VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

Robert VanNatta, Editor

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VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

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

PRICE FIFTY DOLLARS

SAIF CLAIM NO. BB 16675 JULY 1, 1977

JERL H. CHRISTIAN, CLAIMANT
James Larson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Own Motion Order

On January 13, 1977 the claimant, by and through his attorney, requested the Board to reopen his claim for a compensable injury suffered on September 10, 1973 through the exercise of its own motion jurisdiction granted by ORS 656.278. Claimant's claim had been closed, initially, by a Determination Order mailed March 30, 1966 and his aggravation rights had expired at the time of his request.

Both the claimant and the Fund furnished the Board medical evidence relating to claimant's condition, however, the Board found the medical evidence to be conflicting and concluded that it would be in the best interest of all parties concerned to refer the matter to its Hearings Division with instructions to hold a hearing and take evidence on the issue of claimant's present condition as it relates to his compensable injury of September 10, 1973.

By order dated February 24, 1977 the matter was referred to the Hearings Division and the Referee directed, upon conclusion of the hearing, to cause a transcript thereof to be prepared and forwarded to the Board together with his recommendation.

On May 24, 1977 a hearing was held before Referee J. Wallace Fitzgerald, who, on June 23, 1977, submitted to the Board a transcript of the proceedings of the hearing, together with his recommendation.

The Board, after a de novo review of the transcript of the proceedings and a study of the Referee's recommendation, a copy of which is attached hereto and, by this reference, made a part hereof, adopts as its own the recommendation of the Referee that claimant be found to be permanently and totally disabled.

ORDER

Claimant is to be considered as permanently and totally disabled as of May 24, 1977, the date of the hearing before the Referee.

Claimant's attorney is awarded as a reasonable attorney fee a sum equal to 25% of the compensation granted to claimant by this order, payable out of said compensation as paid, to a maximum of $2,300.

WCB CASE NO. 73-3243 JULY 8, 1977
74-2075

PATSY CARPENTER (MATHIS), CLAIMANT
William Purdy, Claimant's Atty.
Philip Mongrain, Defense Atty.
Own Motion Order

On February 17, 1976 claimant had requested the Board to exercise its own motion jurisdiction under the provisions of ORS 656.278 and modify the former awards made to her for two separate compensable injuries which had occurred in 1968. At that time there was pending before the Board a request for review of the Referee's order entered In the Matter of the Compensation of Patsy Carpenter, Claimant, WCB Case No. 75-1989. The issue upon Board review involved the relationship between claimant's 1968 injury and her current cervical problems and the Board concluded that claimant's request for own motion relief was premature; however, claimant was advised that after the issues in WCB Case No. 75-1989 had been fully resolved she might renew her request.

The Board's Order on Review entered on April 20, 1976 affirmed the Referee's order and, on October 10, 1976, the Circuit Court of Oregon for Jackson County entered its judgment order affirming the Referee and the Board. No appeal was taken from the judgment order.

Claimant, on December 20, 1976, renewed her request for own motion relief. This request was accompanied by supportive medical reports and the carrier, Employers Insurance of Wausau, was furnished copies of the request and the medical reports. The Board was not advised, however, until May 31, 1977 that the circuit court had entered its judgment order in WCB Case No. 75-1989 and no appeal had been taken.

The Board advised the carrier that it would expect a response from it within 20 days, stating the carrier's position with respect to the request for own motion relief. On June 29, 1977 counsel for the carrier informed the Board that the employer and its carrier had no statement of position to make.

The Board, after full consideration of the medical evidence offered in support of claimant's request for own motion relief, concludes that there is sufficient justification to reopen claimant's claim for an industrial injury suffered on February 23, 1968 and that the carrier should be directed to accept the claim for payment of compensation, as provided by law, commencing on September 9, 1975, the date claimant was first hospitalized for cervical surgery, and until the claim is closed pursuant to ORS 656.278, less time worked.

Claimant's attorney should be 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 $500.

IT IS SO ORDERED.

