referee, dated October 18, 1976, is affirmed.

WCB CASE NO. 76-5307 JUNE 10, 1977

TERRY MIKKELSEN, CLAIMANT
A. J. Giustina, 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, and assessed it a penalty in a sum equal to 25% of the compensation for temporary total disability due and owing claimant.

Claimant, a 19 year old general laborer for a wood remanufacturer, alleges a compensable injury to his right arm over a course of three weeks of employment. Defendent contends no injury occurred on the job.

Claimant was examined by Dr. Rasmussen on June 16, 1976 who diagnosed synovitis due to a strain which resulted from an industrial injury or exposure.

On September 22, 1976 Dr. Jones reported he had injected the right carpal tunnel with a steroid. Dr. Jones, subsequently, reported that since claimant did not have any symptoms of a carpal tunnel syndrome prior to his pulling on the greenchain the syndrome developed as a result of his work.

Prior to Dr. Jones' report the Fund had accepted claimant's claim as a non-disabling injury.

The Referee found claimant to be a credible witness and, based on this and the reports of Dr. Rasmussen and Dr. Jones, concluded claimant had sustained a compensable injury arising out of and in the course of his employment. He remanded the claim to the Fund.

The Referee found that Dr. Jones' report of October, 1976 indicated that claimant had been off work and couldn't even return to school because of his problems. These symptoms disappeared after the injection of September 22, 1976. Claimant's attorney sent Dr. Jones' report to the Fund on October 5, 1976. The Fund did not deny the claim until the hearing of November 17, 1976. The Referee concluded that compensation for temporary total disability was due to claimant within 14 days after the Fund's knowledge of this time loss and that failure to pay compensation timely was unreasonable on their part. He assessed a penalty against the Fund for such unreasonable conduct and awarded claimant's attonrey an attorney fee.

The Board, on de novo review, adopts the Referee's order. The Fund's contention that this matter should be remanded back to the Referee for additional testimony is not accepted by the Board.

ORDER

The order of the Referee, dated November 26, 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 Fund.

SAIF CLAIM NO. ED 186052 JUNE 10, 1977

MIKE SCHNEIDER, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant suffered a compensable back injury on May 20, 1969. Claimant was examined by Dr. Bennett who diagnosed abrasions and contusions of the low back coccyx. A Determination Order of January 14, 1970 granted claimant no award for permanent partial disability. Claimant's aggravation rights have expired.

Claimant returned to Dr. Bennett on January 3, 1977 with complaints of pain in the sacral area. Dr. Bennett felt they were due to the May, 1969 injury and requested the claim be reopened. Dr. Bennett's report and request were submitted to the Board.

The Board advised the Fund of the request, furnished it copies of the request and Dr. Bennett's report and requested the Fund to state their position. The Fund requested an independent examination of claimant by Dr. Pasquesi. On March 17, 1977 Dr. Pasquesi, after examining claimant, stated that he did not feel that additional curative treatment would be of any help, he did not recommend claim reopening. Dr. Bennett concurred with Dr. Pasquesi.

On May 4, 1977 the Fund requested a determination. The Evaluation Division of the Board recommended that no compensation for temporary total disablity be granted. The claim had not been reopened nor had any medical treatment been recommended. The problems which keep claimant from returning to work are unrelated to the industrial injury, therefore he has lost no wage earning capacity. No award for permanent partial disability was recommended.

The Board concurs with these recommendations.

ORDER

Calimant's claim for his May 20, 1969 industrial injury is closed with no additional award of compensation for temporary total disability and no award of compensation for permanent partial disability.

WCB CASE NO. 76-1453 JUNE 10, 1977

IRVIN TIRY, CLAIMANT
Jerome Bischoff, 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 the claimant's claim for aggravation to the Fund for acceptance and payment of compensation, as provided by law, and assessed a penalty against the Fund in the amount of 10% of the compensation for temporary total disability due to claimant from January 8, 1976 through March 12, 1976.

Claimant sustained a compensable injury on October 13, 1972 to his back. A Determination Order of May 23, 1973 granted claimant compensation for temporary total disability only.

On January 8, 1976 Dr. Thompson wrote to the Fund indicating he had placed claimant in back therapy. He stated that he had only claimant's word that this stemmed from the continuation of his old difficulties; however, he did believe this was compatible with the history and he recommended claim reopening. The Fund denied claimant's claim for aggravation.

Claimant was examined by Dr. Wilson on April 20, 1976 who indicated that claimant's symptoms were secondary to nerve root irritation and compression, secondary to the progressive degenerative disc disease and osteoarthritic changes in his lower lumbar spine. Dr. Wilson believed that claimant's complaints at that time were related to his injury in October, 1972.

In his deposition Dr. Wilson stated that the work claimant performed after leaving this employer might have been a contributing factor to his problems since hard labor would aggravate his condition. However, he felt that the industrial injury of October, 1972 was the main contributing factor to claimant's present condition.

The Referee found that the medical evidence presented supported the claimant's contention that his condition was related to his industrial injury of 1972. There was no evidence that the condition claimant now has resulted from a new injury. The claim for aggravation was remanded to the Fund.

The Referee further found that the medical report indicating aggravation which was submitted to the Fund on January 8, 1976 was not denied until March 12, 1976, nor was there any evidence that compensation for temporary total disability was paid claimant prior to the issuance of the denial. Therefore, the Referee assessed a penalty in the sum of 10% of the compensation due claimant.

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

ORDER

The order of the Referee, dated October 21, 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 Fund.

SAIF CLAIM NO. KC 298823 JUNE 13, 1977

MARVIN EPLEY, CLAIMANT
Pamela Thies, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On May 17, 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 injury sustained on March 29, 1971 and for the payment of his surgery in January, 1977. In support of his request claimant attached copies of medical reports from Dr. Poulsen, Dr. Skirving and Dr. Schwartz. Claimant's claim was closed on July 14, 1971, his aggravation rights have expired.

On May 19, 1977 the Board advised the Fund it had 20 days within which to state its position on claimant's request.

On June 6, 1977 the Fund responded, stating that claimant's need for surgery in January, 1977 resulted from causes not related to his muscle strain injury of 1971.

The Board, after giving this matter full consideration, concludes that the medical evidence submitted supports claimant's contention that his condition has worsened since the last award of compensation and that the surgery performed in January, 1977 was a result of an aggravation of his industrial injury suffered on March 29, 1971.

ORDER

Claimant's claim is remanded to the Fund for acceptance and payment of compensation, as provided by law, commencing on the date of claimant's surgery in January, 1977 and until closure is authorized pursuant to ORS 656.278, and for the payment of all medical expenses incurred as a result of said surgery.

Claimant's attorney is hereby granted as a reasonable attorney fee a sum equal to 25% of the compensation for temporary

total disability granted by this order, not to exceed the sum of $500, and 25% of any additional permanent partial disability award claimant may receive as a result of subsequent action by the Evaluation Division, total attorney fees not to exceed $2,000.

No NUMBER JUNE 13, 1977

THEODORE FAVER, CLAIMANT
Jerome Bischoff, Claimant's Atty.
Eldon Caley, Defense Atty.
Own Motion Order

On May 20, 1977 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen for further medical and hospital care his claim for an injury sustained on May 20, 1967.

On May 25, 1977 the Board advised the carrier, Fireman's Fund Insurance Company, that it had 20 days within which to respond to claimant's request.

On June 7, 1977 the carrier, by and through his attorney, responded, stating that there was no medical evidence that claimant's back problems, surgery or treatment were medically related to his industrial injury of May 20, 1967.

The Board, after giving due consideration to this matter, concludes that the medical reports of Dr. Young do not justify reopening claimant's claim. Therefore, claimant's request should be denied.

IT IS SO ORDERED.

SAIF CLAIM NO. SC 298131 JUNE 13, 1977

CLEMENT FITZGERALD, CLAIMANT
Michael Strooband, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On March 29, 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 to his back suffered on April 10, 1971. In support of his request claimant attached two medical reports from Dr. Holbert.

By letter dated May 26, 1977 the Board informed the Fund that it had 20 days within which to respond to claimant's request.

On June 2, 1977 the Fund responded, stating that claimant is presently 71 years of age and claimant has osteoarthritis, chronic bronchitis, pulmonary emphysema, in addition to his back complaints, all of which contribute to his present disability. It refused to reopen claimant's claim.

The Board, after giving full consideration to this matter, concludes that the medical reports indicate that claimant's condition is worsening, however, it is caused by the aging process. Therefore, claimant's request to reopen his claim must be denied.

ORDER

Claimant's request to have the Board, pursuant to ORS 656.278, reopen his claim for an industrial injury of April 10, 1971 is hereby denied.

SAIF CLAIM NO. C 94932 JUNE 13, 1977

HERMAN GREEN, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Order

On April 11, 1977 claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an injury sustained on October 4, 1967.

On April 25, 1977 the Board wrote to claimant advising him that it needed a current medical report.

On April 27, 1977 Dr. Hill reported to the Fund that he had "no records of his prior industrial injury claim as to its severity, as to what is involved and am unable to make a recommendation as to whether this is an aggravation of the previous claim or not". The Board was furnished a copy of this letter.

The Board, after giving full consideration to this matter, concludes that it still has no medical information upon which a reopening of claimant's claim for his industrial injury of October 4, 1967 can be based.

If claimant, at a later date, can furnish the Board with sufficient medical documentation, he may again request the Board to reopen his claim.

ORDER

The claimant's request to reopen his claim for his injury of October 4, 1967, pursuant to ORS 656.278, is, at this time, denied.

SAIF CLAIM NO. A 595300 JUNE 13, 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

On January 18, 1977 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claims for the 1957 and 1960 industrial injuries. Claimant further requested that his claims for the 1957 and 1960 claims be heard on a consolidated basis with the issue of the denial for his claim of aggravation of a 1972 injury.

The Board did not have sufficient evidence before it to make a determination, therefore, on March 9, 1977 it referred the matter to the Hearings Division to hold a hearing and take evidence on the merits of all of the aforesaid issues.

On March 29, 1977 a hearing was held before Referee Forrest James. On May 25, 1977 Referee James presented his recommendation together with the transcript of the proceedings to the Board.

After giving the matter full consideration on de novo review, the Board concurs with the recommendation of the Referee, a copy of said recommendation is attached hereto and, by this reference, made a part of this order.

ORDER

Claimant is hereby granted permanent total disability from and after May 25, 1977.

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.

No NUMBER JUNE 13, 1977

WENZEL LUTHE, CLAIMANT
Frank Susak, Claimant's Atty.
Own Motion Order

On May 20, 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 injury sustained on January 22, 1966. In support of his request claimant attached a medical report from Dr. Eckhardt.

On May 25, 1977 the Board informed the carrier, Argonaut Insurance Company, that it had 20 days within which to respond to claimant's request.

On June 7, 1977 the carrier responded, stating that it would not reopen claimant's claim because his aggravation rights had expired, but it would continue to pay all medical bills related to the injury.

Dr. Eckhardt found claimant's knee problems were slowly worsening and felt that at some future time claimant would require surgical intervention. Therefore, the Board concludes that claimant's medical treatment, at the present time, can be provided under the provisions of ORS 656.245. If and when the surgical intervention becomes necessary the claimant may request the Board to reopen his claim.

ORDER

Claimant's request that the Board reopen his January 22, 1966 claim, pursuant to ORS 656.278, is hereby denied.

SAIF CLAIM NO. HC 288411 JUNE 13, 1977

WILBIA MEYER, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Order

On May 11, 1977 claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen her claim for an industrial injury suffered on January 29, 1971.

On May 23, 1977 the Board informed claimant that it needed a current medical report to be submitted indicating her condition was related to the industrial injury and had worsened since her last award of compensation.

On May 31, 1977 the Fund sent a copy of Dr. Wade's medical report to the Board. This report stated claimant's present problem was in no way related to her industrial injury.

The Board, after giving full consideration to this matter, concludes that claimant's request to reopen her claim must be denied.

IT IS SO ORDERED

SAIF CLAIM NO. GC 23899 JUNE 13, 1977

ELMER MISTEREK, CLAIMANT
Keith Tichenor, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

On May 25, 1977 an Own Motion Determination was entered in the above entitled matter granting claimant compensation for temporary total disability from January 2, 1974 through February 18, 1977 and closed the claim pursuant to ORS 656.278.

Claimant's aggravation rights expired on November 19, 1972. Since the entry of the Own Motion Determination, the Board has been advised that the Fund reopened claimant's claim for the June 22, 1966 injury with payment of compensation for temporary total disability commencing on August 14, 1972, which was within the five year period from claimant's initial claim closure on November 20, 1967. The claim was closed by a Determination Order dated July 6, 1973 which granted no additional award for permanent partial disability. Claimant appealed, contending that he was entitled to additional compensation for temporary total disability and a determination of the extent of his permanent partial disability. After a hearing, the Referee found claimant was entitled to further compensation for temporary total disability and for further medical care and treatment; he ordered the case reopened and the payment of compensation from the date of the recommended surgery to claimant's foot and until closure was authorized pursuant to ORS 656.268.

Inasmuch as the claim was reopened prior to the expiration of the five year aggravation period by a Determination Order which, after a hearing, was held by the Referee to be, in effect, a premature closure because claimant's condition was not medically stationary at that time, the Board concludes that its closure of claimant's claim by the Own Motion Determination of May 25, 1977 was erroneous and that claimant is entitled to have his claim closed pursuant to the provisions of ORS 656.268. Therefore, the Own Motion Determination entered in the above entitled matter on May 25, 1977 should be set aside and held for naught and claimant's claim should be submitted to the Evaluation Division of the Board for a proper evaluation of claimant's disability and entitlement to compensation, as provided by law, pursuant to the provisions of ORS 656.268.

IT IS SO ORDERED.

No NUMBER JUNE 13, 1977

FRANCES NICHOLAS, CLAIMANT
Own Motion Order

On February 16, 1977 claimant requested that the Board exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen her claim for an injury sustained on July 11, 1969.

On April 1, 1977 the Board wrote to claimant indicating the need for a medical report establishing that her condition had worsened since the last closure and that her present condition was related to her industrial injury of 1969.

On April 5, 1977 the Board informed the carrier, Aetna Life and Casualty, that it had 20 days within which to respond to the claimant's request.

On April 15, 1977 the carrier responded, stating that there was no indication in Dr. Harris' medical report authorizing claimant to be off work because of current medical treatment.

The Board, after giving full consideration to this matter, concludes that the medical evidence presented indicates that the medical treatment claimant is presently receiving can be provided under the provisions of ORS 656.245. If Dr. Harris refers claimant to Dr. Silver to perform a myelogram to determine the existance of a ruptured disc the Board will then consider reopening claimant's claim.

The claimant's request to reopen her claim for an injury sustained on July 11, 1969 is hereby denied.

IT IS SO ORDERED

No NUMBER JUNE 13, 1977

ALLEN NORTON III, CLAIMANT
Own Motion Order

On May 4, 1977 the Board received a report from Dr. Nathan stating that claimant had come to his office with infections in the left long and ring fingers which were incurred after claimant accidently burned his fingers. The area of the infection occurred in the two fingers which claimant had previously injured in an industrial injury.

It was Dr. Nathan's opinion that these infections were an aggravation of the previous industrial injury; he requested that claimant's claim be reopened by the Board through the

exercise of its own motion jurisdiction to allow the appropriate medical coverage.

The Board, after giving full consideration to this request, concludes that claimant's surgery and subsequent treatment was the result of a new and independent trauma; that the cigarette burn was not industrially caused.

ORDER

The request to reopen claimant's claim for an industrial injury in July, 1970 is hereby denied.

SAIF CLAIM NO. ZC 223848 JUNE 13, 1977

ART PAULS, CLAIMANT
J. David Kryger, Claimant's Atty.
Dept. of Justice, Defense Atty.
Referred for Hearing Own Motion Order

On June 2, 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 injury sustained on December 10, 1969. In support of his request claimant attached copies of medical reports from Dr. Hoda.

The Fund contends that claimant's current problems were the result of working in his own chicken barn while stapling insulation to the ceiling and experienced pain and numbness in the fall of 1976. It denies responsibility for claimant's present condition.

The Board concludes that the evidence before it at the present time is insufficient for it to determine the merits of the request, therefore, the matter is referred to the Hearings Division of the Board with instructions to hold a hearing and take evidence on the issue of whether claimant's present problems since the last arrangement of compensation are a result of his industrial injury of December 10, 1969 and constitute an aggravation thereof.

Upon the conclusion of the hearing the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board, together with the Referee's recommendation.

SAIF CLAIM NO. FC 171222 JUNE 13, 1977

FRANK REID, CLAIMANT
Allen Owen, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order Referred for Hearing

On June 3, 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 September 26, 1968. Claimant underwent surgery on March 8, 1977 which he contends was related to his 1968 injury. In support of his request claimant attached various medical reports. Claimant's attorney advised the Board that on January 19, 1977 the Fund had formally denied the request to reopen claimant's claim for the aforementioned surgery.

The Board concludes, after giving full consideration to this matter, that claimant's request should be referred to the Hearings Division of the Board and the merits thereof should be heard in consolidation with WCB Case No. 77-1074 now assigned to Referee Gayle Gemmell. Referee Gemmell is instructed to hold a hearing and take evidence on the issue of whether or not claimant's surgery which he underwent on March 8, 1977 was related to his industrial injury of September 26, 1968.

Upon conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board, together with her recommendations on claimant's request to reopen his claim.

WCB CASE NO. 76-4086-E JUNE 13, 1977
WCB CASE NO. 76-4578

JACK C. RUTHERFORD, CLAIMANT
Frank Susak, Claimant's Atty.
Dept. of Justice, Defense Atty.
Amended Order on Review

On June 2, 1977 the Board issued its Order on Review in the above entitled matter but overlooked the fact that when it reversed the Referee's order and concluded that the Fund had refused to pay compensation due pursuant to its Own Motion Order entered in the above entitled matter on July 9, 1976 and that such refusal would entitle claimant's attorney to a reasonable attorney fee pursuant to ORS 656.382(1). Claimant's attorney also would be entitled to a reasonable attorney fee for his services performed on Board review.

Therefore, the Order on Review entered on June 2, 1977 should be amended by inserting after the last paragraph on page 3 of said Order on Review the following paragraph:

> "Claimant's attorney is awarded as a reasonable attorney fee for his services at the hearing before the Referee, the sum of $1,000 to be paid by the Fund. Claimant's attorney is awarded as a reasonable attorney fee for his services in connection with this Board review the sum of $500, also payable by the Fund."

In all other respects the Order on Review entered on June 2, 1977 should be ratified and reaffirmed.

IT IS SO ORDERED.

SAIF CLAIM NO. HC 296221 JUNE 13, 1977

SULA SAMPLEY, CLAIMANT
Jan Baisch, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On April 21, 1977 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 an injury sustained on March 29, 1971. In support of her request claimant offered two medical reports from Dr. Cherry and other documentary evidence.

On May 19, 1977 the Board asked the Fund to state its position on claimant's request. Claimant's attorney stated that Mr. Hess had advised him that the claim would not be voluntarily reopened.

On June 2, 1977 the Fund responded, stating that it would not reopen claimant's claim. It enclosed medical reports from the Orthopaedic Consultants, dated March 10, 1977, which indicated claimant's condition was stationary and no further treatment was recommended.

The Board, after giving full consideration to this matter, concludes, based on the evidence presented, that claimant's request must be denied.

IT IS SO ORDERED.

SAIF CLAIM NO. ED 50521 JUNE 13, 1977

ANDREW TRAMMELL, CLAIMANT
Brian Welch, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order Referred for Hearing

On May 25, 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 injury sustained on March 24, 1971. In support of his request claimant attached two medical reports from Dr. Cherry.

By letter dated May 31, 1977 the Board informed the Fund that it had 20 days within which to state its position in response to claimant's request.

On June 3, 1977 the Fund responded, stating that it found no justification to reopen claimant's claim and that claimant had been adequately compensated for his industrial injury.

The Board does not have sufficient evidence upon which to base a determination of 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 claim should be reopened because his condition has worsened since the last award or arrangement of compensation on October 18, 1976 and, if so, whether his worsened condition is a result of the industrial injury of March 24, 1971.

Upon the conclusion of the hearing, the Referee shall cause to be prepared a transcript of the proceedings which he will submit to the Board, together with his recommendation.

WCB CASE NO. 76-1000 JUNE 13, 1977

AMANDUS VOLK, CLAIMANT
Charles Seagraves, 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 granted claimant an award of 80° for 25% unscheduled low back disability. Claimant contends he is odd-lot permanently and totally disabled.

Claimant sustained a compensable injury to his left ankle on August 3, 1971 while working as a construction worker.

He was examined by Dr. Donahoo who diagnosed a fracture of the left ankle with posterior malleolus fractured tibula. He performed an open reduction and fragment fixation surgery.

Claimant returned to work but could not continue due to his ankle pain. On April 6, 1972 claimant was again examined by Dr. Donahoo who felt claimant's problem was one of motivation; however, there were objective findings. Dr. Davis examined claimant on August 30, 1972 and felt claimant had post traumatic degenerative change in the left ankle. He indicated claimant would probably not work again.

A Determination Order of October 3, 1972 granted claimant an award of 13.5° for 10% loss of the left foot.