WCB CASE NO. 76-2617 JULY 8, 1977

WARREN CATT, CLAIMANT
James Purcell, Claimant's Atty.
Ron Podnar, Defense Atty.
Order of Dismissal

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

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

SAIF CLAIM NO. EC 193499 JULY 8, 1977

MARION CLINTON, CLAIMANT
State Accident Insurance Fund, Defense Atty.
Own Motion Determination

Claimant sustained a compensable back injury on July 3, 1969. On October 29, 1969 claimant underwent a laminectomy with disc removal at L4-5 level. In February, 1970 claimant was evaluated at the Board's Physical Rehabilitation Center and, thereafter, was referred to the Vocational Rehabilitation Division for a training program in auto mechanics.

A Determination Order of July 1, 1970 granted claimant an award for 15% unscheduled disability.

On September 2, 1970 claimant was examined by Dr. Church who found claimant's condition stable but stated claimant was precluded from doing heavy lifting. Claimant appealed the Determination Order and, after a hearing, an order, dated April 15, 1971, granted claimant an additional 112° for a total of 160° for 50% unscheduled back disability. This award was affirmed by the Board but on appeal the circuit court granted claimant an additional 10%, giving claimant 192° for 60% unscheduled back disability.

Claimant returned to Dr. Church, who on April 26, 1974, requested that the claim be reopened as claimant had been totally disabled since March 26, 1974. The Fund refused to accept further responsibility. Dr. Church continued treating claimant throughout 1974 and 1975; the treatment was complicated by a heart attack claimant suffered in April, 1975 and also by claimant's chronic depression.

A hearing was held on January 9, 1975, on the denial of claimant's claim for aggravation. On January 20, 1975 the

Referee ordered the claimant's claim for aggravation dismissed but ordered the Fund to pay claimant as a penalty for its unreasonable resistance and delay an amount equal to 25% of all compensation benefits due claimant. The Fund appealed and the Board issued two orders. The first order, entered on October 3, 1975, reaffirmed the Referee's order. The second, entered the same day, was an "Own Motion" order which directed the Fund to have claimant re-examined by Dr. Church to determine if claimant was in need of additional treatment and, if so, to provide such treatment. When claimant's condition was found to be medically stationary the claim was to be submitted to the Evaluation Division for closure under the provisions of ORS 656.278.

Dr. Church continued treating claimant and, on April 29, 1977, the Fund had claimant examined by Dr. Pasquesi who reported that claimant should not be employed in any occupation requiring lifting more than 30 pounds. He rated claimant's disability at 21% and found him to be medically stationary. On May 24, 1977 Dr. Church concurred with this report.

On June 2, 1977 the Fund requested a determination. The Evaluation Division, based upon the reports of Dr. Church and Dr. Pasquesi, concluded that claimant should be granted compensation for temporary total disability from March 26, 1974 through April 29, 1977 but no additional compensation for permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted additional compensation for temporary total disability from March 26, 1974 through April 29, 1977.

WCB CASE NO. 77-100 JULY 8, 1977

LESLIE HARTUNG, CLAIMANT
Milo Pope, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order of Dismissal

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

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

SAIF CLAIM NO. YC 85849 JULY 8, 1977

DIANA HUBBS, CLAIMANT
Dept. of Justice, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on August 8, 1967 fracturing her right tibia and fibula. Dr. Corrigan performed a bone graft on August 16, 1967 to the distal tibia. Claimant's residuals were a mild 1/4" shortening of the right leg and a loss of 20° dorsiflexion of the ankle.

A Determination Order of April 9, 1968 granted claimant an award for 15% loss of the right foot.

Claimant returned to see Dr. Corrigan on April 9, 1973, complaining of pain which she had had for the last two or three months; Dr. Corrigan felt this was due to development of anterior bone spurs, but he recommended no treatment.

In July, 1976 claimant saw Dr. Tiley who requested that claimant's claim be reopened for further surgery. The Fund voluntarily reopened claimant's claim. On July 9, 1976 Dr. Tiley performed an arthrotomy with excision of bone spurs.

Claimant returned to work on August 9, 1976 and continued to be treated by Dr. Tiley until April 28, 1977 when he did a closing examination. Dr. Tiley felt claimant had significant impairment with post traumatic arthritis and crepitus in the ankle joint.

On May 6, 1977 the Fund requested a determination. After receiving the closing examination from Dr. Tiley, the Evaluation Division of the Board recommended claimant be granted compensation for temporary total disability from July 9, 1976 through August 8, 1976 and to an additional award for 15% loss of the right foot.

The Board concurs with this recommendation.

ORDER

Claimant is hereby awarded compensation for temporary total disability from July 9, 1976 through August 8, 1976 and 22.25° for 15% loss of the right foot. This award is in addition to any awards previously granted to claimant.

WCB CASE NO. 72-2337 JULY 8, 1977

PETE PETITE, CLAIMANT
J. David Kryger, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which had recommended that the Board deny claimant's petition for own motion relief for further benefits on account of his January 6, 1967 industrial injury and also had affirmed the Determination Order entered August 22, 1972 which related to an industrial injury suffered by claimant on January 20, 1972.

On September 30, 1976 the Board entered its Own Motion Order which, based upon the recommendation of the Referee, denied claimant's request that his claim for the compensable injury suffered on January 6, 1967 be reopened by the Board pursuant to its own motion jurisdiction; therefore, the only issue before the Board at this time is the Referee's affirmation of the Determination Order of August 22, 1972.

In January, 1972 claimant went to work as a yarder engineer for Riverside Lumber Company and sustained a compensable injury on January 20, 1972. He was referred by his family doctor to Dr. Cohen for medical treatment and, on August 22, 1972, a Determination Order was entered closing claimant's claim with an award for time loss only. Claimant requested a hearing on the adequacy of this Determination Order. This hearing was delayed pending a decision by the Board on claimant's petition for own motion relief with respect to his 1967 injury. Ultimately, the petition and the request were consolidated for hearing.

The Referee found that although the medical evidence, primarily reports and deposition of Dr. Cohen, indicated that Dr. Cohen felt that claimant was permanently and totally disabled from performing significant gainful work before the 1972 injury and that this status had not changed because he was not fit to work after the 1972 injury either, the other evidence belied this medical conclusion because, in fact, claimant had worked at various times both before and after the 1970 hearing. Claimant testified that the physical impact on his ability to work as a result of the injuries had not really changed over the last several years even after the January 20, 1972 incident. He contended that he was unable to work for any significant period of time at any occupation, including that of a yarder engineer, after the 1967 injury and before the 1972 injury and that he was now likewise incapable of performing gainful and suitable work.

The employer, Riverside Lumber Company contended, in effect, that claimant could not be granted any permanent disability for the 1972 injury because he was actually permanently and totally

disabled before that injury, however, the Referee found that claimant's ability to work in gainful employment at the time of his 1972 injury was evidence that he was not permanently and totally disabled and that he would be entitled to receive workmen's compensation if the evidence justified it. The Referee found that the evidence failed to establish that claimant had any greater disability now, from a medical standpoint, than that which he had prior to the 1972 injury. Dr. Cohen stated that he did not consider that claimant was physically disabled any more by the 1972 injury. The Referee concluded that claimant had not sustained his burden of proving that he was entitled to any award for permanent disability as a result of the residual effects of his 1972 injury and the Determination Order of August 22, 1972 should be affirmed.

The Board, on de novo review, concurs in the findings and conclusions made by the Referee with respect to claimant's 1972 injury. The Board notes that this matter has progressed through a number of administrative activities and hearings, including reopenings of the claim for aggravation and a petition for own motion relief, and has become very involved, however, the Referee very clearly and concisely set forth in his Opinion and Order the history of this matter both as it pertains to the 1967 and the 1972 injuries.

ORDER

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

WCB CASE NO. 75-3267 JULY 11, 1977

RICHARD BOWMAN, CLAIMANT
Jay Edwards, Claimant's Atty.
Scott Kelley, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which granted him an award of 224° for 70% unscheduled chest and upper back and psychological disability, an increase of 50% over his former award. Claimant contends he is entitled to an award for permanent total disability.

The employer cross requests review by the Board of the Referee's order, contending that claimant has been over compensated by the Referee's award.