On March 12, 1973 Dr. Donahoo examined claimant and recommended a tibiotalar fusion. Claimant does not want this surgery. On July 2, 1973 Dr. Campagna examined claimant and diagnosed cervical spondylosis C5-6, lumbar spondylosis T12 and L1 and found much functional overlay.

On June 1, 1973 Dr. Wilson examined claimant and found severe post traumatic arthritis of the left ankle with substantial organic reason for the pain of which claimant complained. He further believed that if claimant was left in his present state he should be a total permanent disability. Claimant has a fourth grade education and can neither read nor write.

On January 7, 1974 Dr. Wilson performed an ankle fusion on claimant.

On August 9, 1974 Dr. Davis stated that where there is a degenerative arthritic change in the low back or when there is an abnormal gait secondary to ankle deformity, low back symptoms are the result. Therefore, he found a correlation between claimant's back symptoms and his ankle problems.

A Determination Order of September 24, 1975 granted claimant an award for 101.25° for 75% loss of the left foot.

The Referee found evidence that claimant suffers from degenerative disc disease with nerve root irritation in his lumbar spine, aggravated by the gait pattern caused by his injured foot. Therefore, he concluded that claimant had suffered an unscheduled disability and granted claimant an award of 80° for 25% unscheduled back disability based on his loss of wage earning capacity.

The Referee found that claimant's contention that he was permanently and totally disabled was not supported by the total evidence. Claimant has made no attempt to procure light employment or seek help from vocational rehabilitation. This indicates a lack of motivation on his part and none of the medical evidence indicates claimant is physically unemployable. Therefore, claimant does not fall within the odd-lot category permanently and totally disabled.

The Referee found that claimant has lost 75% use of function of his left foot. There was no medical evidence that he suffered leg impairment at or above the knee joint, and the award of 75% loss of the left foot is adequate.

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

ORDER

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

WCB CASE NO. 76-1001 JUNE 13, 1977

JULIA THOMAS, CLAIMANT
Dan O'Leary, 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 affirmed the denial of responsibility for claimant's latest surgery and any residual disability.

Claimant sustained a compensable neck and back injury on March 25, 1970. A Determination Order of December 23, 1970 granted her 16° for 5% unscheduled low back disability. A stipulation, dated February 27, 1971, granted her an additional 32°, giving claimant a total of 48° for 15% unscheduled disability.

On May 7, 1972 claimant was hospitalized and an L4-5 laminotomy and discoidectomy were performed by Dr. Tsai. The final diagnosis was L5 nerve root compression due to traumatic disc herniation L4-5 on the left. Claimant was discharged on May 14, 1972.

A Determination Order of September 15, 1972 granted no additional compensation.

Dr. Tsai saw claimant on December 19, 1972, she was having complaints of stiffness in the morning with no leg pain. A stipulation entered into on January 11, 1973 granted claimant an additional 48° bringing her total award to 96°.

On August 14, 1975 claimant was examined by Dr. Tsai who diagnosed disc herniation at L5-S1 on the left with left S1 radicular compression, one level below the surgery of May 8, 1972. On September 4, 1975 claimant was hospitalized and a left L5-S1 laminotomy was performed. Dr. Tsai stated that this surgery was unrelated to the industrial injury of March 25, 1970.

Dr. Stainsby disagreed, stating that in all probability the second surgery was the result of the initial injury as claimant did not improve following her first surgery.

Dr. Tsai has treated claimant since June, 1970 and had performed both of the surgeries. He said that the second surgery was one level below that of the first. Dr. Stainsby based his opinion solely on his review of the operative records.

The Referee found that the evidence indicated claimant had done well for two years following the first surgery and he found Dr. Tsai's reasoning to be the most persuasive because he was claimant's treating physician and had performed both surgeries. He affirmed the denial.

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

ORDER

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

WCB CASE NO. 76-3523 JUNE 15, 1977

WELLINGTON AMLIN, CLAIMANT
Brian Welch, Claimant's Atty.
Marshall Cheney, 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 directed it to accept claimant's claim for medical services, to process said claim and pay compensation as provided by the Workmen's Compensation Law.

Claimant, an extra sawyer, sustained a compensable injury to his low back on February 22, 1968. The claim was originally accepted as a disabling compensable injury and appropriate benefits paid. On April 15, 1969 the claim was closed by a Determination Order which awarded 32° for 10% unscheduled disability.

In 1974 claimant's back condition worsened and on October 13, 1974 his condition was diagnosed as degenerative lumbar disc disease with herniated disc at the L4-5 level. Medically, claimant's condition was attributed to the industrial injury. From October 13, 1974 to August 25, 1976 claimant received medical treatment for his back condition consisting of conservative treatment, myelographic studies and a surgery for lumbar laminectomy. The employer denied claimant's claim for medical

benefits under ORS 656.245 on the ground that such claim was barred by lapse of time; that the five year limitation applies not only to claims for aggravation under ORS 656.273 but also to claims for medical care and treatment under ORS 656.245.

ORS 656.245(1) provides that for every compensable injury medical services shall be provided for conditions resulting from the injury for such a period as the nature of the injury or the process of recovery requires. Bowser v Evans Products Company, 270 Or 841.

The Referee found that claimant is entitled to medical services despite the lapse of the five year period for aggravation. Furthermore, the evidence clearly established that the claimant's need for medical treatment was directly attributable to the original injury.

The Referee concluded that the claim should be remanded to the employer for acceptance and the payment of compensation as provided by law.

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

ORDER

The order of the Referee, dated December 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 $300, payable by the employer.

SAIF CLAIM NO. GA 787283 JUNE 15, 1977

IVAN CVARAK, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on February 26, 1960 and strained his back. On July 27, 1960 he had a fusion L4 to S1. Claimant was vocationally retrained as a barber, a profession claimant has pursued since finishing this training. He owned his own shop until he was forced to close due to progressive back pain. On May 29, 1961 claimant was injured in a car accident, temporarily aggravating his low back condition.

Claimant's claim was closed on October 25, 1961 by a Determination Order granting him an award for 50% unscheduled disability as recommended by Dr. Rankin. A stipulation of March 12, 1964 reopened the claim for surgery performed by Dr. Kimberley for excision of a spur and remodeling the donor site. The claim

was again closed on December 3, 1964 with no additional permanent partial disability. Following litigation, the circuit court granted claimant an additional award of 20% unscheduled low back disability.

On June 15, 1976 Dr. Gripekoven recommended claimant's claim be reopened for conservative treatment. The claim was voluntarily reopened and claimant was enrolled at the Disability Prevention Division where it was found claimant had a capacity for light work but must avoid any repetitive bending or lifting.

The physicians at the Orthopaedic Consultants examined claimant and found mildly moderate loss of function of the low back.

On April 11, 1977 the Fund requested a determination. The Evaluation Division of the Board recommended compensation for temporary total disability from July 27, 1976 through April 4, 1977, inclusive, but no additional award for permanent partial disability.

ORDER

Claimant is hereby granted compensation for temporary total disability from July 27, 1976 through April 4, 1977, inclusive.

WCB CASE NO. 76-943 JUNE 15, 1977

VELMA DANIEL, CLAIMANT
Daryll Klein, 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 reopened claimant's claim as of June 1, 1976 the date that she was first seen by Dr. Hickman for psychological care and treatment, and ordered the payment of benefits, as provided by law.

Claimant sustained a compensable injury to her low back on September 20, 1973. Her claim was originally closed by a Determination Order of May 21, 1974 with an award of 16° for 5% unscheduled disability.

After a hearing on March 24, 1975 claimant's claim was reopened at the request of Dr. Reynolds. Dr. Julia Perkins, clinical psychologist, stated that claimant was in need of further

medical care and time loss benefits as of August 1, 1974 and that psychological counseling appeared in order.

Claimant had an abnormal electromyelographic study which showed positive for nerve root compression and irritation. However, surgical intervention was not recommended. Claimant was then examined by the physicians at the Orthopaedic Consultants who recommended claim closure with loss of function being mild, including the psychological factors present. Dr. Misko concurred with the findings of the Orthopaedic Consultants.

By a Determination Order of February 10, 1976 claimant received an additional award of 16°.

Dr. Hickman submitted various reports indicating claimant could benefit from additional psychological counseling, and he apparently believed that claimant was permanently and totally disabled under the odd-lot doctrine.

Claimant testified that her condition now is just about the same as before. She indicated that she sees Dr. Hickman every two weeks for one or two hours.

The Referee found Dr. Hickman's reports came dangerously closed to reflecting that he had become the advocate of claimant medically, psychologically and legally. He had reservations about the objectivity of Dr. Hickman's analysis. However, the purpose of workmen's compensation is to restore the workman as nearly as possible to a condition of self support after an industrial injury. Dr. Hickman has treated claimant since June 1, 1976 and his recommendations that claimant receive further psychological counseling in an attempt to return her to the labor market is the only medical report in the file.

The Referee concluded that claimant's claim should be remanded to the Fund to be reopened for the recommended psychological care and treatment commencing June 1, 1976. Such treatment cannot be provided under the provisions of ORS 656.245.

The Board, on de novo review, notes that the Referee found absolutely no evidence of psychopathology evinced by claimant during the course of the rather long hearing. Furthermore, the physicians at the Orthopaedic Consultants found claimant's disability, including the psychological factors, to be mild.

The Board concludes that claimant has not met her burden of proving that her claim should be reopened for psychological care and treatment and payment of compensation, as provided by law.

ORDER

The order of the Referee, dated November 30, 1976, is reversed.

SAIF CLAIM NO. HC 224743 JUNE 15, 1977

NORMAN HUX, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant, a horse trainer, sustained a compensable injury to his low back on December 28, 1969. Claimant was examined by Dr. Poltzer who diagnosed right lumbar strain. A Determination Order of January 29, 1970 granted claimant an award for time loss only. Claimant's aggravation rights have expired.

On September 7, 1976 claimant requested the Board to reopen his claim pursuant to ORS 656.278. In March, 1976 the Fund had issued a formal denial.

On October 6, 1976 the Board referred the matter for a hearing. At the hearing on December 17, 1976 additional medical evidence was presented which indicated that claimant was treated by Dr. Cohen who performed a laminectomy at L4-5 on December 12, 1975. On April 19, 1977 Dr. Cohen submitted his closing examination stating that claimant had on-half inch of thigh and calf atrophy, left and 20% weakness of the left dorsi and plantar flexors. However, claimant was medically stationary.

The Referee recommended the Board exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen claimant's claim.

The Board, following de novo review, adopted the Referee's recommendation and remanded the claim to the Fund for acceptance until closure was authorized under ORS 656.278.

On May 5, 1977 the Fund requested a determination. The Evaluation Division of the Board recommended claimant be granted compensation for temporary total disability from November 28, 1975 through April 19, 1977 and for 10% unscheduled low back disability and 5% loss of the left leg.

ORDER

Claimant is awarded compensation for temporary total disability from November 28, 1975 through April 19, 1977 and for 32° for 10% unscheduled disability and 7.5° for 5% loss of the left leg. These awards are in addition to any previous awards received by claimant.

Claimant's attorney is awarded as a reasonable attorney fee, a sum equal to 25% of the compensation granted claimant by this order, payable out of said compensation as paid, to a maximum of $2,300.

WCB CASE NO. 76-1397 JUNE 15, 1977
WCB CASE NO. 76-1398
WCB CASE NO. 76-3270

MARTIN SMITH, CLAIMANT
Thomas Howser, Claimant's Atty.
Dept. of Justice, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

Eldorado Insurance Company 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.

The only issue before the Referee was whether an incident which occurred in March, 1976 was an aggravation of claimant's May 6, 1974 injury or was a new injury.

Claimant sustained an industrial injury on May 6, 1974 when he slipped getting out of a cab of a truck, he suffered a strain to his low back.

Claimant was examined by Dr. Graham who diagnosed recurrent severe lumbosacral strain superimposed on degenerative disc disease L5-S1. Dr. Graham hospitalized claimant on May 28, 1975 for conservative treatment.

The Disability Prevention Division examined claimant on September 29, 1975 and recommended a job change for claimant with no lifting over 50 pounds and no repetitive bending, stooping, or twisting. Dr. Graham concurred with the Disability Prevention Division and recommended claimant's claim be closed with mild to mildly moderate permanent partial disability, and referral for vocational rehabilitation or retraining.

On November 14, 1975 a Determination Order awarded claimant 32° for 10% unscheduled disability.

On May 13,1976 claimant filed a claim for an injury which occurred on March 15, 1976. This claim was denied by the Fund. Claimant was subsequently examined by Dr. Keizer who stated claimant had developed insidious left leg pain and numbness which had become quite severe. On April 19, 1976 he performed a lumbar laminectomy on claimant at L5-6 level.

Claimant testified that in March, 1976 he was proceeding to chain a load down and was using a cheater bar which slipped causing him to fall backwards on his buttocks in a sitting position. He felt excruciating pain in his back and both legs.

Claimant testified that after the 1976 injury the pain was in a different area of his body. Claimant stated the reason the claim was filed late was that until his left leg went totally numb and gave out from under him, he did not think the problem was as great as it was.

The Referee found that the evidence indicated claimant had sustained an aggravation of his 1974 industrial injury, rather than a new injury in March, 1976. The evidence, in the Referee's opinion, preponderates that claimant sustained a severe low back injury in 1974 which has continued until it finally developed into a full blown disc.

Eldorado Insurance Company paid claimant compensation for temporary total disability up to the date of the hearing, although it neither accepted nor denied the claim.

The Referee concluded that claimant suffered an aggravation of his 1974 injury and that Eldorado, even though it commenced the payment of compensation for temporary total disability, had never accepted or denied the claim as required by the statute, therefore, he awarded the claimant's attorney an attorney fee.

The Board, on de novo review, finds that the preponderance of the evidence establishes that claimant's 1974 and 1976 injuries had occurred to the same area of his body but the first was on the right and the second on the left. Furthermore, claimant was practically symptom free for two years prior to the March, 1976 incident.

The Board concludes that claimant has proven he sustained a new injury on March 15, 1976 and that the Fund's denial was improper, therefore, claimant's attorney fee should be paid by the Fund.

WCB CASE NO. 77-3140 JUNE 15, 1977

PERRY D. SMITH, CLAIMANT
Stanley Sharp, Claimant's Atty.
Merlin Miller, Defense Atty.
Own Motion Order Referred for Hearing

On June 7, 1977 the claimant, by and through his attorney, petitioned the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an injury suffered on September 13, 1968 while employed by Safeway Stores, whose workmen's compensation coverage was furnished by The Travelers Insurance Company. That claim was accepted and closed and claimant's aggravation rights expired on December 9, 1976.

Claimant requested Travelers to reopen his claim and, on May 10, 1977, Travelers denied claimant's request, stating that not only had claimant suffered a new injury on March 21, 1977 while employed by Albertsons but that claimant's aggravation rights had expired.

Claimant had filed a claim for the March 21, 1977 injury which was denied by Albertsons, a self-insurer employer, on May 3, 1977 for the reason that it did not feel that claimant's injury on that date had arisen out of and in the course and scope of his employment. Claimant requested a hearing on Albertsons denial and the matter has been set down for hearing.

The Board, at this time, does not have sufficient evidence before it upon which to base a determination on the merits of claimant's request to reopen his 1968 claim and, therefore, refers this matter to the Hearings Division with instructions to hold a hearing in conjunction with the hearing on the denial of claimant's claim for an injury on March 21, 1977 while in the employ of Albertsons. The Referee shall determine whether the incident of March 21, 1977 constituted a new injury and, if so, was compensable, or whether it was an aggravation of claimant's condition resulting from his compensable injury of September 13, 1968 while an employee of Safeway and, if so, has his condition worsened since the last award or arrangement of compensation for that injury.

Upon conclusion of the hearing the Referee shall cause to be prepared a transcript of the proceedings which he will submit to the Board, together with his recommendations, if he finds that claimant has suffered an aggravation of his 1968 injury. If the Referee finds there has been no aggravation of the 1968 injury then he shall enter his Opinion and Order on the compensability of the March 21, 1977 injury.

WCB CASE NO. 76-2374 JUNE 15, 1977

EARL WESTON, CLAIMANT
John Ryan, Claimant's Atty.
Roger Luedtke, 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 affirming the Determination Order of April 20, 1976 which had awarded claimant 32° for 10% unscheduled low back disability but corrected it by relating the disability to the cervical area rather than the low back.

Claimant sustained a compensable injury on December 30, 1974 which caused an immediate sharp pain in the cervical area. The diagnosis was acute cervical sprain and claimant was subsequently hospitalized, and treated conservatively.

On July 21, 1975 claimant was examined by Dr. McKillop who found claimant had suffered a soft tissue injury to his spine but found few objective findings. He indicated that it was doubtful that any specific treatment would help claimant. The clinical picture appeared to be exaggerated and claimant's lack of recovery was due or caused by functional or emotional components. Dr. McKillop thought claimant should not return to his regular job but could return to a job that did not require a lot of lifting; he urged vocational rehabilitation.

Dr. Mason at the Disability Prevention Division examined claimant on September 16, 1975 and diagnosed cervico-dorsal spine strain, the degree being questionable; gross emotional overlay exaggeration with hysterical type hypoesthesia; a history of six automobile accidents between 1965 and September 18, 1975 with cervical strains and headaches incurring in most of them. Dr. Mason did not recommend any medical treatment but suggested a job change.

On February 24, 1976 claimant was examined by the physicians at the Orthopaedic Consultants who diagnosed cervical sprain superimposed on previous compression fractures of C7 and narrowing of C6-7 interspace. They felt a job change was necessary but he might return to his regular job with imposed limitations. Claimant could work as a musician, a job for which he is trained. The physicians rated the loss of function of the neck due to this injury as mild.

A Determination Order of April 20, 1976 granted claimant an award of 32° for 10% unscheduled low back disability.

The Referee found the impact of claimant's cervical strain on his ability to compete in the open labor market for wages was difficult to judge because, according to the psychologist who evaluated claimant, claimant has spent most of his life involved in completely useless behavior. He has excellent resources and aptitudes but a long history of instability. Furthermore, claimant's involvement in many automobile accidents, most of which had caused injuries to the cervical area, accounts for some of claimant's disability..

The Referee concluded that the Determination Order of April 20, 1976 adequately compensated claimant for his loss of wage earning capacity. He affirmed it with the aforementioned correction.

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

ORDER

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

WCB CASE NO. 76-3783 JUNE 15, 1977

ABRAHAM ZAHA, CLAIMANT
Keith Tichenor, Claimant's Atty.
Daryll Klein, 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 for a compensable injury to it for acceptance and payment of compensation as provided by law.

Claimant, at the time of the alleged industrial injury, was a 55 year old engineer and inventor who began working for the employer's Research and Development Division in Newberg on December 18, 1974. The contract of employment was given orally and is in dispute. Claimant contends the contract of employment contemplated his working half time in Newberg and half time at the facilities in his Pendleton home. The employer contends claimant was to work at Newberg all the time, however, the employer did concede that claimant had done some of the work for the employer at his home shop. The employer furnished claimant with living accommodations in Newberg and paid all associated expenses.

Prior to this employment claimant's wife had been ill for some time, diagnosis undetermined. In early March, 1975 claimant's wife joined him in Newberg to undergo diagnostic testing. By March 15, 1975 the tests were completed but the results were not known until March 17.

Claimant testified that on March 15, 1975 he gathered up his various tools and materials from the employer's plant in Newberg and with his wife, headed for their Pendleton residence, intending to remain in Pendleton for the next two or three weeks unless the diagnosis of his wife's illness required him to return to Newberg. On the way to Pendleton claimant's wife's illness required they stop in Hermiston and continue their journey the next day. Within minutes after leaving Hermiston their automobile was involved in a rock slide which resulted in severe injuries to claimant and caused the death of his wife.

The employer contends that claimant's trip to Pendleton was entirely personal in nature. Claimant contends that the

purpose of the trip was to utilize equipment in his home shop which was not available at the Newberg plant.

The Referee found that the contract of employment, like all oral contracts, was not well defined; there was no clear meeting of the minds between the parties involved. The Referee concluded that claimant believed he was authorized to utilize his home shop in Pendleton to construct working models; in fact, the employer had accepted a partially completed model of one of the projects from claimant that he produced at home.

The Referee found that the purpose of the trip to Pendleton was dual in nature, i.e., claimant needed to utilize the Pendleton shop and he desired to return his wife to her home after the diagnostic testing was completed. The fact that claimant intended to work on several company projects in his own shop gives the journey a business purpose as well as a personal one.

The Referee concluded that claimant had proven he sustained a compensable injury which arose out of and in the course of his employment. He remanded the claim for acceptance to the employer.

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

ORDER

The order of the Referee, dated October 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 $350, payable by the employer.

WCB CASE NO. 76-4184 JUNE 16, 1977

WILLIAM FUHRER, CLAIMANT
Garry Kahn, Claimant's Atty.
James Gidley, 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 December 31, 1974 to March 31, 1975 and 32° for 10% unscheduled low back disability. Claimant contends he is entitled to a greater award for both scheduled and unscheduled disability.

Claimant, a utility man, sustained a compensable injury on May 28, 1974 when he was jolted off the lift truck he was

riding and the lift truck ran over his left foot. Claimant was examined by Dr. Waldram who diagnosed fracture of the left cuboid. In December, 1974 claimant was seen at the Disability Prevention Division. The physicians diagnosed fracture, cuboid bone left foot, residual calf atrophy left and marked emotional overlay with exaggeration of symptoms. They recommended a job change for claimant in an occupation not requiring prolonged standing, walking, climbing or walking on uneven terrain.