On February 28, 1969 claimant injured his right wrist. The injury required two operations and a hospital confinement for psychiatric care and the claim was closed on February 24, 1970 with no award for permanent partial disability. The claim was

reopened in May, 1970 and after extensive medical treatment was received by claimant the claim was again closed by Determination Order dated August 23, 1973 whereby claimant was awarded 64° for unscheduled chest and upper back disability and 38.4° for loss of use of the right arm, a total of 102.4°. Later the parties stipulated to set aside this award and claimant's claim was reopened as of August 23, 1973. On July 17, 1975 a Third Determination Order reinstated the prior award of 102.4°.

Claimant was first seen by his family physician Dr. Bump, who found claimant's wrist to be stiff, sore and swollen and he diagnosed the condition as "penosynovitis right abductor pollicis longus (DeQuervain's disease)". Dr. Bump cast the wrist and felt that the injury would prevent claimant from working; however, claimant thought he could go back to work with the cast and did so for a few days but was forced to quit.

Dr. Bump performed surgery for a tendon release in March, 1969 and on July 21, 1969 further surgery was performed on claimant's wrist by Dr. Jones. Claimant returned to work on September 11, 1969 and slipped and caught himself with his right wrist to prevent falling. In November, 1969 claimant was seen by Dr. Nash, a neurologist, claimant was complaining of increasing pain but because of the lack of subjective findings at that time and the complications which occurred with previous surgeries Dr. Nash felt claimant should not have neurosurgical intervention.

Claimant was also hospitalized for a short period because of a psychiatric problem. Dr. Quan, a psychiatrist, had seen claimant on three separate occasions for examination only and not for treatment. He felt that claimant suffered from personality disorder which pre-existed the accident and described claimant as having a passive-aggressive personality which was not caused by the accident although there was some aggravation of this pre-existing condition. Dr. Quan felt that claimant was not well motivated to seek employment. Dr. Sprang, also a psychiatrist, testified that the consequences of claimant's two surgeries were the triggering force for claimant's outburst and hospital confinement for psychiatric care.

The Referee found that Dr. Sprang, who was claimant's treating physician during his psychiatric disorder, was in a better position to give definitive diagnosis and that both he and Dr. Hickman, a clinical psychologist, felt there was direct psychological involvement in claimant's on-going problems and that such involvement was directly related to the industrial injury. The Referee felt more persuaded by the opinions expressed by Dr. Sprang and Dr. Hickman than the opinion of Dr. Quan.

Claimant continued to have increasing pain in his wrist and Dr. Nash felt that a dorsal sympathectomy should be considered even though it involved hazards. Claimant consented to, and underwent, the surgery which required entry into the pleural cavity and required collapsing the right lung. Claimant continued to have pain in the right arm, right chest and upper back and was unable

to work. He was seen by several neurosurgeons and, on April 26, 1972, extradural sensory root (dorsal root rhizotomy D1-D6 inclusive, right) was performed by Dr. Grewe. This last surgery did not alleviate claimant's pain and Dr. Grewe stated that the only means for eliminating the intractable pain described by claimant would be a cordotomy but because of past failures to successfully relieve claimant's pain and because of his known psychiatric component further surgical intervention was abandoned.

Claimant enrolled, through the auspices of the Vocational Rehabilitation Division, in a small engine repair class. Claimant's attendance was not of the best and his motivation was seriously questioned. Claimant worked in an on-the-job training situation for approximately two weeks for the owner of the Cycle Mart. The owner testified that claimant was a good worker and that he did not recall claimant expressing any serious complaints; he further stated that had he had an opening at that time he would have hired claimant on a full time basis.

The Referee found that claimant's testimony indicated that when he was in the mood to do so he could, on a short time basis, do small engine repair for local people,that he was able to maintain his garden and he had attempted to go hunting. Claimant has driven his car considerable distance when necessary and the Referee felt that it was not unreasonable to believe that claimant was physically able to do quite well if motivated. Claimant was severely limited in the types of occupations now open to him; all heavy or really active employment situations are closed, however, there were many things that claimant could do.