A Determination Order of February 7, 1975 granted claimant an award of 20.25° for 15% loss of his left foot.

On July 14, 1976 Dr. Wells examined claimant and diagnosed post-crush injury to the left foot with multiple fractures with secondary mid and hind foot deformity and mild leg length discrepancy and secondary chronic lumbosacral strain.

On July 21, 1976 Dr. Hebert indicated that claimant has a chronic, functional low back involvement caused from the structural disarrangement of the left foot causing a transitory stress to the low back.

The Referee found that by claimant favoring his left foot he has developed occasional mechanical low back pain.

The Referee concluded that claimant was entitled to compensation for an unscheduled area and that his loss of wage earning capacity was such as to justify an award of 32°. He felt claimant had been adequately compensated for the loss of function of his left foot.

The Board, on de novo review, finds the evidence does not support any greater awards for scheduled and unscheduled disability than already granted. The order of the Referee should be affirmed.

ORDER

The order of the Referee, dated December 3, 1976, is affirmed.

WCB CASE NO. 76-4049 JUNE 16, 1977

THOMAS HOLLY, CLAIMANT
David Vinson, 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 November 7, 1975.

Claimant sustained a compensable injury on June 26, 1973 when he fell 16 to 20 feet from a scaffold, landing on his back on a concrete floor. Claimant was rushed to the emergency room of the hospital where X-rays revealed significant degree of osteoarthritis. The diagnosis was severe low back strain. Claimant eventually returned to carpentry work for a period of several months in a supervisory capacity.

Claimant continued having low back pain and sought treatment from Dr. Degge in June, 1975 who noticed marked loss of motion throughout the dorso-lumbar area and tenderness on extremes of motion. In August, 1975 Dr. Degge found claimant's condition medically stationary and he released claimant to work. Dr. Degge rated claimant's impairment as moderate. The claim first closed with an award of 32° for 10% unscheduled disability. It was later reopened and closed by a Second Determination Order which granted claimant an additional award of 80°, giving claimant a total of 112° for 35% unscheduled disability.

Claimant has not worked for any construction company for at least a year and a half. He does do general carpentry work on an odd-job basis for $3-4 an hour. Claimant testified he can only do about one-third of the work he could prior to the injury.

The Referee found that claimant is still capable of working but is precluded from jobs which require the lifting over 50 pounds and cannot do much overhead work. The Referee concluded that claimant has been adequately compensated by the award of 35% unscheduled disability 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 December 30, 1976, is affirmed.

WCB CASE NO. 75-3067 JUNE 16, 1977

JOHN WELLS, CLAIMANT
John Relihan, Claimant's Atty.
Bob Joseph, 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 to be accepted for

payment of compensation for treatment of claimant's back condition until closed pursuant to ORS 656.268.

Claimant suffered a compensable injury on June 4, 1969. The claim was accepted as a hernia injury. The claim was closed in November, 1970. Claimant later filed a claim for aggravation, contending that his back condition which was progressively worsening was a result of his industrial injury. This was denied.

Claimant presently lives in Arizona where he moved because he thought the climate would help his back condition. While in Portland claimant was examined by Dr. Uhle who stated that the hernia was work related but indicated no back condition existed at that time.

In Arizona claimant was examined by Dr. Sturgis who referred claimant to Dr. Fisler; on August 20, 1974 Dr. Fisler indicated that claimant's back symptoms were due to degenerative arthritis. On May 15, 1975 Dr. Fisler indicated it was impossible to determine what caused the degenerative change. He felt it was possible that the claimant did sustain an injury to his back in 1969 and that a portion of the arthritis was related to the injury; however, he said that without preceding medical files it was impossible to state this within the terms of medical probability.

Dr. Stump, who originally treated claimant in Arizona, testified that claimant told him his pain came from the back right around and through his groin. Dr. Stump stated, based on medical probability, that a back injury could have been suffered at the same time a person developed a hernia but he could not say this with respect to claimant as he had not treated claimant for his back condition but had referred him to a back specialist.

Dr. Stump also testified that it is not unusual for a 63 year old man who has done physical labor all of his life, to have changes of degenerative arthritis in the spine and such changes are affected and often occur just with the trauma of getting up and moving around every day. He testified that an injury could have brought about the degenerative arthritic changes or aggravated this condition, but he can't really know.

Dr. Uhle does not indicate in his medical report whether a back injury did or did not occur.

The Referee found that it was understandable from Dr. Stump's testimony that a man with claimant's limited education and background would believe that his hernia condition was causing all his problems and yet he might have had a back condition all of the time.

The Referee, based on the two medical reports and his belief that claimant was a credible witness, found the claim for a back condition to be compensable. The hernia condition did,

in fact, mask the back condition which misled the claimant and the doctors who treated him. The Referee remanded the claim to the employer for acceptance.

The Board, on de novo review, finds absolutely no medical evidence relating claimant's back condition to the industrial injury of June 4, 1969.

ORDER

The order of the Referee, dated December 20, 1976 is reversed.

The partial denial issued by the employer for an alleged back condition, is hereby affirmed.

WCB CASE No. 77-57 JUNE 16, 1977

FRED WYATT, CLAIMANT
Alan M. Scott, Claimant's Atty.
James Cronan, Defense Atty.
Stipulation and Order of Dismissal

This Matter coming on regularly before the Workmen's Compensation Board, Claimant appearing in person and through his attorney, Alan M. Scott of Galton & Popick and the Employer/Carrier appearing through James Cronan Assistant Attorney General and it appearing to this Board that this matter which is on appeal from an Opinion and Order of the Referee entered herein on April 28, 1977, has been compromised and settled, now, therefore;

IT IS HEREBY ORDERED that this claim for aggravation made by the Claimant on December 8, 1976 and denied by the State Accident Insurance Fund on December 30, 1976, be and the same is hereby settled on a disputed aggravation claim basis. The Carrier shall pay to Claimant the sum of $3,360 and Claimant's attorneys, Galton and Popick, are hereby awarded 25% of the aforementioned sum on account of their efforts expended at hearing and on appeal. The Carrier shall make payment of this settlement in a lump sum directly to Claimant and Claimant's counsel.

IT IS FURTHER ORDERED that the pending request for review filed by the Claimant be and the same is hereby dismissed.

IT IS SO STIPULATED.

WCB CASE NO. 72-1454 JUNE 17, 1977
WCB CASE NO. 72-1515

JOSEPH H. BRAY, CLAIMANT
Thomas Howser, Claimant's Atty.
Fred Aebi, Defense Atty.
Order on Review

Reviewed by Board Members Wilson and Phillips.

The employer, Rogue River Orchards, and its carrier, The Home Insurance Company, requested a review by the Board of the Referee's order on remand entered in the above entitled matter on April 21, 1975. The request was made on May 19, 1975 but, pursuant to agreement of all parties involved, the review was held in abeyance pending the disposition by review of a companion case entitled, In the Matter of the Compensation of Joseph H. Bray, Claimant, WCB Case No. 75-2110.

The employer contends that the Referee erroneously concluded that claimant's medical condition was related to the industrial accidents which occurred on September 17, 1971 and October 11, 1971 and that he failed to reopen the hearing for evidence that claimant suffered a substantial compensable injury on April 2, 1973 thus ending the responsibility of the employer, Rogue River Orchards, at that point.

On May 27, 1977 the Board entered its Order on Review in WCB Case No. 75-2210 which affirmed the Referee's findings and conclusions that the compensability of the September 17 and October 11, 1971 injuries had been decided by the Referee in the earlier case and were, therefore, res judicata, and further found that the carrier, The Home Insurance Company had responsibility for claimant's condition beyond April 2, 1973.

This Order on Review, which was appealed by the claimant on June 6, 1977, disposes of the contentions set forth in the employer's request for review in the above entitled matters. The evidence in support of claimant's contentions was before the Board and was considered by it in its determination of WCB Case No. 75-2110, therefore, it is not necessary to reiterate the Board's findings and conclusions in this de novo review.

The Board concludes that the Referee's order on remand entered in the above entitled matter was correct and should be affirmed.

ORDER

The order on remand of the Referee, dated April 21, 1975, 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 $150, payable by the employer.

SAIF CLAIM NO. C 165155 JUNE 17, 1977

WILBUR CHRISTIANI, CLAIMANT
Dept. of Justice, Defense Atty.
Amended Own Motion Determination

On June 6, 1977 an Own Motion Determination was entered in the above entitled matter. On line six of paragraph four on page one of said Own Motion Determination the "1976" should be substituted for "1977" and, on line two of the last paragraph on page one "1976" should be substituted for "1977".

In all other respects the Own Motion Determination entered on June 6, 1977 in the above entitled matter should be ratified and reaffirmed.

IT IS SO ORDERED.

SAIF CLAIM NO. FC 36880 JUNE 17, 1977

CHERYL HAYWARD, CLAIMANT
John Danner, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On May 13, 1977 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 an industrial injury suffered on September 6, 1966. In support of her request claimant attached a medical report from Dr. Eckhardt dated April 27, 1977.

On May 18, 1977 the Board informed the Fund that it had 20 days within which to respond to claimant's request and state its position.

On June 7, 1977 the Fund responded, stating Dr. Eckhardt's report indicated no swelling, warmth or redness about the wrist or thumb. Claimant had full range of motion in the wrist and thumb with no discomfort and full range of motion in the right elbow. The Fund contended it had adequately met its responsibilities.

The Board, after giving full consideration to this matter, concludes that Dr. Eckhardt's report does not justify a finding that claimant's condition has worsened since her last award of compensation. Therefore, claimant's request to reopen her claim should be denied.

IT IS SO ORDERED.

WCB CASE NO. 76-4795 JUNE 17, 1977

CHARLES JENKINS, CLAIMANT
Richard Nesting, 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 granting claimant an award of 160° for 50% unscheduled low back disability. Claimant cross appeals, contending the award granted is inadequate.

On July 1, 1975 claimant, a 23 year old janitor in a nursing home, strained his low back lifting a patient. Claimant was treated conservatively.

On February 6, 1976 Dr. Pasquesi examined claimant and found him medically stationary but with chronic problems. Dr. Pasquesi recommended employment not involving lifting of more than 50 pounds, no repetitive bending, stooping and twisting of the trunk. He rated claimant's disability at 15% of the whole man.

On March 30, 1976 Dr. Mason at the Disability Prevention Division examined claimant and diagnosed low back strain, probably only mild, marked emotional overlay with exaggeration and claimant is functionally illiterate.

Claimant was born with some brain damage; he lacks vocational skills and has very poor aptitudes; he is depressed and discouraged.

The Referee found that claimant's work has always entailed the use of his back; claimant is now precluded from doing such work. Therefore, although claimant's back disability is rated as mild, his loss of wage earning capacity is substantial.

The Referee concluded claimant was entitled to an award of 160° for 50% unscheduled disability.

The Board, on de novo review, concurs with the conclusions reached by the Referee. However, the Board recommends that claimant be contacted by one of the Workmen's Compensation Board service coordinators and that job placement and an on the job training program be set up to enable claimant to return to some segment of the labor market.

ORDER

The order of the Referee, dated December 21, 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. 76-3244 JUNE 17, 1977

TERRILL JONES, CLAIMANT
Jerome Bischoff, Claimant's Atty.
Daryll Klein, 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 of his bilateral carpal tunnel syndrome condition and to provide the benefits required by law.

Claimant began working for the employer on July 15, 1956 and terminated on November 20, 1975 because the business changed ownership. Claimant, during that period of employment, performed various jobs for the employer working as a hot press helper during his last months of employment. Claimant first noticed bilateral wrist problems when he had tingling sensations both on the job and off the job. Claimant lost no time from work due to this tingling sensation.

After job termination claimant sought medical attention on January 30, 1976 from Dr. Renaud because of increased symptomatology. Dr. Renaud referred claimant to Dr. Sullivan who diagnosed bilateral carpal tunnel syndrome. On April 20, 1976 and April 28, 1976, respectively, Dr. Tennyson performed surgeries to correct claimant's condition.

On May 11, 1976 claimant filed a claim for compensation benefits; this claim was denied by the carrier because the medical records failed to establish that the condition was job related.

The only medical evidence produced at the hearing was a report from Dr. Tennyson which indicated a causal connection of claimant's condition to his work. Dr. Tennyson opined that claimant's bilateral carpal tunnel syndrome was clearly occupationally related and a direct result of claimant's work activity over the past 18 years. He indicated that this condition, however, could be caused by just a few weeks of activity of the type claimant performed.

After claimant's termination, claimant was involved for a couple of weeks in tree cutting which involved the use of his arms and hands and which did aggravate his bilateral wrist condition.

The Referee found that the evidence indicated claimant's carpal tunnel syndrome was causally related to his employment. Although claimant's tree cutting activities aggravated his condition, the Referee concluded that claimant would not have experienced such aggravation had it not been for the on the job activities.

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

ORDER

The order of the Referee, dated October 19, 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. 76-3002 JUNE 17, 1977

ROBERT LAUBER, CLAIMANT
Leonard Popick, 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 June 8, 1976. Claimant contends he is entitled to an award of unscheduled disability for his left hip and an increased award for his low back disability.

Claimant suffered a compensable injury on November 16, 1968. He was working on a hyster and fell into a 20 foot hole and the hyster fell on top of him. Claimant sustained injuries to his left leg, left hip, pelvis, arm, back, teeth and neck. He had a below the knee amputation of his left leg.

Following this injury claimant was retrained as a diesel mechanic and is now in the 7th term of an 8 term apprenticeship program.

Claimant's claim was first closed by a Determination Order of November 10, 1971 which awarded claimant 143° for partial loss of the left leg. This award was increased by a stipulation to 150° for loss of the left leg and 48° for unscheduled back, neck and left shoulder disability on August 1, 1972. A Second Determination Order of July 26, 1974 granted no further award for permanent partial disability. A Third Determination Order of June 8, 1976 granted no further award for permanent partial disability.

On November 20, 1975 a stipulation reopened claimant's claim for the purpose of removing fracture nails used to fix his fractured hip. Claimant testified that the pain in his hip is worse now that the pins have been removed.

The Referee found that claimant's hip disability was both scheduled and unscheduled. As to the scheduled disability claimant has already received 150° for 100% loss of the left leg and with respect to the unscheduled disability, it must be determined by loss of wage earning capacity. The Referee concluded that claimant has been adequately compensated for his unscheduled disability by the 48° granted by the stipulation.

The Board, on de novo review, finds, based upon Dr. Cherry's report, that claimant is entitled to an award for his left hip disability, his mobility has been impaired because of this disability.

Therefore, the Board concludes that claimant is entitled to an award of 80° for 25% unscheduled disability.

ORDER

The order of the Referee, dated January 6, 1977, is modified.

Claimant is hreby granted an award of 80° of a maximum 320° for unscheduled disability. This award is in lieu of the award for unscheduled disability previously granted to claimant.

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 increased compensation as paid, not to exceed the sum of $2,300.

WCB CASE NO. 76-4251 JUNE 17, 1977

VITTORIO PANCIARELLI, CLAIMANT
Gary Galton, Claimant's Atty.
Michael Hoffman, 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 dismissed claimant's request for hearing.

The only issue before the Referee was whether or not the employer had failed to comply with the Referee's order, as amended, entered on May 18, 1976 (WCB Case No. 75-3691).

Claimant sustained a compensable injury on November 30, 1973. A Determination Order of September 3, 1975 granted claimant 128° unscheduled disability and claimant appealed, contending he was in need of further medical care and treatment and compensation for temporary total disability and/or permanent partial disability. After a hearing, on December 18, 1975, an Interim Order was entered on January 27, 1976 which ordered an independent medical examination of claimant by a physician chosen by the Referee. This medical examination was conducted on February 11, 1976 and the medical report was dated February 17, 1976.

On May 13, 1976 the Referee issued his order reopening claimant's claim for further medical care and treatment and the commencement of compensation for temporary total disability without stating the date of commencement. An amended order dated May 18, 1976 reopened the claim effective February 11, 1976, the date claimant was examined by Dr. Langston.

Thereafter, the employer notified claimant that the permanent partial disability award payments between February 11, 1976 and May 1, 1976 would be recharacterized as temporary total disability compensation. Claimant objected, contending he was entitled to receive both compensation for temporary total disability and permanent partial disability for that period.

The employer requested an opinion from the Workmen's Compensation Board and the Legal Division thereof notified it that its procedure was correct. The employer thereafter refused to comply with claimant's demands and claimant requested a hearing.

The Referee found that in WCB Case No. 75-3691 claimant had contended he was in need of further medical care and treatment but there wasn't any evidence to support his contention, therefore, the issue was inappropriate at that time and it is in this case as well. Such evidence did not exist until it was developed after the Interim Order of January 27, 1976. The employer could not be expected, in December, 1975, to rebut evidence which did not become available until five months later. When the employer was confronted with claimant's demand it did the most reasonable thing available, it requested instructions from the Workmen's Compensation Board and then followed them.

The Referee concluded that between February 11, 1976 and May 1, 1976 claimant received payments on his permanent partial disability award but, after the Referee's order was published, those payments were recharacterized as payments of compensation for temporary total disability. Claimant contends he is thereby deprived of part of his permanent partial disability award; this is not true, the sum recharacterized as temporary total disability compensation will be due claimant as part of his permanent partial disability award when his claim is again closed.

The Referee found no provisions in the Workmen's Compensation Act which requires that both temporary total disability and permanent partial disability compensation be paid to claimant at the same period of time. Furthermore, claimant has received various benefits since his injury of November 30, 1973 with no disruption of his income since that date. Therefore, his request for a hearing was dismissed.

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

ORDER

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

WCB CASE NO. 76-1075 JUNE 17, 1977

HARRY SHUBIN, CLAIMANT
Richard Kropp, Claimant's 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 of claimant's claim for aggravation.

On March 17, 1972 claimant, a sawmill utility man, sustained an injury to his low back. Claimant worked until April 14, 1972 when his doctor advised him to quit heavy work; there was no light work available and claimant quit work on that date.

On April 28, 1972 claimant was examined by Dr. Robinson who diagnosed acute sprain of the lumbar spine with an atrophied lumbosacral disc and some arthritic changes.

A Determination Order of September 11, 1973 granted claimant 112° for 35% unscheduled low back disability and 7.5° for 5% loss of the left leg. Claimant appealed and, after a hearing, the Referee granted claimant 160° for 50% unscheduled low back disability and affirmed the leg award.

Claimant underwent surgery in 1974 and, thereafter, suffered from constant pain, inability to bend or lift. The pain was so severe that it would awaken him at night.

On March 13, 1974 Dr. Knox examined claimant and found that the blackout spells experienced by claimant were secondarily related to the industrial injury.

Claimant started a printing business in 1974; he can only work one or two hours without resting. During a full day he may

work three or four hours. On March 16, 1975 claimant suffered a period of unconsciousness and was hospitalized.

On October 14, 1975 Dr. Berg examined claimant who was complaining of severe headaches, intermittent pain and discomfort in the neck and low back with some numbness and weakness in the left arm and left leg. Dr. Berg felt claimant might be rehabilitated for some form of light work. Dr. Berg also believed that claimant was developing further difficulties and this might continue.

On November 5, 1975 Dr. Knox, primarily because of his hypertension, found claimant permanently and totally disabled from his vocation; he said claimant could work at his own pace in his own print shop but for all practical purposes claimant was unemployable because of his physical condition.

The Vocational Rehabilitation Division is presently purchasing printing press equipment for claimant; no further services beyond this one is needed by claimant to achieve independence and to make his business successful.

The Referee found that the evidence does not indicate that claimant's condition has worsened since July 15, 1974, the date of the last award of compensation nor has he suffered any greater loss of wage earning capacity than he had at that time. The Referee concluded that the denial of claimant's claim for aggravation must be affirmed.

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

ORDER

The order of the Referee, dated December 1, 1976, is affirmed.

SAIF CLAIM NO. A 641728 JUNE 17, 1977

CARBA SISK, CLAIMANT
Raymond Rees, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order Referred for Hearing

On May 20, 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 injury sustained on October 28, 1957. In support of his request, claimant attached two medical reports from Dr. Donald Smith.

On May 25, 1977 the Board advised the Fund of the request and gave it 20 days within which to state its position.

On June 7, 1977 the Fund responded, stating that there was a very serious question of whether or not claimant is totally disabled as a result of his October 28, 1957 industrial injury, he has already received awards totalling 60% loss of function of an arm for unscheduled disability.

The Board, after consideration of this matter, concludes that the evidence before it is not sufficient to determine the merits of claimant's request, therefore, the matter is referred to the Hearings Division to hold a hearing and take evidence on the issue of whether or not claimant's present condition is the result of his 1957 industrial injury and, if so, has claimant's condition worsened since he last received an award of compensation for said injury.

Upon conclusion of the hearing the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board, together with his recommendation on claimant's request.

WCB CASE NO. 76-4642 JUNE 17, 1977

LESLIE SWALLING, CLAIMANT
Frank Moscato, Claimant's Atty.
Roger Luedtke, 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 to it claimant's claim for aggravation for acceptance and payment of compensation, as provided by law; and directed the employer to refer claimant to the Disability Prevention Division for evaluation to determine if claimant has a vocational handicap.

Claimant, a 30 year old industrial mechanic, sustained a compensable low back injury on October 8, 1973. In November, 1973 he had a fusion with good results. Within a month and a half he was performing his regular heavy employment, with a substantial amount of overtime.

Claimant continued to work until September 27, 1974 when he hurriedly ducked under a low metal walkway on his way to put out a fire and when he arose to a standing position he hit his back on a metal obstruction. Claimant immediately experienced pain and quit working. The diagnosis was pseudoarthrosis. The physician did not know if the pseudoarthrosis was due to non-union of the fusion or due to reinjury on September 27, 1974.

A Determination Order of November 22, 1974 closed the September 27, 1974 claim, the carrier had handled this claim as a continuation of the October, 1973 claim. In December, 1974 claimant was hospitalized for a second fusion.

On February 5, 1976 the October, 1973 claim was closed by a Determination Order that granted claimant an award of 64° for 20% unscheduled low back disability. Claimant requested a hearing but prior thereto a stipulation granted claimant an additional 64° on May 21, 1976.

On May 23, 1976 claimant was hospitalized for a nervous breakdown and received a psychiatric evaluation. This hospitalization was causally related to the industrial injury. Claimant filed a claim for aggravation on August 9, 1976 which was denied on August 13, 1976.

The Referee found sufficient evidence to establish that claimant suffered an aggravation in 1976 directly related to his industrial injury of September, 1974. Further, the Referee found, regardless of the physician's opinion expressed in November and December, 1974, that claimant's second fusion was directly related to the injury sustained in September, 1974. Consequently, the benefits he received should be charged to that injury not to the injury of October, 1973.

Claimant, after the October, 1973 injury, had worked eight or nine months at extremely hard, heavy and vigorous work, with substantial overtime. After the injury of September, 1974 forward claimant was no longer physically able to perform his work activities.

The Referee found, based upon the testimony of the claimant, that claimant was entitled to a thorough examination by the Disability Prevention Division because he concluded claimant had a vocational handicap.

The Board, on de novo review, concurs with the Referee's findings of aggravation; however, the Referee has no authority to determine whether claimant is vocationally handicapped. That decision is exclusively within the province of the Disability Prevention Division, therefore, that portion of the Referee's order must be reversed.

ORDER

The order of the Referee, dated December 28, 1976, is modified by deleting therefrom the last paragraph which commences at the bottom portion of paragraph 3. In all other respects the order of the Referee 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. 75-4995 JUNE 17, 1977

MARY WRINKLE, CLAIMANT
David Hittle, Claimant's Atty.
Ron Podner, 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 November 14, 1975.

Claimant sustained a compensable injury to her right elbow on February 1, 1973. She was treated by Dr. Neisius for a sprain complicated by tendinitis. Claimant subsequently saw Dr. Clarke who diagnosed epicondylitis with associated strain. On August 31, 1973 claimant underwent surgery for epicondylitis. Claimant has not worked since April 4, 1973.

Claimant continued having problems and saw Dr. Anderson on March 19, 1974 who found 20-25% loss of extension in the right elbow and limited pronation.

Claimant saw the Vocational Rehabilitation Division on October 21, 1974 to discuss her vocational interests and physical limitations. She was advised to report for testing and evaluation.

On March 27, 1975 Dr. Clarke examined claimant and he found she lacked 30° from full extension. Her shoulder was painful because of the way she held her arm down to her side. There was no calcification in the shoulder joint.

A Determination Order of November 14, 1975 granted claimant 96° for 50% loss of the right arm.

On February 3, 1976 claimant was examined by the Orthopaedic Consultants. The physicians found she exhibited severe interference due to functional disturbance. They found her condition to be not medically stationary. Total loss of function of the upper extremity was moderately severe in degree.

Claimant reported to the Vocational Rehabilitation Division again in April, 1975 but because of her severe physical limitations and learning deficiencies vocational rehabilitation was not deemed advisable.

On April 14, 15, 1976 claimant was examined by Dr. Hickman who found her psychological factors were significantly interfering with her restoration and rehabilitation. Dr. Hickman believed that if claimant's right hand was not improved medically she would be severely disabled because of lack of resources in the verbal area.

Claimant has a 7th grade education. Her arm is a dead weight and it pulls her shoulder down, causing pain and swelling into the shoulder and right side of her neck. She wears her arm in a sling.

Dr. Clarke concurred with the Orthopaedic Consultants finding that claimant's condition was not medically stationary.

Claimant was enrolled at a two week rehabilitation readiness program in which she cooperated in most aspects of the program. She had continuing physical complaints. She claims she is incapable of using her dominant right arm, however, she wants no further surgery.

Dr. Parveresh examined claimant on May 25, 1976 and found she had no significant degree of psychiatric impairment and, from a psychiatric standpoint, could be gainfully employed.

The Referee found many of claimant's problems were unrelated to her industrial injury. She has already received an award of 50% loss of the right arm. Aside from disuse atrophy, there appears to be no abnormality in her shoulder. He further found that claimant was unmotivated to improve her situation, either by further medical treatment or by rehabilitation.

The Referee concluded, based on the entire record presented, that claimant had suffered no greater permanent disability than that already granted to her by the Determination Order.

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

ORDER

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

WCB CASE NO. 76-2794 JUNE 21, 1977

WILLIAM FITZGERALD, CLAIMANT
David Vandenberg, 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 75% loss of the left foot and 10% for unscheduled low back disability. Claimant contends he is permanently and totally disabled.

Claimant, a 62 year old custodian, sustained a compensable injury to his left foot on October 22, 1973 when he slipped off a step. He worked for only a few days after the injury and has not worked since. On January 10, 1974 he underwent an ankle fusion. In October, 1974 claimant underwent surgery for a posterior tibial tendon release; continued foot pain required a third surgery which was performed in February, 1975 for a tarsal tunnel syndrome. Despite these surgeries claimant still complained of problems.

A Determination Order in July, 1975 granted claimant an award for 25% loss of the left foot.

In the summer of 1975 Dr. Bennett gave claimant a back injection, thereafter, claimant complained of back pain. X-rays of the spine revealed marked osteoporosis and osteoarthritic changes. The claim was reopened and claimant was admitted to the Portland Pain Rehabilitation Center.

The doctors at the Portland Pain Rehabilitation Center felt claimant had significant disability in his foot but believed that claimant was not well motivated to return to work.

In May the claim was again closed by a Determination Order which granted an additional award for 15% loss of the left foot.

The Portland Pain Rehabilitation Center provided claimant with the use of an electrical stimulator and he no longer takes pain pills. He wears this stimulator every day and night. Claimant still complains of pain in his ankle and foot and only feels comfortable when lying down.

The Referee found that most of claimant's problems were in his left foot which is a scheduled injury and must be rated on loss of function. The Referee did find some unscheduled back disability but the major reason claimant cannot return to work, disregarding motivational factors, was claimant's left ankle and foot disability. The medical evidence indicates that claimant's back difficulties are minimal.

The Referee concluded that the loss of function of claimant's left foot is greater than the 40% and he granted claimant an award for 75% loss of use of his left foot and an award of 32° for 10% unscheduled back disability.

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

ORDER

The order of the Referee, dated January 20, 1977, is affirmed.

WCB CASE NO. 76-3138 JUNE 21, 1977

EMILIO GARCIA, CLAIMANT
Allan Coons, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

On June 2, 1977 the Board entered its Order on Review in the above entitled matter and on June 14, 1977 the Board received a request from the Fund to reconsider said Order on Review for the reason that "the Board admits in its order, there is no evidence that this man has anything wrong with him which has been caused by the accident in question."

Although the Referee found that neither the medical evidence nor the testimony taken at the hearing supported claimant's contention that he was entitled to an award for permanent partial disability the Board, on its de novo review, found that claimant was precluded from doing heavy manual labor which he had been capable of doing prior to the injury and, therefore, had suffered a minimal amount of loss of wage earning capacity. Because of this loss the Board concluded that claimant was entitled to an award of 32°.

The Board finds nothing in the request for reconsideration to persuade it to change its conclusion that claimant should be granted an award of 32° to adequately compensate him for the loss of wage earning capacity.

ORDER

The request of the Fund that the Board reconsider its Order on Review entered in the above entitled matter on June 2, 1977 is hereby denied.

WCB CASE NO. 76-2657 JUNE 21, 1977
WCB CASE NO. 76-5195

EDDIE HILL, CLAIMANT
Robert Bennett, 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 dismissed claimant's requests for hearing.

In WCB Case No. 76-2657 the issue was an appeal from a Second Determination Order of May 19, 1976 which granted claimant

no further award for permanent partial disability. In WCB Case No. 76-5195 the issue was an appeal from a denial of claimant's claim for aggravation.

Claimant, a 33 year old truck driver, on November 19, 1973 sustained a compensable injury to his back when he was struck by another truck. Claimant suffered contusions of his chest and spine, without any fractures. This injury occurred on the first day claimant had returned to work following his involvement in a rear-end collision on April 23, 1973 resulting in a whip lash injury.

On February 4, 1974 a Determination Order granted claimant an award of 64° for 20% unscheduled disability. Claimant requested a hearing; after the hearing, the Referee affirmed the Determination Order on August 20, 1975.

Claimant's claim was reopened on November 24, 1975 when claimant was admitted to the Portland Pain Rehabilitation Center. On May 15, 1976 claimant was seen at the emergency room at the hospital for a knee injury resulting from an altercation with a policeman. On May 19, 1976 a Second Determination Order granted claimant no additional award for permanent partial disability.

In 1976 claimant, while driving his own car, was rear-ended by another vehicle.

The Referee found in WCB Case No. 76-2657 that the order entered on August 20, 1975 by the Referee was res judicata, therefore, the issue is whether claimant's disability is greater now than it was on August 20, 1975.

The objective medical evidence prior to August 20, 1975 is similar in nature and degree to the current findings except for Dr. Harris' new findings of arachnoiditis and pseudoarthrosis at the fusion site. The existence of the pseudoarthrosis is disputed by every doctor who has examined claimant except for Drs. Harris and Pasquesi. However, if such condition does exist at the fusion site it is the result of an injury claimant sustained in 1964 and not the responsibility of this carrier.

The Referee concluded claimant did not have pseudoarthrosis at the fusion site, and there was no orthopedic or neurological support for the diagnosis of arachnoiditis in the lumbar area. Comparing claimant's present condition to that in August, 1975 there is no objective or subjective symptoms to prove a worsening condition. Therefore, the Determination Order of May 19, 1975 was affirmed.

In WCB Case No. 76-5195 the Referee found that the denial of claimant's claim for aggravation was based on the ground that claimant's hospitalization was not necessitated by his injury of November 19, 1973.

In Dr. Harris' report of September 20, 1976 he indicated claimant returned to work despite the fact that he had had a previous spinal laminectomy and fusion and that he was able to function until such time as he sustained the November, 1973 injury; since that injury he has never been free of pain. This report completely ignores the April, 1973 injury and, in fact, reveals that Dr. Harris appears to be totally unaware of the April 23, 1973 injury and the seven months time loss caused thereby.

The Referee concluded that the hospitalization of claimant by Dr. Harris from July 27 to July 31, 1976 was for the purpose of a diagnostic workup related to cervical and lumbar pain. The cervical injury which occurred in April, 1973 was not work related and the lumbar injury in December, 1964 was not the responsibility of the present carrier. There was no persuasive evidence that claimant's hospitalization was related to the November, 1973 incident. He affirmed the denial.

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

ORDER

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

No NUMBER JUNE 21, 1977

JERALD MCCARTNEY, CLAIMANT
Merlin Miller, Defense Atty.
Own Motion Order

On January 6, 1977 claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an industrial injury sustained on June 1, 1970.

On February 3, 1977 the Board denied claimant's request to reopen his claim for the reason that there was no medical report relating claimant's present condition to the industrial injury of June 1, 1970 and showing a worsening of his condition since his last award of compensation.

On February 15, 1977 the carrier, The Travelers Insurance Company, responded, stating its position was that there was no justification for reopening claimant's claim. It attached a medical report from Dr. Berselli, dated January 31, 1977.

Dr. Berselli's report did not contain sufficient information to enable the Board to determine whether the claim should be reopened and the claimant was so advised.

Thereafter, on June 6, 1977 Dr. Berselli sent the Board a medical report which stated that claimant's current problems were definitely related to his industrial injury of 1970 and have worsened during the past year.

The Board, after giving full consideration to both reports from Dr. Berselli, concludes that claimant's claim should be reopened and payment of compensation commenced until closure is authorized pursuant to ORS 656.278.

ORDER

Claimant's claim is hereby remanded to the carrier, The Travelers Insurance Company, for acceptance and payment of compensation, commencing December 17, 1976 and until closure is authorized pursuant to ORS 656.278, less time worked.

SAIF CLAIM NO. YC 162135 JUNE 21, 1977

BILLY MCKINNEY, CLAIMANT
David Hittle, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On May 27, 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 injury sustained on December 19, 1968. An Own Motion Determination of June 2, 1976 had granted claimant an additional award of 37.5° for loss of the right leg. In support of claimant's request was attached a report from Dr. Gripekoven requesting that claimant be referred to the Orthopaedic Consultants for consideration of further disability.

On June 1, 1977 the Board informed the Fund that it had 20 days within which to respond to claimant's request.

On June 7, 1977 the Fund responded, stating there was no medical evidence to substantiate a reopening of claimant's claim at this time.

The Board, after giving full consideration to this matter, concludes that the medical report of Dr. Gripekoven does not support a reopening of claimant's claim at this time.

ORDER

Claimant's request to have the Board exercise its own motion jurisdiction and reopen his claim for an industrial injury suffered on December 19, 1968 is hereby denied.

WCB CASE NO. 74-3784 JUNE 21, 1977

GLENN MCVICKER, CLAIMANT
J. David Kryger, 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 that portion of the Referee's order which granted claimant an award of 160° for 50% unscheduled disability. Claimant contends he is entitled to a greater award for his unscheduled disability.

Claimant sustained a compensable injury to his low back on March 14, 1973 which was diagnosed as chronic lumbosacral strain. Claimant has been treated and/or examined by various physicians. The Back Evaluation Clinic found claimant's disability was minimal. A Determination Order of November 1, 1973 granted claimant 32° for 10% unscheduled low back disability.

On February 7, 1974 Dr. Tsai examined claimant and diagnosed right L5 nerve root compression due to mid-line disc herniation, L4-5, more marked on the right side, related to the accident of March 14, 1973. On March 4, 1974 claimant underwent an L4-5 right laminectomy and discectomy.

On August 7, 1974 claimant was examined by the physicians of the Disability Prevention Division, they found claimant's physical impairment was mildly moderate and recommended a job change.

A Determination Order of October 7, 1974 granted claimant an additional award of 64°, giving claimant a total award of 96° for 30% unscheduled disability.

Claimant testified he had limitation of motion of his low back and chronic low back pain and discomfort which is always present and periodic muscle spasms.

Claimant received vocational rehabilitation counseling and was placed in a training program, i.e., welding, on a trial basis. It was unsuccessful. Throughout claimant's vocational rehabilitation participation other jobs were considered and applied for without success.

The Referee found that claimant had proven by a preponderance of the evidence his entitlement to a greater award for his permanent partial disability. Claimant's employability in the general labor market is greatly diminished because he is now precluded from taking any jobs requiring heavy lifting, repetitive bending, stooping, twisting and turning movements and prolonged sitting, standing and walking.

The Referee concluded that claimant should be granted an award of 160° for 50% unscheduled low back disability to adequately 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 July 23, 1976, is affirmed.

CLAIM NO. B 8186 JUNE 21, 1977

JACK H. ROBINSON, CLAIMANT
Own Motion Order

On April 26, 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 July 31, 1963. Claimant's claim had been accepted and closed and his aggravation rights have expired.

On May 2, 1977 the Board advised claimant that before it could exercise its own motion jurisdiction it would be necessary for claimant to submit to the Board and to the appropriate insurance carrier a current medical report commenting on two essential points: (1) that claimant's physical condition had worsened since the last award and closure and (2) that the worsened condition is attributable to the industrial injury. Claimant was advised that after receipt of this information the insurance carrier would be given 20 days in which to respond, stating its position with respect to his request.

On June 4, 1977 the Board received a report from Dr. James W. Brooke. Dr. Brooke's letter indicated that he thought eventually claimant would have to have additional treatment which he had recommended to claimant in 1965 and expressed his feeling that the course of problems regarding claimant's knee was probably one of the sequela of his initial industrial injury. However, Dr. Brooke thought it would be appropriate to solicit another medical opinion.

The Board, after due consideration of Dr. Brooke's report, concludes that it is not sufficient to justify a reopening of claimant's claim at this time. However, this does not preclude claimant from obtaining additional medical information and if he does so and it is sufficient to justify reopening the claim the Board will act accordingly.

ORDER

The request made by claimant on April 26, 1977 to reopen his claim for the injury of July 31, 1963 is hereby denied.

WCB CASE NO. 76-5036 JUNE 21, 1977

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

On June 9, 1977 the Board entered its Order on Review in the above entitled matter. It now appears that the Order on Review should be amended as follows:

In the third line of the third paragraph on page three "Parcher" should be substituted for "Parveresh", and the sixth paragraph on page three, should be deleted and the following paragraph inserted in lieu thereof:

> "Claimant is to be considered as permanently and totally disabled from and after January 21, 1977, the date of the Referee's Opinion and Order."

In all other respects the order on review entered in the above entitled matter on June 9, 1977 should be ratified and reaffirmed.

IT IS SO ORDERED.

WCB CASE NO. 76-6988 JUNE 21, 1977

BILL STIFEL, CLAIMANT
Rolf Olson, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Order Denying Motion

On June 10, 1977 the employer requested Board review of the order of the Referee entered in the above entitled matter on May 16, 1977. This request was accompanied by a motion for stay of payment of back compensation pending appeal.

The employer stated that it would pay current compensation benefits due as a result of the Referee's order but wished to be relieved of the liability to pay compensation to claimant from the date of his injury until the date of the Referee's order, contending that claimant would be unjustly enriched if ultimately his claim was found to be non-compensable.

The Referee found that claimant's claim was compensable and directed the employer to commence payment of of compensation for temporary total disability from and after November 19, 1976 the injury having occurred on November 18, 1976. If the Board were to grant the motion to stay payment of back compensation it would, in effect, be deciding, without review, that the Referee's order was incorrect. This the Board cannot and will not do.

Any failure on the part of the employer to pay compensation from January 19, 1976 will be a direct refusal to comply with the order of the Referee from which it has taken appeal. ORS 656.313 is the controlling statute.

ORDER

The employer's motion for stay of payment of back compensation pending appeal in the above entitled matter is hereby denied.

WCB CASE NO. 76-4314 JUNE 22, 1977

GEORGE ABDO, CLAIMANT
Richard Nesting, 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 denial of claimant's claim for aggravation.

Claimant sustained a compensable injury to his left shoulder and neck on October 15, 1971 when he fell from a ladder. He continued working until January 3, 1972 but has not worked since. Claimant has been treated by various physicians and is presently being treated by Dr. Schuler.

A Determination Order of February 21, 1973 granted claimant 32° for 10% unscheduled neck and left shoulder disability. On December 20, 1973 that award was increased by a Referee to 160°.

On July 1, 1975 Dr. Schuler indicated claimant has Marie Strumpell arthritis that has been moving up his spine and is approaching the cervical area where he has spondylitis. He has pain and stiffness in his neck with headaches. On July 28, 1975 the Fund denied responsibility for this condition after July 1, 1975. Claimant did not appeal this denial.

In October, 1975 the Orthopaedic Consultants examined claimant and found that he could return to the same occupation. They found total loss of function due to this injury was mild. The physicians opined that the injury was not responsible for the arthritis but is only responsible for aggravating it.

On April 13, 1976 claimant filed a claim for aggravation which was denied by the Fund on August 23, 1976.

In June, 1976 Dr. Pasquesi had found claimant's condition, orthopedically, had not been aggravated. He indicated that the claimant's impairment to which he previously had submitted a report, i.e., the left shoulder, "no longer exists".

Throughout the record Dr. Schuler maintains that all of claimant's symptoms are a direct result of his industrial injury.

The Referee found that claimant was not young at the time he sustained his injury. Claimant's conditions of Marie Strumpell disease and osteoarthritis are progressive in nature and the injury was superimposed on these conditions and temporarily exacerbated them.

The Referee concluded that an examination of the medical evidence prior to December 20, 1973 and the present evidence indicates no change in claimant's condition other than the natural progression of his pre-existing conditions. Therefore, claimant's claim for aggravation was properly denied.

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

ORDER

The order of the Referee, dated January 14, 1977, is affirmed.

WCB CASE NO. 75-3813 JUNE 22, 1977

ANNA (HERSCHBERGER) FEICKERT, CLAIMANT
Richard Nesting, Claimant's Atty.
Philip Mongrain, 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 40.5° for 30% loss of her right foot. Claimant contends this award is inadequate.

Two issues were presented to the Referee: (1) an appeal from a partial denial of April 7, 1976, denying that

claimant's head, neck and back complaints were causally related to her right ankle injury and (2) appeal from the Second Determination Order of June 25, 1975 which awarded claimant 27° for 20% loss of her right foot.

Claimant fractured her right ankle in a fall at work. She underwent open reduction and fixation surgery and various casts were applied. On November 12, 1973 claimant was released to return to work.