Because claimant is no longer able to engage in the work which he followed from the time he graduated from high school until his injury, the Referee concluded that claimant had suffered a substantial loss of wage earning capacity, after considering claimant's unscheduled chest and upper back disability and the psychological component which was directly related to his compensable injury and was entitled to an award for 70% of his unscheduled disability. He concluded that the award for 20% for the right arm sufficiently compensated claimant for the loss of function of that scheduled member.

The Board, on de novo review, affirms the conclusion reached by the Referee. The Referee's Opinion and Order incorrectly stated that the Determination Order of August 23, 1973 awarded claimant 60° for unscheduled chest and upper back disability it should be 64°.

ORDER

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

WCB CASE NO. 77-243 JULY 11, 1977

WILLIAM H. LYNCH, CLAIMANT
Orlin Anson, Claimant's Atty.
Dept. of Justice, Defense Atty.
Order

On June 21, 1977 claimant, by and through his attorney, requested the Board to refer the above entitled matter to the Referee for a further hearing. The basis for the request was a statement by claimant's counsel that claimant had returned to see Dr. Burr who reported that on June 13, 1977 the examination "today again reveals limitation of sub talar motion with pain. Mid tarsal motion is also somewhat limited, but not too painful."

The Fund responded on June 24, 1977, in opposition to the request, stating the additional evidence which claimant's counsel quoted in support of his request did not differ from the evidence of Dr. Burr's closing examination on November 19, 1976 which had been received in evidence by the Referee (Joint Exhibit 21). Dr. Burr had noted pain, limitation of sub talar motion, and limitation of mid-tarsal motion which he had anticipated would be symptomatic from time to time.

The Board, after consideration of the request and the response, concludes that there is no justification for remanding the above entitled matter to the Referee. The evidence, at best, is cumulative.

ORDER

The request made by claimant that the Board refer the above entitled matter to the Referee for further hearing is hereby denied.

WCB CASE NO. 76-3570 JULY 11, 1977

BERNICE URBANO, CLAIMANT
Don Wilson, Claimant's Atty.
Scott Kelley, 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 on August 5, 1976 of claimant's claim for aggravation.

Claimant, 66 years old at the time of the accident, sustained a compensable injury on September 13, 1972 when she slipped and fell sustaining superficial lacerations of the forehead and a fractured nose. On September 16, 1972 claimant saw Dr. Won,

a chiropractor, she was complaining of pain in her neck, upper back, lower back and knees. He diagnosed very bad arthritis, aggravated by the fall.

In October, 1972 claimant was seen by Dr. Wayman, another chiropractor, who treated her into 1974. Dr. Pasquesi had examined claimant in 1973 and had diagnosed advanced generalized osteoarthritis or degenerative arthritis of the cervical, dorsal and lumbar spine and of the left knee. He found little impairment and that pre-existed her industrial injury.

A Determination Order of October 16, 1973 granted claimant 32° for 10% unscheduled neck and back disability and 15° for 10% loss of the left leg.

In July and August, 1974 Dr. Fagan examined claimant and found claimant severely disabled from the marked degenerative changes which had been aggravated by her industrial injury. He recommended no treatment other than chiropractic, and that only if it helped claimant. Claimant filed a claim for aggravation which was subsequently denied. On April 9, 1975 the parties entered into a disputed claim settlement for a lump sum payment of $5,500.

In June, 1976 claimant was examined by Dr. Ferrante who found her symptoms exacerbated since the injury. Claimant, thereafter, filed another claim for aggravation which was denied by the carrier on August 5, 1976.

In November, 1976 Dr. Berg examined claimant and diagnosed a number of physical conditions, including generalized advanced skeletal arthritis. Dr. Berg opined that the arthritis condition was aggravated by her industrial injury. He further felt that the bulk of her problems originated from her injury in 1972.

Dr. Berg testified at the hearing that claimant's condition had worsened since April, 1975; however, he did indicate that part of claimant's problems are due to her progressive arthritic disease which were aroused by the injury. Dr. McNeill in April, 1973 had recommended knee surgery but Dr. Berg did not concur.

Claimant also suffers from high blood pressure and diabetes.