On May 23, 1974 a Determination Order granted claimant no award for permanent partial disability. Her claim was reopened on April 19, 1974 for removal of the Steinmann pins and, on May 2, 1975, her physician found her medically stationary.

A Determination Order issued on June 25, 1975 granted claimant an award of 27° for 20% loss of her right foot.

In October, 1975 claimant sought treatment from her physician for severe headaches and neck, dorsal and lumbar pain none of which existed prior to her industrial injury.

On September 9, 1976 Dr. Smith found a relationship between claimant's ankle injury and her neck problems; however, Dr. Struckman, claimant's treating physician, found none of claimant's complaints to her neck, head and back were related to her industrial injury, mainly because of the lapse of time.

The Referee found it was not probable that claimant's headaches, neck and back pain would have been suppressed by the ankle symptoms for more than two years. He, therefore, affirmed the partial denial.

Claimant testified that she has a perpetual limp and her symptoms increase if she walks a lot and if she sits too long her ankle becomes numb.

The Referee found that scheduled disability is rated on loss of function. He concluded that the evidence indicated claimant has lost 30% of her ability to ambulate and bear weight on her right ankle and she was entitled to such an award; he granted her an increase of 10% loss of her right foot.

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

ORDER

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

TERRANCE GANDY, CLAIMANT
Dan O' Leary, 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 that portion of the Referee's order which did not grant claimant any greater award for his unscheduled disability than that granted by the Determination Order of June 8, 1976 which awarded claimant 48° for 15% unscheduled disability. This Determination Order also had granted claimant 60° for 40% loss of the right leg and 150° for 100% loss of the left leg.

Claimant, a labor foreman in charge of laying multiple plate pipe on highway construction, suffered a compensable injury on October 26, 1971 when a truck with two trailers lost control striking claimant and inflicting multiple injuries including near traumatic amputation of the left leg.

On May 30, 1974 claimant was examined by Dr. Tanaka. Claimant had complaints of pain in his right shoulder and a back ache, all of which Dr. Tanaka felt were understandable residuals of his original extensive injuries.

Dr. Short examined claimant on May 7, 1975 and found mild and moderate right shoulder disability due to loss of outer end of the right clavicle.

On August 16, 1976 claimant was examined by the physicians at the Orthopaedic Consultants. The physicians found claimant could not return to his former occupation but could return to some other job. They found mildly moderate loss of function of the right shoulder.

The Referee found that claimant has difficulty in the right shoulder,where claimant had surgery,when lifting any kind of weight. He develops a sharp shoulder pain when he attempts to lift more than 20 pounds. Claimant has not looked for work since June, 1976.

The Referee concluded that claimant's awkward gait could produce a chronic low back strain, however, the claimant had not met his burden of proof that this was the case at this time. Therefore, the Referee found that the award of 48° for 15% unscheduled disability adequately compensated claimant for his right shoulder disability.

The Board, on de novo review, concurs with the findings and conclusions of the Referee. However, the Board would suggest that claimant be contacted by one of the Workmen's Compensation

Board's service coordinators in an endeavor to obtain for claimant job placement and on the job training to enable him to return to some regular and gainful employment.

ORDER

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

WCB CASE NO. 76-3737 JUNE 22, 1977

ARNOLD JAKOLA, CLAIMANT
Rolf Olson, 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 claimant's claim for rheumatoid arthritis to it for acceptance and payment of compensation from the day claimant began working for the employer, Independence IGA, and until closure is authorized pursuant to ORS 656.268; and awarded claimant additional compensation equal to 20% of the amounts due claimant from January 7, 1976 through September 13, 1976.

Four issues were presented at hearing: (1) compensability of rheumatoid arthritis; (2) whether or not penalties and attorney fees should be assessed against the Fund for its failure to accept or deny the rheumatoid arthritis claim; (3) whether or not penalties and attorney fees should be assessed against the Fund for its failure to pay medical expenses relating to the rheumatoid arthritis and (4) responsibility for medical bills related to lung pathology for the period 1970 through May, 1975.

Claimant's claim for respiratory difficulties and pulmonary pathology was ordered accepted by an Opinion and Order entered in April, 1976. Background history from that order establishes that claimant was employed by IGA Market in October, 1974 and continued working for them until May, 1975. Claimant was a meat cutter. Except during the period from 1965 when he worked for Safeway Stores, claimant's working environment during all of his working career as a meat cutter was substantially the same as that prevailing at IGA during the months prior to May, 1975.

At Safeway Stores claimant had been exposed throughout the day to a constant temperature of 40 to 45°F. His work at IGA required claimant to constantly move back and forth from rooms where the temperatures varied from 72° to minus 10°.

Claimant testified that in the 1950's he only had minor occasional coughing spells. In 1961 his coughing symptoms increased and he began to experience shortness of breath and wheezing which difficulties continued during the period from 1961 through 1975. Claimant quit his employment in May, 1975, acting on medical advice.

In May, 1974 claimant began having severe shoulder pain. This condition became worse until it involved the joints. In August, 1974 Dr. Pettit diagnosed rheumatoid arthritis. Claimant has swelling in the shoulder, neck, knees, ankles, feet, wrists and hands. Claimant has not worked since quitting IGA in May, 1975. In January, 1976 claimant came under the care of Dr. Rinehart for his rheumatoid arthritis.

The Referee found Dr. Rinehart had stated that it was highly probable that claimant's rheumatoid arthritis arose as a result of altered immune response related to his pulmonary disease and that both conditions have been significantly aggravated by the conditions of claimant's employment. Dr. Rosenbaum had indicated that rheumatoid arthritis was a disease of unknown etiology, however, he testified that stress, strain or fatigue would aggravate rheumatoid arthritis and he found claimant's condition compensable. He stated that claimant's chronic lung condition when coupled with the rheumatoid arthritis and the going from one extreme temperature to another would cause stress, as would the fact that these conditions forced claimant to quit his job.

Subsequent to the hearing the Fund, based on Dr. Rosenbaum's opinion, accepted responsibility for claimant's arthritis condition for the period October, 1974, when claimant commenced working for IGA, through May, 1976, one year after quitting work.

The Referee found that the rheumatoid arthritis condition was compensable.

The claim for rheumatoid arthritis was made in January, 1976, the Fund, according to the evidence, did nothing about it until after the hearing. The Referee found that the Fund's failure to either accept or deny the claim was unreasonable and he assessed a penalty equal to 20% of the amount due claimant from January, 1976 through September 13, 1976. With respect to the Fund's failure to pay medical expenses related to the rheumatoid arthritis, the Referee found such failure to accept responsibility was again unreasonable and in conflict with the statute.

On the question of the responsibility for medical bills related to lung pathology between 1970 and May, 1975 the Referee found that the lung pathology was an accepted occupational disease claim and the responsible employer was IGA for whom claimant worked in October, 1974 through May, 1975, but he concluded that IGA was not responsible for any medical expenses claimant incurred

prior to his employment with them, stating that he interpreted the rule set forth in Mathis v SAIF, 10 Or App 139, to operate retrospectively and place no more than contemporary or prospective liability on the responsible employer for any medical expenses incurred by claimant prior to his employment with the responsible employer. He found IGA was not responsible for any medical bills incurred prior to claimant's employment with IGA.

The Board, on de novo review, agrees with the Referee's findings and conclusions on all of the issues except the last which relates to responsibility for payment of medical bills incurred by claimant prior to being employed by IGA but which relate to his occupational disease.

The Board finds that the refusal by the Fund to pay all the medical expenses relating to the lung condition leads to an illogical result. Mathis, relied upon by the Referee, clearly held that the employer at the time of the "last injurious exposure" is responsible for the disabling effects of an occupational disease if "the conditions of the last employment were such that they cause the disease over some indefinite period of time". In this case the Referee's order of April, 1976 found claimant's lung condition compensable and ordered the last employer to accept it. This was a correct interpretation of the court's holding in Mathis.

The Board concludes that IGA, the claimant's last employer must be held liable for all medical services necessitated by his occupational disease but which were incurred prior to claimant's employment with IGA.

ORDER

The order of the Referee, dated November 3, 1976, is modified.

The Fund is ordered to pay all medical bills related to claimant's lung pathology which were incurred between 1970, the exact date of the inception of claimant's occupational disease is not known, and May, 1975.

In all other respects the Referee's order of November 3, 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 $500, payable by the Fund.

Dissent of M. Keith Wilson, Chairman:

I disagree with the majority position of the Board as to issue number 4 "Responsibility for medical bills related to lung pathology between 1970 and May, 1975" and would affirm the Referee's holding on this issue. It would be unconscionable to

hold the last employer responsible for medical expenses incurred prior to his employment with that employer. In Mathis this problem did not arise, inasmuch as the worker had not required medical services prior to the time his condition became fully developed while employed by the last employer. I would, therefore, hold that IGA is not responsible for any medical expenses incurred by claimant prior to that employment, and adopt the Referee's rationale on this issue.

The Referee's order on page 5 thereof provides that the "rheumatoid arthritis claim is remanded to the State Accident Insurance Fund to be accepted for payment of compensation from the day claimant began work with the defendent employer IGA, until termination is authorized pursuant to ORS 656.268." This order should be modified to direct the Fund to pay time loss benefits from the date claimant terminated this employment until closed under ORS 656.268, and any medical expenses incurred during the course of such employment.

M. Keith Wilson, Chairman

SAIF CLAIM NO. 69382 JUNE 22, 1977

ROBERT HAINES, CLAIMANT
Richard Kropp, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order Referred for Hearing

On May 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 April 20, 1967. In support of his request claimant attached a medical report from Dr. Knox.

On June 2, 1977 the Board advised the Fund that it had 20 days within which to respond to claimant's request.

On June 9, 1977 the Fund responded, stating there were no grounds to reopen claimant's claim. It further stated that there was an outstanding medical bill from the Corvallis Clinic in the amount of $455.90 which the Fund would give consideration to paying for if an adequate explanation of the charges was given to it.

The Board, after giving full consideration to this matter, finds that it does not have sufficient evidence before it to decide 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 whether or not claimant's condition has worsened since the last arrangement of compensation of January 20, 1976 and, if so, whether that worsening of his condition was related to the industrial injury of April 20, 1976.

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.

SAIF CLAIM NO. RC 276019 JUNE 22, 1977

JUNE PYLE, CLAIMANT
Robert Grant, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On May 26, 1977 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 an injury sustained on November 9, 1970. In support of her request claimant attached a medical report from Dr. Parrish.

On May 31, 1977 the Board informed the Fund that it had 20 days within which to state its position concerning claimant's request.

On June 7, 1977 the Fund responded, stating it would reopen claimant's claim for additional time loss and payment of medical bills from the date of claimant's recommended surgery.

The Board, based upon the Fund's agreement to reopen claimant's claim, concludes that an order entered pursuant to ORS 656.278 should be entered reopening the claim.

ORDER

Claimant's claim is remanded to the Fund for payment of compensation commencing on the date of claimant's hospitalization for the recommended surgery and until closure is authorized pursuant to ORS 656.278.

WCB CASE NO. 76-901 JUNE 24, 1977

EVA AUSTIN, CLAIMANT
A. C. Roll, Claimant's Atty.
Lawrence Dean, 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 of 160° for 50% unscheduled disability, giving claimant a total award of 208° for 65% unscheduled disability.

On February 25, 1970 claimant sustained a compensable back injury while working in a cannery. Claimant's claim went through various closures and administrative hearing procedures which culminated in a Determination Order of October 17, 1975 which granted claimant 48° for 15% unscheduled disability.

After her injury claimant was treated conservatively and had returned to work for the employer on May 18, 1970. A Determination Order of June 1, 1970 granted no award for permanent partial disability. Later, claimant's claim for aggravation was accepted in July, 1973 and the employer reopened her claim for surgery by Dr. Cherry.

Claimant resisted vocational rehabilitation efforts because she and her husband wanted to try self-employment, operating a motel and a small grocery store and cafe. Claimant had help in these endeavors and could rest and progressed satisfactorily. When she eventually lost this help she found she could not continue to operate the cafe herself. She closed it down. Some of the discouraging aspects of continuing self-employment for claimant were due to economic factors rather than physical impairment.

The Referee found claimant was not permanently and totally disabled, but she was foreclosed from returning to her former job or any heavy labor and from some types of light employment which would put any stress on her back.

The Referee concluded claimant had a greater loss of wage earning capacity than that reflected by the award of 48°, the limited employment opportunities now available to claimant resulted in a substantial loss of wage earning capacity. He increased her award to 208° for 65% unscheduled back disability.

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

ORDER

The order of the Referee, dated December 17, 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.

SAIF CLAIM NO. BB 92418 JUNE 24, 1977

GERTRUDE COLLINS, CLAIMANT
David Hittle, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On June 3, 1977 the claimant, by and through her attorney, petitioned the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen her claim for an injury suffered on November 15, 1974. Claimant's claim was initially closed in January, 1966 and her aggravation rights have expired. Attached to the petition was a report from Dr. Tsai dated January 13, 1977 and admission and discharge summaries, dated December 7, 1976 and December 14, 1976, respectively, which indicated that claimant had been recently treated by Dr. Tsai.

On June 15, 1977 the Board was advised by the Fund that it had been aware that claimant had been hospitalized between December 7, 1976 and December 14, 1976 for recurrent back pain and it would pay for the medical treatment and time loss incurred by claimant while hospitalized. It felt inasmuch as claimant had previously received awards for 100% loss of function of an arm and 5% loss of function of a leg for unscheduled disability that there was no basis for granting claimant an additional award for disability.

The Board, after full consideration of this matter, concludes that claimant is entitled to receive compensation for temporary total disability for the period she was hospitalized and to have the cost of the medical services received which relate to said hospitalization paid.

ORDER

The Fund shall pay claimant compensation for temporary total disability from December 7, 1976 through December 14, 1976 and for all medical services rendered claimant which are related to her hospitalization.

Claimant's attorney is granted as a reasonable attorney fee a sum equal to 25% of the compensation granted by this order, payable out of said compensation as paid, to a maximum of $500.

WCB CASE NO. 76-4849 JUNE 24, 1977

LEE HABERSAAT, CLAIMANT
Eric Lindauer, 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 granted claimant an award of 96° for 35% unscheduled disability.

Claimant sustained a compensable injury to his low back on July 10, 1975 and saw Dr. Colgan who diagnosed acute traumatic 5th lumbar vertebral subluxation with secondary functional disturbances.

On September 3, 1975 claimant was examined by Dr. Becker who started claimant on a conservative treatment program; he had diagnosed acute lumbosacral sprain, by history, with chronic lumbosacral strain symptoms, and mild sciatica on the right. On November 14, 1975 Dr. Becker indicated claimant was to try to obtain some light work.

On January 29, 1976 Dr. Becker performed a closing examination. He found claimant was medically stationary with no motion in the lumbar area and tenderness at L2 and L5 midline.

On February 17, 1976 Dr. Becker saw claimant again with exacerbation of his low back discomfort. Claimant had picked up a soap stone on a shelf and felt acute onset of low back discomfort with radiation down the left leg. On March 2, 1976 Dr. Becker found claimant had improved and returned to work.

A Determination Order of July 2, 1976 granted claimant an award of 48° for 15% unscheduled low back disability.

The Referee found claimant was a credible witness and concluded that claimant's back difficulty was one of the reasons he left his employer. Therefore, claimant had sustained a permanent partial disability equal to 30% unscheduled low back disability.

The Board, on de novo review, finds that after claimant's injury in July, 1975 he returned to work for the employer in December, 1975, doing the same type of work, but as a subcontractor, and for reasons which the Board finds do not enhance the credibility of the claimant. By January, 1976 claimant had returned to his same job as welder and layout man on a full time basis. By claimant's own testimony the reason he had left his employment was "just a misunderstanding between my employer and myself" (Tr. 22). The fact that a workman voluntarily leaves one employer

and takes a job with another that pays less money does not mean that he has suffered a loss of earning capacity.

Claimant, at the time of the hearing, was not having any medical treatment, only took medication when the pain was severe and was working "more or less" on a regular basis.

Based on the totality of the evidence, the Board concludes claimant would be adequately compensated for his loss of wage earning capacity by an award of 20% of the maximum for unscheduled disability.

ORDER

The order of the Referee, dated December 29, 1976, is modified.

Claimant is hereby granted an award of 64° of a maximum 320° for unscheduled disability. This is in lieu of the award granted by the Referee's order which is affirmed in all other respects.

CLAIM NO. B 32-6418 JUNE 24, 1977

DENNIS HANKINS, CLAIMANT
Amended Order

On June 8, 1977 an order was entered in the above entitled matter which notified the parties involved that each had a right to appeal said order to the Circuit Court under the provisions of ORS 656.298.

Although the order remanded the claim for the payment of compensation until closure pursuant to ORS 656.268, the order was issued pursuant to ORS 656.278, therefore, appeal rights should have been set forth as provided by ORS 656.278 (3).

The order entered on June 8, 1977 should be amended by deleting therefrom the first complete paragraph on page 2 of said order and inserting in lieu thereof the following:

WCB CASE NO. 76-3188 JUNE 24, 1977

ROBERT MCCABE, CLAIMANT
Gary Jensen, Claimant's Atty.
Jack Mattison, 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 dismissed his request for hearing.

The issue before the Referee was whether claimant, by requesting and receiving a lump sum payment of his award, has waived his right to a hearing on the adequacy of that award.

Claimant contends he executed the request for lump sum payment which contained the waiver of his right to appeal the award as a result of economic duress imposed on him by the carrier as a result of lack of understanding. In support of his contention claimant cites Capps v Georgia Pacific Corporation, 253 Or 248.

A Determination Order of April 12, 1976 granted claimant an award of 102.5°. Claimant's wife then contacted the claims representative and asked how to obtain a lump sum payment, she was advised that claimant had to make written application and that he would then waive his right to a hearing. On April 15 claimant requested a lump sum payment to purchase a small grocery store which he and his family could operate. On April 22 claimant signed the request.

The Referee found that the circumstances in the case before him differed from those in Capps. Furthermore, the record does not demonstrate claimant lacked understanding of the transaction.

Claimant initiated the request because his only chance to get out of financial difficulty was to obtain a lump sum settlement and then appeal to the Board. Claimant was not advised by counsel concerning this matter but such advice was available to him had he desired it since he was, at that time, represented by counsel.

The Referee concluded that, although the lump sum request ultimately might be to claimant's disadvantage and to the employer's advantage, nevertheless, claimant had the freedom of choice and perhaps he exercised bad judgment in this situation, but he was bound by his choice. Therefore, his request for hearing was dismissed.

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

ORDER

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

CHESTER NORDLING, CLAIMANT
Hugh Cole, 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 208° for 65% unscheduled disability. The Fund contends that claimant is not entitled to any award for scheduled or unscheduled disability.

Claimant cross appeals the Referee's order contending he is permanently and totally disabled.

Claimant, a 61 year old brake serviceman, first began to notice a rash and irritation on his hands and arms prior to Christmas, 1974. He saw Dr. Weiss in February, 1975 who diagnosed contact dermatitis brought on by claimant's continued exposure to solvents and brake fluid required by his job. Claimant attempted to work wearing gloves but the problem continued and Dr. Weiss advised claimant to seek other employment.

The Disability Prevention Division refused to make a referral of claimant to the Vocational Rehabilitation Division on the ground that claimant had other skills which would allow him to return to work within his capabilities. Claimant was referred to a service coordinator in his area who attempted to assist claimant back into employment but so far has been unsuccessful. Claimant has been cooperative and zealous in his attempts to find work; he has sought employment since August, 1976. At the time of the hearing claimant's hands and arms were completely clear from dermatitis.

A Determination Order of July 29, 1976 granted claimant no award for permanent partial disability.

The Referee found that claimant's problem is systemic and, therefore, must be treated as an unscheduled disability. Claimant's loss of wage earning capacity is substantial, taking into consideration his age and work background. Claimant has been doing brake work for the last thirty years and is 61 years old.

The Referee concluded that claimant was entitled to an award of 208° for 65% unscheduled disability to compensate him for his loss of wage earning capacity.

The Board, on de novo review, agrees with the Referee that claimant's disability is in the unscheduled area. However, the Board finds that claimant's loss of wage earning capacity is not so substantial as to justify an award for 65% of the maximum. It believes an award of 30% of the maximum will amply

compensate claimant for his loss of wage earning capacity, therefore, the award made by the Referee should be reduced.

ORDER

The order of the Referee, dated January 14, 1977, is modified.

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

WCB CASE NO. 76-4311 JUNE 24, 1977

WAYNE SCHEESE, CLAIMANT
Franklin Bennett, 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. 76-2038 JUNE 24, 1977

MARCIEL SCHWARTZ, CLAIMANT
Dennis Graves, 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 claimant's claim to it for acceptance and payment of compensation as provided by law.

Claimant alleges she sustained a compensable injury to her back muscles during the week of December 14, 1975. At this time the workload at the store had increased considerably due to the "Snowball", an annual teenage dance, which usually resulted in the rental of approximately 300 men's formal attire from the store.

These outfits were assembled by the manager of the formal rental department and by claimant, and included the measuring for shirts, coats, pants and other articles of clothing. Most of the coats and pants had to be carried upstairs to the alteration room and carried downstairs when completed.

After this dance on December 13th, the outfits were returned, sent to the cleaners and when returned replaced on the racks. This extra work, claimant contends, is what caused her symptoms.