Claimant contends her condition has worsened since April, 1975 and that in June, 1976 she sustained an acute aggravation for which she is entitled to compensation for temporary total disability. The carrier contends that claimant had acute aggravation following the industrial injury but no permanent residuals therefrom and further that the acute episodes were the result of her progressive arthritic condition.

The Referee found that claimant's family physician, Dr. Stevens, had treated claimant for four or five episodes of pain and disability per year. In June, 1971 claimant slipped and fell,

injuring her left knee and leg which aggravated the arthritis in her left knee. Dr. Stevens diagnosed generalized arteriosclerosis with hypertension; chronic pain syndrome; cervical and lumbar spine and chronically dislocated left patella. Dr. Stevens had also treated claimant in May, 1968 for stabbing pain in the left lower back and, in May, 1956, for aches and pains in the neck, back and legs of six years duration.

The Referee found, after consideration of all of the evidence presented, that claimant's condition prior to September, 1972 was very similar to the episodes she suffered before and after that time. Dr. Stevens has treated claimant for various pain syndromes for 18 years. The Referee could not find that claimant's acute episodes were attributable to her industrial injury of September, 1972. He concluded that claimant had not met her burden of proving her condition resulting from the industrial injury has worsened since the last award of compensation received by claimant. He affirmed the denial of her claim for aggravation.

The Board, on de novo review, disagrees with the conclusions reached by the Referee. While its true that claimant has experienced prior pain syndromes, the medical evidence supports a finding that since the last award of compensation in April, 1975 claimant's condition has progressively worsened and the medical reports indicate that it is the residual effects of her September, 1972 industrial injury. There is no medical evidence in the record to the contrary.

Therefore, the Board concludes that claimant's claim for aggravation should be accepted.

ORDER

The order of the Referee, dated January 13, 1977, is reversed.

Claimant's claim is remanded to the employer for acceptance and for payment of compensation, as provided by law, commencing June 24, 1976 and until closure is authorized pursuant to ORS 656.268.

Claimant's attorney is hereby granted as a reasonable attorney fee for his services before the Referee $1,000 payable by the employer.

Claimant's attorney is hereby granted as a reasonable attorney fee for his serv ices in connection with this Board review $350, payable by the employer.

WCB CASE NO. 75-5066 JULY 15, 1977

HERSHEL HAMMOND, CLAIMANT
Sidney Galton, 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 claims for a heart attack and left arm thrombus to it for acceptance and payment of compensation, as provided by law, and ordered the employer pay to claimant a penalty of 25% of the compensation for temporary total disability accrued between October 18, 1976 and the date of his order (November 9, 1976) for refusal to pay compensation ordered to be paid by the Referee.

Claimant, a 42 year old truck driver at the time of the accident on July 28, 1975, had his legs and feet pinned between two stacks of pallets. Claimant continued to work but was finally hospitalized on August 10, 1975 with a diagnosis of occlusion of the distal superficial femoral artery. A femoral popliteal bypass graft was performed on August 11, 1975 and the following day Dr. Gingrich explored the distal vein graft and popliteal artery.

On November 5, 1975 claimant was again hospitalized, the diagnoses were acute myocardial infarction, an embolus or acute thrombosis in the left axillary artery, acute alcoholic intoxication, essential hypertension and a history of gout. Dr. Gingrich performed an embolectomy of the distal brachial, ulnar and radial arteries. On November 25, 1975 the employer denied responsibility for claimant's heart attack, and upper extremity embolus.

In mid-December, 1975 Dr. Gingrich reported claimant had developed claudication in the left lower extremity and was unable to walk more than a block; at that time compensation for time loss was resumed.

Dr. Gingrich believed that claimant's heart attack and upper extremity embolus were not related to the injuries claimant had sustained on July 28, 1975. Dr. Sutherland did not believe that claimant's on-going pain from his peripheral arterial disease was a material contributing cause to his myocardial infarction of November, 1975.

Dr. Griswold thought there was severe disabling pain resulting from the left lower extremity following the surgery in August, 1975 which was a contributing factor is his heart attack. Dr. McAnulty felt that if the history obtained by Dr. Griswold was true, then he concurred with him that claimant was in significant stress as a direct result of the work related accident and such stress was a contributing factor to the development of the myocardial infarction.