Claimant testified that she told the manager that her back was bothering her and asked the manager to do the heavy lifting and reaching up to the high racks. The manager denies claimant mentioned any incident to her back.

Claimant's condition did not improve and, on January 26, 1976, she saw Dr. Freeman, a chiropractor, who put claimant on crutches and gave her treatments. Her condition still did not improve and she saw Dr. Lawton, who agreed with Dr. Freeman that the lifting and stretching involved at work caused claimant's problems.

Several employees testified at the hearing, all indicating that at that particular time of the year they were overworked because of excessive business; none could specifically recall claimant making any reference to hurting her back although there was some verification of her complaining of back problems.

The medical records indicate that claimant suffered a back problem and within a reasonable medical probability that claimant's problems could have begun at work.

The Referee found there was some conflict in the testimony; the claimant testified she took one day sick leave because of her back condition but the manager testified, and produced records, indicating ,that claimant worked every work day and took no sick leave. The Referee found that this descrepency which was unexplained could have been the result of an honest mistake. He found claimant was a credible witness who gave the same history of the incident to both doctors and also to the Referee at the hearing. There was no question but that claimant had a bad back which needed medical care and treatment and that the doctors felt the condition could have been caused by hyperextension of her back while employed.

The Referee concluded, based on all of the evidence, that claimant had sustained a compensable injury arising out of and in the course of her employment.

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

ORDER

The order of the Referee, dated January 12, 1977, 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. 76-2523 JUNE 24, 1977

MARIA STRACK, CLAIMANT
Benton Flaxel, Claimant's Atty.
Robert Walberg, 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 compensation, as provided by law, and directed it to pay to claimant an amount equal to 20% of the compensation due and owing to claimant from the date claimant's compensation was terminated to the date of his order.

Claimant alleges she suffered an industrial injury on February 11, 1976 when she reached up, while feeding veneer into the dryer, and heard something pop in her right shoulder; she experienced immediate b urning pain. Claimant continued to work, but the pain became worse and two days later she couldn't raise her right arm. She informed her foreman and asked for another job; he put claimant on the automatic feeding dryer where all she had to do was watch the wood going into the dryer.

On February 16, 1976 claimant reported to the emergency room at the hospital where she was examined by Dr. Bills who diagnosed "Shoulder pain cause?" he put claimant's arm in a sling and referred her to Dr. Adams. Dr. Bills reported that the condition requiring his treatment was due to an industrial injury or exposure.

Dr. Adams diagnosed supraspinatous tendinitis and painful arc syndrome. On March 4, 1976 he diagnosed bicipital tendinitis and treated claimant with injections.

Claimant's claim was initially accepted by the employer but on April 20, 1976 it issued a denial for the reason that the condition for which claimant sought medical treatment did not arise out of and in the course of her employment with them.

On April 21, 1976 claimant had an exacerbation of her symptoms and Dr. Adams wrote to the claims manager for the employer stating in his opinion that claimant has never been completely well and "that the second episode is still related to the first".

Claimant was released, and returned, to work on July 6, 1976, feeding the dryer. After her injury, but prior to her return to work, claimant had commenced construction on a new home. She testified that she helped out at the site of the new home construction, doing the lighter tasks. A private investigator testified he observed claimant on six different days and took motion pictures of her activities. The films were run at the hearing and showed claimant shoveling trash into a wheel barrow pushing it, picking up boards and moving plywood sheets from one side of a haystack to another; all these movements were done below shoulder level.

The employer contends that these films destroyed claimant's credibility. The Referee did not agree. She found that the only medical evidence in the record was Dr. Adams' clear and uncontroverted opinion that claimant's arm and shoulder condition for which he treated claimant was related to her employment.

The Referee concluded, based upon the evidence presented at the hearing, that claimant did sustain a compensable injury which arose out of and in the course of her employment with the employer. She remanded the claim to the employer.

Claimant's claim was originally accepted and compensation paid to claimant. However, later the claim was denied and claimant's compensation was cut off as of April 20, 1976 prior to a response from Dr. Adams that employer's carrier had requested. On April 21, 1976 Dr. Adams responded, advising the carrier that claimant's treatment all related to the one episode which occurred at work in February, 1976. Therefore, the denial was not based on information received from the treating physician, nor any other doctor that would prove that claimant's condition was not compensable, nor was it based on the information of the private investigator because he did not observe claimant until April 22, 1976.

The Referee concluded she could find no rational basis for the employer's denial and, therefore, the action of the employer and its carrier was unreasonable and justified assessment of penalties and attorney fees. She assessed a penalty in the sum of 20% of the compensation due and owing claimant, and awarded claimant's attorney a fee of $1,000.

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

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 $400, payable by the employer.

VERA WENAUS, CLAIMANT
Thomas Howser, 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 granted claimant an additional 160°, giving her a total of 192° for unscheduled neck and vertigo disability. Claimant contends that she is permanently and totally disabled.

Claimant, age 63, sustained a compensable injury in August, 1970 while employed as a custodian-domestic worker she was struck on the head by a bulletin board. Orthopedically, claimant was found to have degenerative joint disease of the cervical spine aggravated by the industrial injury. On June 4, 1971 claimant's claim was closed by a Determination Order which granted her 32° for unscheduled neck disability.

After an extensive diagnostic workup it was found claimant had significant bilateral hearing loss; such condition was denied by the Fund but was subsequently overturned. Claimant, after the injury, also began experiencing vertigo. After testing, it was found claimant had a mild to moderate bilateral sensory neural hearing loss. Claimant's vertigo comes and goes. Stooping, bending and quick movements cause the dizziness.

A Second Determination Order of November 25, 1974 granted claimant an award of 37.44° for binaural hearing loss.

The Fund contends that claimant's cervical disability was unrelated to the industrial injury. Dr. Hagens, an orthopedist, who first examined claimant, found the narrowing of the C5-6 and C6-7 disc spaces was a result of degenerative change but that the injury aggravated this condition making it become symptomatic.

The Referee found that although the industrial injury was not wholly responsible for claimant's cervical problems, it did cause a material change of circumstances to occur which were related to the industrial injury and contributed to the neck symptoms claimant has had since June, 1971.

Since the injury claimant has sought employment at her old job, but was not rehired. She tried for five months to sell Avon products but could not continue because of the heavy bag of products she was required to carry; also climbing stairs and walking after dark effected her vertigo.

Dr. Thompson, a psychiatrist, examined claimant and found her depressed, anxious and easily startled. When startled claimant

would tremble visably and sometimes lose consciousness. Dr. Thompson felt the anxiety was related to her hearing loss; claimant would startle easily because she had no awareness of people approaching out of her line of vision. Dr. Thompson further opined that claimant's emotional problems were related to her injury.

Mr. Henderson, a professional employment consultant, felt, based on all of the testimony and the medical reports which he had read, that because of claimant's physical condition, work history, age and education, she was unemployable in the area where she resided. He further felt that because of her hearing loss and balance problem claimant probably could not be retrained for any work.

The Referee found nothing in the record which indicated claimant could not be retrained; at the hearing she demonstrated she could communicate and her physical condition did not prevent her from sitting for sustained periods of time. The evidence did, however, indicate that claimant cannot perform work involving bending, stooping, climbing, heavy lifting or walking in the dark.

The Referee concluded that claimant is now precluded from a large segment of the labor market and has lost a substantial loss of wage earning capacity. He granted her an award of 192° for 60% unscheduled neck and vertigo disability.

The Board, on de novo review, finds that claimant is now precluded, based on her age, education, physical impairment and work history, from being gainfully and regularly employed in any suitable occupation. Mr. Henderson, an employment specialist, found that her physical condition precluded her from returning to work or from being retrained. Also Dr. Cope, an eye, ear, nose and throat specialist, who examined claimant found her totally disabled due to her balance problems.

Therefore, the Board concludes, claimant is permanently and totally disabled.

ORDER

The order of the Referee, dated January 27, 1976, is modified.

Claimant is found to be permanently and totally disabled as of the date of this order.

Claimant's attorney is awarded, as a reasonable attorney fee for his services at this Board review, a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, to a maximum of $2,300.

WCB CASE NO. 76-6166 JUNE 28, 1977

LORA DAVIS, CLAIMANT
Peter Rudie, Claimant's Atty.
James Huegli, Defense Atty.
Order

On February 2, 1977 claimant's attorney wrote to the Workmen's Compensation Board, with copies to all interested parties, requesting Board review of the Referee's order entered in the above entitled matter on January 12, 1977. The envelope in which the request was enclosed bears a postmark of February 10, 1977.

On June 2, 1977 the employer's attorney asked the Board to be advised of the date the claimant's request for Board review was mailed. Inadvertantly, he was advised that it was mailed on February 14, 1977, actually this was the date the letter was received by the Board.

On June 15, 1977 the employer, relying upon this information, filed a motion for dismissal on the grounds that the request for review was not timely filed pursuant to ORS 656.295.

The Board finds that the claimant's request for review was timely filed as indicated by the postmark on the envelope in which it was enclosed and that all parties were properly served within the statutory period. The Board further finds that the only basis for the employer's motion for dismissal was the incorrect information furnished to it by the Board.

Therefore, the Board concludes that the motion for dismissal should be denied.

IT IS SO ORDERED.

WCB CASE NO. 76-1985 JUNE 28, 1977
WCB CASE NO. 76-3297

FLOYD MONROE, 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 remanded to the Fund claimant's claim for aggravation of his October 11, 1972 injury and affirmed the Fund's denial of claimant's claim for an alleged new injury in July, 1975.

Claimant suffered a sprained back on October 11, 1972 while employed by Special Products of Oregon, Inc.; he lost no time from work and was treated conservatively. This claim was closed as a "medical only".

On October 21, 1975 Dr. Schroeder, claimant's treating physician, informed the Fund that claimant had a herniated disc L5-S1 on the right and that claimant had suffered an aggravation of his 1972 injury. On November 7, 1975 the Fund denied claimant's claim for aggravation.

On December 26, 1975 claimant underwent surgery by Dr. Schroeder for a lumbar laminectomy.

On April 19, 1976 claimant filed a claim for a new injury on July 22, 1975 while working for Hamilton Construction Company, he also requested a hearing on the denial of his claim for aggravation. On June 11, 1976 the Fund denied claimant's claim for a new injury.

On August 2, 1976 Dr. Schroeder expressed his opinion that the original injury in October, 1972 probably was secondary to disc disease at L5-S1 but nothing in 1972 was obvious. The injury in July, 1975 would appear to have been an aggravation of that 1972 problem.

Claimant has had intermittant pain in his back since his injury of 1972. Claimant testified that at the time of the incident in 1975 he had had little pain but his back seemed to degenerate more rapidly afterwards and he finally had to seek medical care from Dr. Schroeder.

The Referee found the opinion of Dr. Schroeder, who performed the last operation, that claimant's problems were related to the 1972 injury was the most persuasive. He concluded claimant has suffered an aggravation of his 1972 injury. There was no evidence that the 1975 incident constituted a new injury, therefore, he affirmed the denial of that claim.

The Board, on de novo review, concurs with the findings and conclusions reached by the Referee. However, the Board finds that claimant suffered an intervening incident at home in March, 1975; but there is no medical evidence that either this accident at home or the incident on the job in July, 1975 materially contributed to claimant's present condition. Dr. Schreoder found all of claimant's problems were related to the 1972 industrial injury.

ORDER

The order of the Referee, dated October 28, 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 Fund.

DON SCHOOLER, CLAIMANT
Del Parks, Claimant's Atty.
James Gidley, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant requests review by the Board of the Referee's order which affirmed the denial of benefits to claimant.

Claimant, a 61 year old farm machinery service man, had developed a myocardial ischemia in August, 1974 with symptoms of transitory chest pain alleviated by rest and medication. He was seen by his family doctor. In October, 1975 while at work, claimant experienced chest pain several times. On October 12, 1975 he experienced chest pain four times while tossing twigs. However, on October 16, 1975 claimant and another employee had installed four tires on a large tractor and claimant had experienced no chest pains during this endeavor. Claimant went to bed at 9 p.m. and slept well; he had no chest pain.

On October 17, 1975, when claimant arrived at work at 7:45 he was advised that there was a broken water line and he was directed to repair it. Claimant drove a tractor, shoveled several small portions of wet, sticky, clay-like mud, made two cuts on the line with a hacksaw and did some splicing. He had one brief chest pain while shoveling. He then went to get some coffee and, without warning pain or symptoms, collapsed at the coffee site.

Claimant was hospitalized and examined by Dr. Conn who diagnosed myocardial infarction. Claimant underwent a coronary bypass surgery.

Dr. Conn testified at the hearing that claimant's work activity the morning of October 17, 1975 was a substantially contributing cause of the attack.

Dr. Wysham, a cardiovascular specialist, indicated in his reports of June 22 and October 27, 1976, after reviewing the medical records and statements of witnesses, that claimant did not have a heart attack but had experienced arrhythmia. He felt claimant's arrhythmia could have occurred at anytime and that it was only coincidental that it occurred at work. His opinion was that the work activity was not a contributing factor to the attack.

The Referee found that the key question was whether the exertion triggered the attack which caused claimant's collapse on October 17 and this is a medical question.

The evidence shows that claimant's shoveling activities were fairly light and were done over brief periods of time. There was

no chest pain during the time claimant was sawing or splicing, in fact, no pain for at least ten minutes before claimant collapsed. The Referee accepted Dr. Wysham's opinion both because of the facts and Dr. Wysham's expertise in the field of cardiology.

The Referee concluded that claimant had failed to carry his burden of proof that there was a causal relationship between his work activity and his heart problem. He affirmed the denial.

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

ORDER

The order of the Referee, dated December 20, 1976, is affirmed.

WCB CASE NO. 75-4852 JUNE 28, 1977

JEROME SHORT, CLAIMANT
Robert Morgan, 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 set aside the Determination Orders of October 21, 1975 and October 23, 1975; remanded claimant's claim to the employer to be accepted and to pay compensation for temporary total disability from October 10, 1975 through August 26, 1976 and for medical care and treatment until claimant is medically stationary.

Claimant contends he is entitled to continuing compensation for temporary total disability until he is medically stationary and his claim is closed pursuant to ORS 656.268.

Claimant reinjured his low back on November 6, 1974; he originally injured it on August 9, 1974 but recovered sufficiently from that injury to enable him to return to work. Subsequently, claimant underwent a laminectomy with removal of disc at L4-5, he has not returned to work.

Between June and August, 1975 Dr. Davis, Dr. Parsons, and Dr. Rankin examined claimant and none found evidence of significant organic problems. Dr. Rankin recommended claimant be given a psychological evaluation. This recommendation was not followed until after the claim had been closed by a Determination Order dated October 21, 1975, as amended on October 23, 1975, which awarded claimant compensation for time loss from November 6, 1974 through October 9, 1975.

On February 26, 1976 claimant was examined by the physicians at the Orthopaedic Consultants who felt claimant was not medically stationary and needed psychological evaluation.

On March 10, 1976 the Psychology Center reported moderately severe psychopathology related largely to the accident. Psychological counseling was recommended.

Meanwhile, claimant has been examined and/or treated by various physicians at UCLA and has improved somewhat. Dr. Anselen reported on September 3, 1976 that he had conducted psychological and neurological evaluations on claimant and found claimant suffering from depression, agitation, perplexity, phobias, etc. His motivation at that time was not too strong. Dr. Anselen recommended no active psychiatric treatment but did recommend a short course in physical therapy. He found the degree of neurological impairment between slight to moderate. Dr. Anselen thought claimant should discard his cane and could work, as of August 26, 1976, at semi-sedentary type work.

The Referee found that further treatment had been recommended by Dr. Anselen and the Determination Orders were premature. He found that claimant was entitled to additional compensation for temporary total disability from October 10, 1975 through August 26, 1976, the date both Dr. Anselen and Dr. Snyder agreed claimant was able to work. He further remanded the claim to the employer for acceptance of the recommended medical care and treatment until closure was authorized pursuant to ORS 656.268.

The Board, on de novo review, concurs with the Referee that the Determination Orders should be set aside. However, the Board finds that the medical evidence indicates claimant is not medically stationary according to the report from the Orthopaedic Consultants. Furthermore, Dr. Anselen said claimant could return to semi-sedentary type work, this is not a release to regular, gainful employment.

Therefore, the Board concludes claimant is not only entitled to medical care and treatment but also to compensation for temporary total disability from October 10, 1975 until his claim is closed purusant to ORS 656.268.

ORDER

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

Claimant's claim is remanded to the employer for acceptance and payment of compensation, as provided by law, commencing October 10, 1976 and until the claim is closed pursuant to ORS 656.268 and to furnish all medical care and treatment as recommended. This is in addition to the compensation granted by the Referee's order, which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney fee a sum equal to 25% of the compensation granted by this order, payable out of said compensation as paid, to a maximum of $2,300.

WCB CASE NO. 76-6988 JUNE 28, 1977

BILL STIFEL, CLAIMANT
Rolf Olson, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Amended Order Denying Motion

The Board entered an Order Denying Motion in the above entitled matter on June 21, 1977. In the fourth paragraph on page 1 of said order the date January 19, 1976 should be deleted and November 19, 1976 should be inserted in lieu thereof.

In all other respects the Order Denying Motion should be ratified and reaffirmed.

WCB CASE NO. 76-2793 JUNE 29, 1977

CLEO DAVIS, CLAIMANT
Rolf Olson, Claimant's Atty.
Ron Podnar, 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 ordered Employers Insurance of Wausau to pay claimant the sum of $1,614.28, the sum offset or reimbursed to Metropolitan Life Insurance Company and representing time loss benefits from January 5, 1976 to May 4, 1976; and directed it to pay claimant, as a penalty, an additional amount equal to 25% of the "temporary total disability benefits ordered payable to claimant noted in this order".

Claimant sustained an injury to his back and received payment of time loss benefits from Metropolitan Life Insurance Company, his employer's off-the-job carrier, from January 5, 1976 to May 4, 1976. In September, 1975 claimant filed a workmen's compensation claim for this back injury, including medical care he had received. This claim was denied by Employers Insurance of Wausau, the employer's workmen's compensation carrier and claimant requested a hearing. The claim was accepted as of January 5, 1976 pursuant to a stipulation approved on May 14, 1976.

Wausau then reimbursed Metropolitan for the time loss benefits it had paid claimant but Wausau had not received any request from claimant to pay Metropolitan, it did not have prior approval from claimant to make such reimbursement to Metropolitan and had not received a written request from Metropolitan for such reimbursement. It also was made without approval by claimant's attorney.

However, Wausau had a general working knowledge of off-the-job insurance policies, an understanding that Metropolitan was looking for reimbursement and a memorandum from an unidentified employee indicating that on May 4, 1976 this employee spoke to another employee and was apprised of the fact that claimant had received off-the-job group carrier benefits.

Wausau, at the time of the payment to Metropolitan, believed its action to be correct. Such understanding arose from a telephone conversation with a certain employee of the Workmen's Compensation Board. However, direct permission to make the reimbursement was not received from the Board.

A check was drawn by Wausau in the amount of $1,614.28 listing the payee as Caterpillar Tractor, of which the employer, Towmotor Corporation, is a subsidiary.

Claimant contends that the obligation imposed on Wausau was to pay him directly the sum it had paid to Metropolitan and that the carrier's failure to do so was gross misconduct and warranted the imposition of penalties and attorney fees.

The defendant contends that payment made by it to Metropolitan was justifiable because the carrier depended upon certain advice of the personnel of the Workmen's Compensation Board, that claimant has not been prejudiced because claimant owed such money to Metropolitan and it was, in fact, a convenience to claimant. Defendent states it followed its general policy with regard to reimbursement of off-the-job coverage by the carriers and, assuming claimant would not reimburse Metropolitan, the defendent has prevented an unjust enrichment.

The Referee found, based upon the evidence presented, that claimant has proven by a preponderance of the evidence his entitlement to time loss benefits in dispute of $1,614.28 from January 5, 1976 to May 4, 1976 by way of reimbursement. Furthermore, the Referee found claimant was entitled to penalties and attorney fees for Wausau's reimbursement to Metropolitan without the authorization of claimant and without written request from Metropolitan.

The Referee concluded that the conduct of Wausau, under the circumstances of this case, was unreasonable and he assessed a penalty in the sum of 25% of the temporary total disability ordered payable to claimant.

The Board, on de novo review, concurs with the Referee's finding that claimant should be reimbursed for the sums owing him in the amount of $1,614.28. However, the Board finds that the penalty assessed against Wausau was excessive. Wausau should not have paid Metropolitan without first getting the Board's permission but the fact that they did not do so does not justify a penalty greater than 10% of the temporary total disability due claimant.

ORDER

The order of the Referee, dated October 12, 1976, is hereby modified.

The Employers Insurance of Wausau is hereby ordered to pay claimant, as a penalty a sum equal to 10% of the temporary total disability benefits ordered payable from January 5, 1976 through May 4, 1976.

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 Employers Insurance of Wausau.

WCB CASE NO. 74-4690 JUNE 29, 1977

PETER J. GEIDL, CLAIMANT
and The Complying Status of
International Raceway Parks, Inc.
dba Portland International Raceway, Employer
Sanford Kowitt, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order on Reconsideration

The State Accident Insurance Fund's Motion for Reconsideration of the Board's Order on Review entered in the above entitled matter on February 25, 1976 was granted by Board order dated March 17, 1976. In that order the non-complying employer, International Raceway Parks, Inc., dba Portland International Raceway, was given 20 days within which to respond to the Fund's motion. The non-complying employer has not responded and the matter through inadvertance was filed as a "closed" case. The error was just discovered.