The Referee was more persuaded by the opinion of Dr. Griswold, a widely recognized authority in the field of cardiology, and found that claimant's myocardial infarction and left arm thrombus were causally related to the industrial injury of July 28, 1975.

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

ORDER

The order of the Referee, dated November 9, 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. 76-805 JULY 15, 1977

ROBERT HUNT, CLAIMANT
Robert Gardner, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks Board review of the Referee's order which affirmed the denial of claimant's claim by the Fund on February 11, 1976.

Claimant alleges he was accidently shot in the left leg on March 25, 1975 while in the scope and course of his employment. During 1974 and 1975 claimant performed work shearing sheep for various people, one of whom was the employer, Mr. Babcock. Claimant was paid by the head for shearing sheep and no taxes were deducted from his pay nor were directions given as to when, how or what method he should use when shearing the sheep. In addition to shearing sheep claimant was also called upon by the employer from time to time, to do work around the ranch, e.g., building and repairing fences and for this work claimant was paid by the day and taxes were deducted from his pay.

Claimant testified that on the morning of March 25 he was fixing a fence for another rancher and he finished that job about noon. Claimant's father was with his employer and claimant went over to the employer's place. Shortly thereafter his father and the employer asked claimant and two sons of the employer to go up to the pasture and chase a cow out and repair the fence. The three young men decided to take their guns with them and possibly do some target practice and shoot some squirrels. They did not take any tools, nails, or any other materials with them with which to

repair a fence. Claimant testified that he saw the cow but it ran off into the trees and they did not chase it but went back to the barn and while claimant was viewing the damage caused by the cow the gun carried by one of the employer's sons accidently fired and the bullet hit claimant in his left leg. This was at approximately 6:30 p.m.

Claimant further testified that when he was in the hospital the employer told him to say that he was shearing sheep on the day in question and that he had sheared 67. Claimant recorded this in his time record book.

On September 23, 1975 claimant filed a notice of his injury. Later, claimant told both his own attorney and the Fund's investigator he had shorn 67 sheep on the 25th of March, but at the hearing he testified that he did not shear any sheep on that date. He stated that he had said he had because the employer told him that was what he should do.

Claimant's mother had been advised by the employer that the best thing for them to do was to have claimant state that he was shearing sheep on the day of the accident and she went along with the employer's suggestion although she realized that it meant defrauding the insurance company. After the employer became irate because claimant went to see his attorney about filing a claim and had stated that he would not say that claimant was working at all for him that day, claimant's mother decided to tell the truth.

A deputy sheriff for Linn County testified that he had investigated the shooting incident on March 25 and attempted to interview claimant at the hospital but was unable to do so because claimant was heavily sedated. He interviewed claimant the following day and testified that claimant said he and the other two young men were hunting near the farm and went to the barn looking at the work one of the sons had been doing. The deputy sheriff asked claimant what they were doing up at the barn and claimant responded that they had been shooting at birds or anything they could find for target.

The Referee found it almost impossible to determine what the real facts were; she found reason to question the credibility of every witness who testified except for the deputy sheriff. The testimony of each of the other witnesses was full of internal inconsistencies, was inconsistant with the testimony of others and inconsistant with prior statements made by the same individual. Deputy Sheriff Zuhlke was the one independent and credible witness who also had the advantage of having talked with the claimant immediately after the accident when the facts were fresh and when no one had had an opportunity to make up a story which would be advantageous to the employer and, possibly, to the claimant.

The Referee concluded that it was the burden of claimant to produce credible and persuasive evidence which preponderated in favor of compensability and that he had failed to do so, therefore,

she found that claimant had not sustained a compensable injury arising out of and in the scope of his employment.

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

ORDER

The order of the Referee, dated December 14, 1976, is affirmed.

WCB CASE NO. 76-2408 JULY 15, 1977

RICHARD HUTSON, CLAIMANT
Donald Tarlow, Claimant's Atty.
Michael Hoffman, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which granted claimant an additional 15% for a total award of 96° for 30% unscheduled disability. Claimant contends this award is inadequate.