The only issue is whether or not the Fund in its duties to process the claim against an uninsured non-complying employer delegated to it by ORS 656.054 properly denied the claim of this claimant, necessitating the hearing and Board review for which claimant's attorney was awarded attorney fees.

The Referee's order provided that claimant's attorney fee should be paid by the Fund but were not recoverable from the non-complying employer, apparently on the theory that the Fund improperly handled the claim. The Board affirmed the Referee's order.

The employer, by and through its Oregon manager, Jim Rockstad, advised both the Board investigator (Employer's Exhibit 10) and the Fund investigator (Claimant's Exhibit 3) that the claimant in this case was definitely not an employee on the date of the injury. The Fund, relying on the representation of employer's manager, denied the claim. The claimant requested a hearing on the Fund's denial.

The employer's attorney prior to the hearing attempted to settle the matter with the claimant's attorney. The matter was not settled and employer's attorney appeared at the hearing alleging that the Fund had improperly denied the claim.

The employer's attorney could have at any time prior to the hearing stipulated with the claimant's attorney and Fund's attorney that the denial be withdrawn and the claim accepted. No need for a hearing would have occurred. Employer's attorney instead attempted to settle the case and when this did not work, appeared at the hearing blaming the Fund for denying the claim.

On reconsideration the Board finds that the Fund's denial of the claimant's claim was appropriate based on the representation of the employer that claimant was not in the scope of his employment on the date of the injury. The Board finds that the Fund properly processed the claim by denying it and the employer, in allowing the matter to go to a hearing, under the facts of this case, is liable for claimant's attorney fees.

ORDER

The Referee's order, dated September 23, 1975, is amended by deleting the last sentence of the last paragraph on page 5 and substituting in lieu thereof the following sentence:

> "This fee shall be recoverable from the non-complying employer, pursuant to ORS 656.054".

In all other respects the Referee's order of September 23, 1975 is affirmed, and claimant's counsel is awarded as a reasonable attorney fee for services in connection with this Board review a sum of $300, payable by the Fund and recoverable from the non-complying employer, pursuant to ORS 656.054.

RICHARD LEE MYERS, CLAIMANT
Roger Todd, Claimant's Atty.
Robert Walberg, 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.

Claimant alleges that the work he was doing on or about July 30, 1976 is compensably related to the low back condition for which he underwent surgery on September 23, 1976.

Claimant, a 38 year old air track operator, was required to install culverts during three or four days in July. This work required manual labor, heavy at times. Some of the work was done in ankle-deep mud and, on one occasion, at least, claimant had to use a jackhammer. A few days after this culvert work claimant experienced pain in his left leg down into the foot and his toes became numb. Claimant was seen by a physician on August 6 who diagnosed leg muscle strain.

Claimant's symptoms increased and in September, 1976 he saw Dr. Grieser who recommended bed rest. The symptoms were not relieved and surgery was performed on September 25, 1976.

Claimant had a pre-existing degenerative disease with considerable narrowing of L5-S1 disc spaces with several acute episodes of back pain over the last few years.

Claimant did not file a claim until September 8, 1976 because until he saw Dr. Grieser on September 2, 1976 he did not know that he had a serious problem.

The Referee found that claimant's attending doctor was of the opinion that the type of work claimant was performing while installing culverts caused an aggravation of his pre-existing condition. The Referee concluded that claimant's work was a material contributing factor the exacerbation of his pre-existing condition and he remanded the claim for acceptance.

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

ORDER

The order of the Referee, dated January 14, 1977, 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 employer.

WCB CASE NO. 76-4288 JUNE 29, 1977

ROLAND NEUBERGER, CLAIMANT
David Vinson, 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 affirmed the Determination Order of March 15, 1974.

Claimant, a 42 year old mill worker, sustained an industrial injury to his right hand on April 1, 1974 which resulted in partial degloving of all the fingers of the right hand.

Claimant was hospitalized and, on April 10, 1974, underwent surgery for debridement of the devitalized skin and amputation of the long finger. On April 18 abdominal pedicle flaps were attached to the fingers with skin grafts and further surgical repair was performed on April 25, May 2 and May 6, 1974. Claimant was left with residual limitation of function of the hand from loss of the fifth finger, most of the index finger, all of his long finger; the ring finger and thumb were stiff.

While hospitalized claimant complained of pain in the right upper back, neck, shoulder and elbow.

Claimant was examined by Dr. Cutler on April 22, 1975, he found moderate tenderness over the long finger amputation stump and the fifth finger amputation stump. The ring finger lacked complete flexion because of stiffness. On October 1, 1976 Dr. Cutler found no change but claimant was complaining of shoulder pain and he referred claimant to Dr. Rockey.

Dr. Rockey examined claimant on October 4, 1976 for chronic shoulder pain. He believed that claimant had some reactive bone formation in the greater tuberosity of his right humerus where he apparently had suffered a hemorrhage from a partial avulsion of the muscle at the time of the injury.

A Determination Order of March 15, 1976 granted claimant an award of 80% loss of the right hand for 128°.

A scheduled disability is measured by loss of function only. The Referee found claimant's only remaining functional fingers are the ring finger and his thumb on the right hand. However, these remaining fingers have limited ranges of motion.

The Referee concluded claimant still has some useful function of his thumb and ring finger and that claimant's loss of function of the right hand was no greater than 80% which he had already been awarded.

Concerning the alleged shoulder disability, claimant had first complained of shoulder pain when hospitalized. On October 1, 1976 when Dr. Cutler examined him Dr. Cutler believed the pain involved bursitis and referred claimant to Dr. Rockey who found claimant had suffered a shoulder injury at the time of his injury. Because claimant's injury was caused from a hemorrhage from a partial avulsion of the muscle in the greater tuberosity of the right humerus this would be considered a part of the shoulder and, therefore, the injury would be to the unscheduled area.

The Referee found that claimant has returned to the same job he had when injured and has lost no time from work due to this injury and has undergone no treatment since he had therapy. Claimant does suffer neck and right shoulder pain, however, to be compensable the pain must be disabling. In this case it is not. The Referee found claimant has had no loss of wage earning capacity, the sole basis for rating an unscheduled disability. He concluded claimant, therefore, was not entitled to an award for unscheduled disability.

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

ORDER

The order of the Referee, dated January 7, 1977, is affirmed.

WCB CASE NO. 77-1026 JUNE 29, 1977

WILLIAM PATTERSON, CLAIMANT
Gary Galton, 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 Opinion and Order entered in the above entitled matter on May 24, 1977 which dismissed claimant's request for hearing.

On August 27, 1976 claimant had requested the Board to exercise its own motion jurisdiction, pursuant to the provisions of ORS 656.278, and remand his claim for aggravation for an injury suffered on April 6, 1962 to the State Accident Insurance Fund for acceptance and payment of compensation for temporary total disability from May 22, 1974 until closure pursuant to ORS 656.278.

The Board, at that time, did not have sufficient evidence before it to decide the merits of claimant's request, therefore, by an order entered September 19, 1976, it referred the matter

to its Hearings Division to set for hearing and receive evidence on the issues of claimant's entitlement to have his claim reopened and receive compensation for temporary total disability and for the payment of a reasonable attorney fee to claimant's counsel. After the hearing the Referee was directed to submit his recommendations together with a transcript of the proceedings to the Board.

On December 23, 1976 Referee Forrest T. James, after holding a hearing on the matter on September 10, 1976, submitted his recommendations to the Board. He recommended that the Board order the claim reopened with temporary total disability paid claimant for periods specified in the body of his recommendation, to wit: from May 22, 1974 through November 5, 1974; from January 31, 1975 through June 23, 1975; and from August 20, 1975 through October 7, 1975, upon medical verification that claimant, during those periods, was unable to work because of the condition of his right lower extremity and resulting from his April 6, 1962 injury Referee James also recommended that the Board award claimant's counsel a reasonable attorney fee.

On January 5, 1977 the Board entered its Own Motion Order whereby it accepted the recommendations made by the Referee and ordered the claim remanded to the Fund for the payment of compensation for temporary total disability from May 22, 1974 through November 5, 1974 and from January 31, 1975 through June 23, 1975 and from August 20, 1975 through October 7, 1975 less time worked. The order allowed the Fund to offset against the payment of such compensation any payments of compensation for permanent partial disability which it may have made pursuant to the last closure of claimant's claim and awarded claimant's attorney as a reasonable attorney fee a sum equal to 25% of the compensation for temporary total disability granted by the order, payable out of said compensation as paid, not to exceed the sum of $300.

The record indicates that the Fund did not request a hearing on the Board's Own Motion Order within 30 days as provided by said order. The record further reveals that claimant received no compensation from the Fund after the issuance of said order.

The claimant, on February 23, 1977, requested a hearing, contending that he was entitled to assessment of penalties and an award of attorney fees because the Fund had failed to comply with the Own Motion Order and pay claimant the compensation directed thereby.

A hearing was convened before Referee Forrest T. James on May 23, 1977. At the hearing the Fund questioned the jurisdiction of the Referee. The Referee took notice of the fact that the Board's Own Motion Order had accepted his recommendation that temporary total disability be paid claimant for certain periods of time, upon medical verification that claimant, during these periods, was unable to work because of the condition of his right lower extremity and resulting from his April 6, 1962 injury but commented

that the Board, in its Own Motion Order of January 5, 1977, had ordered payment of compensation for the periods of time in question "less time worked".

The Referee stated that the Board's order was ambiguous when read in its entirety, that such ambiguity could have been resolved, when discovered, by request for clarification from the Board by one or both of the parties.

The Referee concluded that he lacked jurisdiction to construe (and thus perhaps modify) the Board's order and hence lacked jurisdiction at that point of time to hear the matter. He, therefore, dismissed claimant's request for hearing.

The Board, after de novo review of the record which consists of the Referee's Opinion and Order, briefs submitted in behalf of claimant and in behalf of the Fund and exhibits which were marked but not admitted (neither party had any objections to the Board considering the contents of said exhibits), finds that its Own Motion Order of January 5, 1977 is clear and explicit in its intent. The Fund was required to pay to claimant compensation for temporary total disability during three specific intervals of time, the commencement and termination of each period was set forth clearly with a proviso that payment of compensation to claimant would not be made for any periods of time during which he worked. Apparently, the Referee and the Fund had some difficulty in distinguishing between "upon medical verification that claimant, during these periods, was unable to work" and "less time worked". The Board finds it incredulous that a claimant was deprived of compensation awarded to him solely because of a dispute over semantics.

The Boards finds no evidence that, at any time, claimant refused to release to the Fund the medical records relating to his condition nor is there any evidence in the record that the Fund made any attempt to contact either claimant's treating physician or claimant himself to determine whether or not during these three specific periods of time claimant had been released to return to regular work or had returned to regular work. In fact, the record indicates that the Fund did absolutely nothing except, upon receipt of the Board's Own Motion Order of January 5, 1977, to prepare memoranda that the claim had been ordered reopened per Own Motion Order and apparently no appeal would be taken unless it was later advised to the contrary by the Assistant Attorney General representing the Fund.

The Fund states in its brief that it has been and is willing to pay compensation for the temporary total disability upon receipt of the medical verification. ORS 656.268 places the burden upon the Fund to properly process a workmen's claim. There is no evidence that the Fund made any attempt to do this in this case. Therefore, the Board requested a computation of the compensation due to claimant for the three specific periods of time be made by its own Compliance Division. The Board has assumed, no

evidence to the contrary, that claimant was unable to work during any of the three specified intervals of time.

The Compliance Division has computed the amount due to claimant, applying the appropriate statutory rate and also the retroactive reserve amounts due. Claimant is entitled to $3,004.80 for the period between May 22, 1974 and November 5, 1974; he is entitled to $2,554.08 for the period between January 31, 1975 and June 23, 1975 and he is entitled to $884.27 for the period of time between August 20, 1975 and October 7, 1975, a total of $6,443.15.

The Board concludes that the Fund should pay claimant the sum of $6,443.15, however, it should be allowed to offset against this amount any payments of compensation for permanent partial disability which it may have made pursuant to the last closure of claimant's claim.

The Board further concludes that the failure of the Fund to comply with the Own Motion Order of January 5, 1977 constitutes unreasonable resistance to the payment of compensation and subjects the Fund to assessment of a penalty against it and requires the Fund to pay claimant a reasonable attorney fee.

In conclusion the Board wishes to comment that it is completely perplexed by the statement made by the Referee that he lacked jurisdiction solely because he was unable to understand the Board's Own Motion Order.

ORDER

The order of the Referee, dated May 24, 1977, is reversed.

The State Accident Insurance Fund is hereby ordered to pay to claimant the sum of $6,443.15, less any payments of compensation which it may have made to claimant for permanent partial disability pursuant to the last closure of claimant's claim.

The State Accident Insurance Fund is hereby ordered to pay to claimant an additional sum in an amount equal to 25% of the compensation which is now due and owing to claimant as a result of this order.

Claimant's counsel is awarded, pursuant to ORS 656.382(1), a reasonable attorney fee in the amount of $1500 to be paid by the State Accident Insurance Fund.

DALE CARLILE, CLAIMANT
and In the Complying Status of
Carroll Greeninger, Employer
Ronald Miller, Claimant's Atty.
Dept. of Justice, 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 the claim to it and the Fund for acceptance and payment of compensation, as provided by law.

The question to be resolved is whether or not claimant was a subject employee under the Workmen's Compensation Act or an independent contractor and whether or not Mr. Greeninger was a subject non-complying employer.

It is not disputed that the claimant sustained an injury while working for the alleged employer while falling and bucking timber on January 9, 1976.

Originally, the parties had met at a restaurant in Astoria and claimant and a Mr. Harris had agreed to cut alder wood, to fall and buck the wood into 20 inch lengths for $8 a cord. Claimant and Harris were to furnish their own saws and equipment and the employer was to have a truck on the premises that could be used in the event any of the trees had to be dragged after they were felled. The alleged employer testified that in the event claimant and harris decided to hire any help they would have to pay such help out of their $8 a cord. There was no deduction for workmen's compensation benefits.

According to the testimony of claimant and Harris, the alleged employer designated where they were to cut first. After claimant's injury he never returned to work but he testified that he and the alleged employer had talked about steady work and the alleged employer had said that would be fine if he could purchase an amount of timber. The alleged employer testified that contrary to claimant's testimony he did not agree to hire claimant because he had no money to do so.

The alleged employer further testified that on the day following claimant's injury he terminated claimant and Harris because it was too wet to get the wood out; also he had no financial backing.

Mr. Smith testified that the working relationship was terminated because George Braugh had withdrawn his finances.

The Referee found that the solution to this case was the Court's ruling in Woody V Weibel, 276 Or 189. In the present case the employer did exercise control to some degree, therefore, claimant was a subject employee and Mr. Greeninger was a subject employer, although non-complying.

The Board, on de novo review, finds that the facts in Woody differs from the facts in this case. First, in Woody the Court found that the transportation of timber was an essential and regular part of the employer's primary business of logging. Certain aspects of the job required close cooperation between the claimant and the employees of the employer. The claimant was hired on a continued basis. In this case Mr. Greeninger's primary business was not logging, it was merely a sideline which sometimes provided him with extra money. Secondly, claimant was not hired on a regular and continous basis, the employer did not fix claimant's hours of work, claimant furnished the equipment necessary and the employer exercised no control over claimant's method of work or the area in which he worked. This was simply a contract for completion of one particular job.

The Board concludes that claimant was an independent contractor and not a subject employee as defined by ORS 656.027 (3) (a).

ORDER

The order of the Referee, dated January 11, 1977, is reversed.

Claimant's claim for an industrial injury of January 9, 1976 is hereby denied.

WCB CASE NO. 76-943 JUNE 30, 1977

VELMA DANIEL, CLAIMANT
Daryll Klein, Claimant's Atty.
Dept. of Justice, Defense Atty.
Amended Order on Review

Reviewed by Board Members Wilson and Moore.

On June 15, 1977 the Board entered its Order on Review in the above entitled matter. The Board, on its de novo review, neglected to state its conclusions with respect to the extent of claimant's disability, an alternative issue raised at the hearing before the Referee. Therefore, the order is amended by inserting after the fourth complete paragraph on page 2 of said order, the following paragraph:

"The Board, based upon all of the medical evidence, finds that claimant has been adequately compensated for her loss of wage earning capacity by the previous awards which total 32° for 10% of the maximum allowable for unscheduled disability".

In all other respects the Order on Review entered in the above entitled matter on June 15, 1977 is hereby ratified and reaffirmed.

SAIF CLAIM NO. HC 58084 JUNE 30, 1977

JACK FISHER, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on January 31, 1967 when he hit a limb with a machete causing a sudden hyperextension of his right elbow. Claimant was examined by Dr. Forinash who diagnosed strain right muscle insertion. Claimant received physiotherapy and medication.

Claimant was referred to Dr. Robinson who diagnosed ligament injured in cubital area, right elbow. After injections claimant developed dermatitis as a result of being allergic to the medication.

On August 5, 1967 claimant returned to work; on August 31, 1967 claimant saw Dr. Fisher complaining of pain in the right elbow. Claimant continued to work while being treated. On December 16, 1967 Dr. Fisher found claimant to be medically stationary with no permanent partial disability.

A Determination Order of February 23, 1968 granted claimant an award of 5% loss of use of the right arm.

In March, 1968 claimant again returned to Dr. Fisher. Later he saw Dr. Puziss, a medical examiner with the Fund, who referred him to Dr. Mueller. Claimant was under Dr. Mueller's care until July 5, 1968 when he obtained a supervisory position which required less strenuous use of his arms. A 2nd Determination Order granted no additional award for time loss or permanent partial disability.

In October, 1968 claimant saw Dr. Mueller, who, on December 16, 1968 performed surgery for exploration of biceps tendon and found scarred biceps aponeurosis, which he removed.

Claimant returned to work on January 27, 1969 and continued treatment with Dr. Mueller. His claim was closed in September, 1969 with an additional award for time loss and an additional award of 15° for a total 22° for partial loss of use of the right arm.

In May, 1976 claimant began experiencing increased pain in the right elbow with numbness of the 4th and 5th fingers. Claimant was referred to Dr. Misko who performed surgery for transposition of the right ulnar nerve.

Claimant returned to work on April 25, 1977. A closing examination of June 14, 1977 by Dr. Misko indicated no numbness in the ulnar nerve distribution, or weakness; good strength in the right hand and no loss of sensation, but persistent pain in the antecubital fossa on the right with heavy lifting.

On June 17, 1977 the Fund requested a determination. The Evaluation Division of the Board recommended claimant be granted compensation for temporary total disability from March 16, 1977 through April 24, 1977, 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 March 16, 1977 through April 24, 1977.

WCB CASE NO. 76-2821 JUNE 30, 1977

OTIS HUBBS, CLAIMANT
Robert Lucas, 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 denial of claimant's claim.

On May 5, 1976 claimant was working on a planer chain, he left work shortly after the shift began and was seen later that day by Dr. Tager who treated him for a fractured metatarsal on his right foot and for lumbosacral strain. On the same day, claimant returned to the employerand reported an on-the-job injury. Before leaving work that morning claimant had had a conversation with his leadman. The conversation is in dispute and the employer's version is important to the denial of the claim.

Claimant testified that he told his leadman that he hurt his foot and was leaving work to see a doctor to which the leadman merely nodded his assent. The leadman testified that claimant reported he couldn't take the work and would have to be replaced on the chain; he then left work without saying anything about an accident.

The Referee found that the chronology of the known events of the day tended to support claimant's claim. However, at the hearing on November 10, 1976, claimant demonstrated to the Referee that his toes were slightly still cocked upward and were noticeably bluish in coloration at the base of his toes and he blamed this on the accident. A medical report from Dr. Tager reports that claimant was last seen by him on June 7 at which time claimant's foot was healed but he was still having some back discomfort.

The Referee concluded that claimant's credibility was discredited by his attempt to foist his bruises upon the Referee as evidence of an injured foot that had healed some five months prior to the hearing and, therefore, the evidence in favor of the employer should be accorded more weight. He sustained the denial.

The Board, on de novo review, makes the same conclusion reached by the Referee but not because of claimant's lack of credibility. The Board finds, based solely on the medical evidence, that claimant had not suffered any on-the-job injury on May 5, 1976.

ORDER

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

WCB CASE NO. 76-847 JUNE 30, 1977

DAVID JOHNSTON, DECEASED
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 by the Board of the Referee's order which remanded the claim for widow's benefits to it for acceptance and the payment of compensation as provided by law.

David Johnston was fatally injured in the course of his employment on October 7, 1975. Claimant alleges she is entitled to widow's benefits under the compensation law as a common-law wife of the deceased. Her entitlement to these benefits is the sole issue in this case.

The decedent had met claimant after her graduation from the 8th grade on June 9, 1974. A week later they had commenced living together. During this period claimant and the decedent had held themselves out as man and wife and had referred to each other as such and had been regarded by their friends as married.

In early November, 1974 the decedent had called claimant and asked her to meet him in Sacramento where they would procede to Colorado where decedent was to get work. Claimant went to Sacramento and she and the decedent had driven to Denver, Colorado and moved in with Joe and Shirley Ramiriz.

Arriving at the Ramiriz's the decedent had introduced claimant as his wife, and Mrs. Ramiriz, the decedent's mother, introduced claimant as her daughter-in-law. Mr. Ramiriz secured a job for the decedent at Engine Rebuilders in Denver in January, 1975. Claimant and decedent had applied, as man and wife, for food stamps.

Patricia Johnston, sister of the decedent, testified that decedent had introduced claimant as his wife and that claimant was his wife and that claimant was generally known as David's wife to the family and friends who came to the Ramiriz home. Claimant became pregnant, and the sister testified that the family was excited and accepted that it would be a grandchild.

There is no question that the child born of this pregnancy was the child of the decedent. In early March, 1975 claimant decided to return to Oregon to have her baby. In the early part of April, decedent had joined claimant. Mrs. Ramiriz testified decedent had missed claimant so much he had quit his job and had followed her to Oregon.

Claimant and decedent had lived in an apartment and decedent had obtained employment. The child was born August 22, 1975. The birth certificate indicates the child's name was Amanda Lea Johnston born to Mr. David Johnston and Ms. Terry Jordan. Claimant testified she did not provide the information for the birth certificate.

ORS 656.226 provides that if an unmarried man and unmarried woman have cohabitated in this state as husband and wife for over one year prior to the date of the injury received by the man, and children are living as a result of that relationship, the woman and children are entitled to compensation. Claimant and the decedent had not cohabitated for over a year prior to the death of the decedent in Oregon, therefore, claimant would not be entitled to the benefits under this provision.

The state of Oregon will recognize a common-law marriage if such marriage is consummated in another state which recognizes such marriages as valid.

In order for claimant to prevail she must establish that a valid common-law marriage had been effected between her and the

decedent in a state recognizing such marriages. Colorado recognizes common-law marriages.

Colorado law requires that (1) the parties be capable of contracting a marriage relationship; (2) that the parties agreed and consented to be husband and wife; (3) that they cohabitated thereafter as husband and wife, and (4) that their reputation in the neighborhood was that of man and wife.

The Referee found that both claimant and the decedent had, while in Colorado, met all these requirements, and he concluded that the totality of the evidence supported a finding that the common-law marriage in the state of Colorado has to be, and was, accepted as a valid marriage in the state of Oregon and claimant is entitled to widow's benefits under Oregon law.

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

ORDER

The order of the Referee, dated December 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 employer.

WCB CASE NO. 76-2191-NC JUNE 30, 1977

THEODORE KLEBE, CLAIMANT
and In the Complying Status of
Fritz Meyer dba Stagecoach of America
John Sidman, Claimant's Atty.
Charles Cusick, Employer's Atty.
Carl Davis, Defense Atty.

Reviewed by Board Members Wilson and Phillips.

The alleged employer requests review by the Board of the Referee's order which found it to be a non-complying employer and sustained the Workmen's Compensation Board's Proposed and Final Order dated April 2, 1976 in its entirety.

Claimant sustained an injury on November 19, 1975 when a stagecoach ran over him at the Lloyd Center. There is no dispute as to the injury or in the manner in which it occurred.

The sole issue is whether a relationship of employer-employee existed between the defedent and claimant.

The defendent, Mr. Meyer, alleges that at the time of claimant's injury he and claimant were engaged in a joint venture.

The defendent had conceived an idea of purchasing an "old west" stagecoach and gathering together horses, equipment and personnel so that a trek could be made through various states in behalf of the Bicentennial. Defendent intended to obtain sponsors so that he could recover his investment and pay the other people involved salaries. Several oil companies expressed an interest in becoming sponsors and there was a substantial amount of correspondence over a substantial period of time concerning this sponsorship. No sponsor was ever obtained.

Defendent had contacted claimant and his wife and proposed that if they would furnish a team of horses to draw the wagon and both actively participate he would pay them $1,000 a month, plus expenses. Employment contracts were drawn up but were never signed. There were also articles of incorporation but, like the employment contract, these were not completed. Defendent obtained a public liability insurance policy with himself and his assumed business name firm shown as the sole and only insured.

Defendent testified that once he was certain that there would be no sponsor he advised all concerned that they commence on the scheduled route anyway, solicit contributors as they progressed and all would share equally.

Claimant's wife did not believe that this situation was workable and refused to leave unless an employment contract was signed. Claimant testified that he had put substantial time into this situation and he felt if he did not go along his time would be lost.

Wilson Wewa, a member of the Paiute Indian Tribe, who had direct negotiations with Mr. Meyer, testified he had agreed to become part of the group for $600 a month. He had trouble pinning Mr. Meyer down and was upset that no employment contract was signed but he testified he expected to be paid. Two weeks after the accident he pulled out.

The Referee found that there was never a true partnership or joint venture committment between the parties. There was no sharing of responsibility or sharing of profit or losses, in fact, the most important things were done by the defendent without consulting claimant or the others.

The defendent terminated one member of the group on his own; he negotiated with Mr. Wewa on his own, and he, alone, made the decision not to cover the operation with compensation insurance. He, on his own, sought and obtained a public liability insurance policy and never disclosed to the carrier that he had partners or was engaged in a joint venture. The defendent conceived this

plan with the idea of it being a profit-making operation as indicated by corporation papers which, although not completed, indicated a non-profit operation was not intended.

The Referee concluded that the Proposed and Final Order of the Workmen's Compensation Board dated April 2, 1976 should be sustained in its entirey because the defendent had not met his burden of disproving that an employer-employee relationship existed.

The Board, on de novo review, finds, as did the Referee, that claimant, Theodore Klebe was a subject employee of Fritz Meyer dba Stagecoach of America on the date and time of his injury on November 19, 1975 and that the subject employer, Fritz Meyer, was a non-complying employer at that time.

ORDER

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

Claimant's attorney, John Sidman, was awarded attorney fees in the amount of $600 payable by the Fund and recoverable from the employer pursuant to ORS 656.054.

Claimant's attorney is awarded attorney fees in the amount of $300 for his services at Board review, as a reasonable attorney fee, payable by the Fund and recoverable from the employer pursuant to ORS 656.054.

WCB CASE NO. 76-322 JUNE 30, 1977

PHILLIP MYERS, CLAIMANT
James Larson, 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 affirming the Determination Order of February 6, 1976 which awarded compensation for 30% loss of each hand. Claimant contends he also has suffered disability to his feet and that he is permanently and totally disabled.

Claimant, a 57 year old truck driver, sustained frostbite to the fingers of both hands on December 4, 1972. Claimant came under the care of Dr. Whitcomb. In February, 1973 claimant had only mild residual trophic changes of the skin and stiffness of the finger joints. Recovery was slow and claimant had marked sensitivity to cold despite wearing gloves as a precaution. Claimant was

returned to work on a trial basis on May 13, 1974. Dr. Whitcomb indicated claimant would always have hand symptoms during cold weather.

Dr. Nathan examined claimant on February 26, 1975, claimant was complaining of loss of feeling in the fingertips, inability to stand cold, yellowing of the hands, and numbness at night. Dr. Nathan diagnosed an underlying problem of peripheral vascular disease; and felt claimant could be gainfully employed.

Dr. Matheson examined claimant on April 22, 1975, he had complaints of his hands and feet being cold, and very painful if he attempted to work. Dr. Matheson found 25% disability of each hand.

Dr. Brokken, who first examined claimant on December 9, 1972, saw claimant on April 23, 1975 and diagnosed vasospasm phenomenon, related to the intense cold injury.

Dr. Rosenbaum examined claimant on July 15, 1975 and diagnosed Reynaud's phenomenon which he felt was not caused by the accident but was seriously aggravated by the freezing injury.

On December 1, 1975 Dr. Matheson examined claimant again and found the hands easily traumatized and slow to heal. He agreed there was some underlying generalized arteriosclerosis and vasicular insufficiency, probably aggravated by heavy cigarette smoking; he felt claimant would have slow general deterioration.

On December 31, 1975 claimant was hospitalized. The diagnosis was chronic obstructive pulmonary disease with fibrosis.

Dr. Brokken felt claimant could not work any more because of his cold injury and his pulmonary disease. He felt that the Reynaud-like phenomenon of the hands was due to the cold injury.

Dr. Bangs, who examined claimant, felt he was incapacitated because of his vasospastic phenomenon, secondary to frostbite; this problem is generally a lifetime problem and claimant would be incapable of any work involving the use of his hands or exposure to cold weather. Dr. Bangs concluded that claimant's injury was a direct material contributing cause to his current symptoms and disability in his hands. He found no evidence that claimant's feet were involved in the injury of December 4, 1972.

Before the industrial injury claimant had worked as a truck driver with no apparent difficulty. He quit smoking in the spring of 1976. Claimant's claim was closed by a Determination Order on February 6, 1976 which granted him awards for 30% loss of the right and 30% loss of the left hand.

The Referee found the Fund had denied responsibility for any disability other than to the hands. The medical evidence indicates claimant suffers from underlying generalized condition which causes slow deterioration. Dr. Matheson, Dr. Brokken and Dr. Rosenbaum

all found that the injury was limited to impairment of the hands and the Referee found no medical evidence of any disability to any other area of the body except the hands as a result of the industrial injury.

On the issue of extent of disability, the Referee found that Dr. Nathan in February, 1975 was of the opinion that claimant could be gainfully employed and had an impairment of 10% of each hand. Dr. Matheson in April, 1976 found 25% impairment in each hand.

The Referee concluded, based upon the medical evidence, and having seen and heard the claimant, that the awards granted by the Determination Order of February 6, 1976 must be affirmed.

The Board, on de novo review, finds that the totality of the evidence indicates claimant has lost 100% function of both hands, which permanently incapacitates him from performing work in any gainful and suitable occupation. The Board concludes that claimant is permanently and totally disabled under the provisions of ORS 656.206(1) which were in effect on the date of claimant's injury.

ORDER

The order of the Referee, dated September 28, 1976, is reversed.

Claimant is found to be permanently and totally disabled as of the date of this order.

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 $2,300.

WCB CASE NO. 76-4532 JUNE 30, 1977

STEVEN PARKER, CLAIMANT
Richard Sly, 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 granted claimant an award of 32° for 10% unscheduled low back disability.

Claimant contends he is entitled to compensation for temporary total disability from February 25, 1976 forward, because his

claim was prematurely closed and because he has suffered an aggravation prior to final closure by Amended Determination Order of May 5, 1976; that he is entitled to penalties and attorney fees for employer's delay in and ultimate denial of payment of compensation for his aggravated condition, and that the award for permanent partial disability granted by the Referee is inadequate.

Claimant sustained a compensable injury to his back on August 26, 1974, diagnosed as lumbosacral strain with functional overlay. On March 21, 1975 claimant's physician found him to be medically stationary but because claimant did not seem able to do the heavy work required by his job at ESCO and was interested in being retrained in the field of communications, he recommended the Disability Prevention Division evaluate claimant.

On April 24, 1975 claimant was examined by Dr. Van Osdel at the Disability Prevention Division who indicated claimant had been working part-time to enable him to attend Portland Community College, taking a communications course, prior to the injury and he had hoped the Vocational Rehabilitation Division would help put him through college. Claimant was found eligible for vocational rehabilitation retraining on the basis of significant medical impairment, diagnosed as chronic low back syndrome.

Claimant's retraining program was terminated after claimant, in the opinion of the vocational rehabilitation personnel, failed to accomplish the goals set up for the first term.

A followup examination at the Disability Prevention Division on May 27, 1975 indicated claimant had a strain of the lumbar muscles and ligaments superimposed on asymmetrical facets at the three lower levels as well as osteoarthritis of the lumbo-sacral facets with early degenerative disc disease of the lumbo-sacral joint with transitional S-1. Claimant had moderately severe character disorder with immaturity in a manic individual.

A Determination Order of March 10, 1976 granted claimant compensation for time loss only, this Determination Order was amended on May 5, 1976 and granted claimant additional compensation for time loss. The Determination Order of March 10, 1976 found claimant medically stationary as of March 21, 1975.

Claimant subsequently saw Dr. Hickman for evaluation; Dr. Hickman opined that the claim was closed prematurely, and should be reopened for psychotherapy.

Claimant was then examined by Dr. Cherry who prescribed pain medication and concluded claimant had considerable disability; that claimant's case should be reopened so that he could return to school.

By report of September 9, 1976 Dr. Hickman stated claimant had severe and chronic psychological problems, minimally aggravated by this industrial injury.

The Referee found claimant had not met his burden of proving that his claim was prematurely closed. He found that the totality of the evidence was that claimant is an immature young man with minor back problems which he is trying to use to obtain a longstanding desire to become educated in the communications and T.V. field. The Referee further found that ESCO had light work available to claimant which would have paid as much as he was getting at the time of his injury, but that claimant did not pursue it.

The Referee concluded claimant did have a chronic back strain as a result of the injury and did suffer minor disability. He granted claimant an award of 32° for 10% unscheduled back disability.

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

ORDER

The order of the Referee, dated January 19, 1977, is affirmed.

WCB CASE NO. 71-1513 JUNE 30, 1977

MARJORIE L. PETERSEN, CLAIMANT
Susan Reese, Claimant's Atty.
Merlin Miller, Defense Atty.
Own Motion Order Referred for Hearing

On March 17, 1977 claimant, by and through her attorney, requested the Board to exercise its own motin jurisdiction, pursuant to ORS 656.278 and reopen her claim for an industrial injury suffered on October 4, 1968 while in the employ of Tektronics, whose workmen's compensation coverage was provided by The Travelers Insurance Company. Claimant had been awarded 148° for unscheduled back disability by the Referee which award was ultimately affirmed by the Court of Appeals. Petersen v Travelers Insurance, 21 Or App 637.

On January 19, 1976 claimant alleges she suffered a compensable injury while in the employ of J. C. Penney Company, whose workmen's compensation coverage was furnished by Liberty Mutual Insurance Company. Her claim was denied and claimant requested a hearing (WCB Case No. 76-3223).

On June 24, 1977 claimant's attorney requested that claimant's request for own motion relief be referred by the Board to its Hearings Division to be heard at the same time as the claimant's hearing on the denial of her 1976 claim, and that Tektronics and its carrier, The Travelers Insurance Company, be joined for the purpose of said consolidated hearing.

The Board, after due consideration, concludes that claimant's request that the Board reopen her claim for the October 4, 1968 injury should be referred to the Hearings Division with instructions to set the matter down to be heard at the same time as the propriety of the denial of claimant's claim for an injury suffered on January 19, 1976.

The Referee is directed to take evidence on the merits of claimant's request to reopen her 1968 claim and, should he find that claimant's condition at the present time is directly related to her October 4, 1968 injury and represents a worsening since the date of the last award or arrangement of compensation upon conclusion of the hearing, he shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendation relating to claimant's request for own motion relief.

If the Referee should find, however, that claimant's present condition is the result of an incident which occurred on January 19, 1976 then he shall issue his Opinion and Order on the compensability of such injury, said Opinion and Order to be separate and apart from the recommendation which he may desire to make with respect to the claimant's request for own motion relief.

SAIF CLAIM NO. KB 53968 JUNE 30, 1977

JUDITH PHIPPS, CLAIMANT
Donald Yokom, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on April 8, 1964, suffering an acute lumbar strain. On August 27, 1964 a laminectomy was performed. A fusion, though indicated, was not performed because claimant was pregnant. A Determination Order of March 15, 1965 granted claimant an award for 15% loss of function of an arm for unscheduled disability.

Claimant's claim was reopened for a fusion of L5-S1 on June 20, 1966. On October 8, 1968 repair was done for pseudo-arthrosis. In May, 1968 a cluneal neurectomy was performed at the donor area. Dr. Smith then recommended a total award for 25%. On July 30, 1969 claimant's claim was closed with an additional award for 10%, giving claimant awards totalling 25% of the maximum for unscheduled disability.

Claimant contacted her physician again on June 24, 1974 for a back injection and another cluneal neurectomy. In February, 1975 claimant was hospitalized for intensive treatment.

Dr. Lahiri recommended claimant be enrolled at the Portland Pain Rehabilitation Center for evaluation. The Fund voluntarily reopened claimant's claim for this evaluation. Claimant was discharged from the Center on February 6, 1976 and Dr. Russakov had indicated claimant was doing extremely well and was active at home and doing bookkeeping work for her husband's business.

Although the Fund had agreed to pay time loss while claimant was at the Pain Clinic and to pay her medical bills, claimant, on November 1, 1976, asked the Board to exercise its own motion jurisdiction and reopen her claim, contending her condition had worsened. The Board referred the request for a hearing and, after the hearing, the Referee recommended that the Fund accept the claim and pay claimant benefits to which she was entitled, including compensation for temporary total disability from September 2, 1975. The Board adopted the Referee's recommendation by its Board's Own Motion Order dated May 17, 1977.

On May 23, 1977 the Fund requested a determination. The Evaluation Division of the Board recommends claimant be granted an additional award for 15%, giving claimant a total award for 40% of the maximum for unscheduled disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted an award for 15% of the maximum allowed for unscheduled disability. This award of compensation is in addition to all previous awards granted to claimant for her April 8, 1964 injury. All compensation for temporary total disability ordered to be paid claimant from September 2, 1975 until the date her claim was closed pursuant to ORS 656.278 shall also be paid.

Claimant's attorney shall be allowed as a reasonable attorney fee a sum equal to 25% of the compensation for permanent partial disability granted to claimant by this order, payable out of said compensation as paid, to a maximum of $2,300.

WCB CASE NO. 76-5409 JUNE 30, 1977

GEORGIANN SHOFFITT, CLAIMANT
Peter Hansen, Claimant's Atty.
Douglas Gordon, 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 claimant's claim for aggravation.

Claimant sustained a compensable injury on April 29, 1975. A Determination Order of August 26, 1976 granted claimant an award of 32° for 10% unscheduled disability. Claimant appealed, stating this award was inadequate and further contending she was entitled to temporary total disability compensation from July 28, 1976 to October 26, 1976 and to penalties and attorney fees for alleged failure to pay promptly or in the full amount.

The employer issued a denial on October 22, 1976, denying responsibility for any period of alleged aggravation. This was based on the reports of Dr. Cohen, claimant's treating physician, dated July 27, 1976 and October 18, 1976 which indicated that claimant had been found to be medically stationary during all pertinent periods of time.

Dr. Olsen, the company doctor, submitted a report indicating it was claimant's opinion that she was unable to work. This is the only medical report even suggestive of a period of compensation for temporary total disability. The Referee ruled at the hearing that this medical report did not constitute a notice to the employer of a claim for aggravation, therefore, no claim for aggravation had been made. The employer was under no obligation to pay compensation for temporary total disability. The Referee affirmed the denial of claimant's claim.

On the issue of extent of permanent partial disability the Referee found that the appeal of the Determination Order was premature as Dr. Cohen had found claimant could not return to her previous employment and needed vocational rehabilitation.

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

ORDER

The order of the Referee, dated December 15, 1976, is affirmed.

WCB CASE NO. 76-1004 JUNE 30, 1977

CLYDE VACHTER, CLAIMANT
J. David Kryger, Claimant's Atty.
Dept. of Justice, 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 found claimant to be permanently and totally disabled.

Claimant sustained an industrial injury to his back on October 10, 1975, diagnosed as a fracture of the T7 vertebra. Claimant was referred to two or three doctors for various types of treatment; during this treatment period a condition of multiple myeloma was discovered. This condition was denied by the Fund.

Claimant, at the present time, is totally disabled. He has tried to return to work since the injury but without success. He has multiple physical problems at the present time.

The question is: how much of claimant's condition can be attributed to the myeloma, which is not connected to his industrial injury, and how much to his back injury itself? Dr. Granatir, who was deposed, stated that, at this time, claimant's symptoms are due to his fracture. The compression fracture of the vertebra is permanent and causes a loss of height and limited back motion. Dr. Granatir defined multiple myeloma as a neoplastic disorder of the plasma cells which are primarily found in bone marrow, they circulate throughout the body, the main source and supply is in the bone marrow. The cells become undifferentiated, they start dividing in an uncontrolled rate.

Dr. Granatir went on to say that claimant's multiple myeloma pre-existed his industrial injury. It is a progressive disease and will continue to worsen. The myeloma weakened claimant's bone condition and made his back more susceptible to a compression fracture. He indicated that it was the condition of multiple myeloma which makes claimant unable to work at this time, however, claimant's myeloma is presently under control, therefore, he has no symptomatology from this condition. His symptoms of pain in his back are due to the fracture which will not heal properly because of his condition of multiple myeloma.

The Referee found it extremely difficult to separate the fracture claimant had suffered at the time of his industrial injury from his myeloma which pre-existed the injury. The claimant would have been permanently and totally disabled within six months because of his myeloma, however, he did suffer a fractured back which would have healed except for the pre-existing condition.

Though claimant is now permanently and totally disabled primarily from the myeloma condition, nevertheless, the injury which fractured his back hastened claimant's permanent total disability.

The Referee concluded that the fracture and the multiple myeloma condition have combined to make claimant permanently and totally disabled.

The Board, on de novo review, concurs with the conclusions reached by the Referee. The Board finds that if an industrial injury, minor though it was, hastens the permanent total disability resulting from the myeloma, then it is the responsibility of the carrier.

ORDER

The order of the Referee, dated January 10, 1977, is affirmed.

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

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