Claimant sustained a compensable injury on March 5, 1971. In 1974 a laminectomy was performed by Dr. Teal; even though three years elapsed Dr. Teal found that the back injury was a material contributing factor to the need for the surgery. On September 23, 1975 Dr. Teal found claimant's condition medically stationary, he found claimant's impairment to be moderate which would prevent him from any occupation requiring unusual heavy lifting, bending or sitting.

The carrier had claimant examined by Dr. Gripekoven on July 1, 1976. Dr. Gripekoven concurred with the findings of Dr. Teal; he further found claimant could be employed full time in a sedentary type occupation.

A Determination Order of October 21, 1975 granted claimant an award for 48° for 15% unscheduled back disability.

Claimant is presently undergoing vocational retraining to become a real estate appraiser. Claimant's counselor testified that claimant's motivation was good, even though he may have difficulties in job placement due to his physical limitations.

The Referee found that the medical reports of Dr. Teal and Dr. Gripekoven indicate claimant has a moderate degree of disability; the evidence further indicates that claimant can no longer return to any of the occupations in which he has had past

experience; therefore, the Referee concluded claimant has suffered a greater loss of wage earning capacity than that for which he had been granted by the Determination Order. He increased the award to 96°.

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

ORDER

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

WCB CASE NO. 76-2017 JULY 15, 1977

DORIS MILLER, CLAIMANT
Don Swink, Claimant's Atty.
SAIF, Legal Services, 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 awarded claimant permanent total disability effective December 10, 1976, the date of his order.

Claimant was 62 years old and employed as a cook when she tripped on a floor mat and fell, sustaining injury to her left hip, originally diagnosed as a contusion. Eleven days later, while walking on crutches, she again fell and displaced left femoral neck fracture was diagnosed. On November 23, 1973 the femoral head was replaced with an Austin-Moore prosthesis which was later replaced with a Thompson prothesis. On December 16, 1974 a total hip arthroplasty, using a Charnley prosthesis, was performed.

On April 9, 1976 a Determination Order granted claimant 75° for 50% loss of her left leg.

Claimant testified she had developed pain in her groin and low back prior to the arthroplasty surgery and still has these symptoms. Dr. Glaubke testified that between 1973 and 1976 claimant's left sacroiliac joint had become almost totally fused although the right sacroiliac joint shows minimal arthritic changes. It was Dr. Glaubke's opinion that the left sacroiliac joint fusion was directly related to the compensable injury.

Claimant was examined by the Orthopaedic Consultants who found that claimant was not totally disabled because of this injury but because of her age it would be practically impossible for her to return to the labor market. They rated total loss of function as moderate.

The Referee found, based on medical evidence the testimony and his observation of claimant, that she now ambulates slowly and carefully. The Referee found that claimant is at retirement age which relates primarily to her employability rather than her disability. However, he concluded that claimant could not regularly engage in any gainful or suitable occupation with her present impairment even if she were 30 years younger. Therefore, he found her to be permanently and totally disabled.

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

The Board finds absolutely no justification for the remarks which the Fund's attorney made in his brief regarding the Referee's handling of the case at the hearing. Such comments serve no useful purpose and, at best, can only be classified as "childish".

ORDER

The order of the Referee, dated December 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 Fund.

WCB CASE NO. 75-4820 JULY 15, 1977

CARL OAKES, CLAIMANT
Richard Hammersley, Claimant's Atty.
SAIF, Legal Services, 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 low back condition, including left hip and left leg involvement, to it for acceptance and payment of compensation, as provided by law.

Claimant sustained a compensable injury to his low back and right leg on September 10, 1971. A myelogram revealed a bilateral extradural defect at the L4-5 level which represented a herniated disc. Claimant's injury was diagnosed as degenerative L5-S1 disc and minimally degenerated L4-5 disc, right. Claimant was treated conservatively until January 26, 1972 when a lumbar laminectomy was performed.

A Determination Order of February 1, 1973 granted claimant 48° for 15% unscheduled low back disability and 15° for 10% loss

of the right leg. A stipulation approved on November 9, 1973 increased claimant's award to 80° for 25% unscheduled disability.

On September 9, 1975, while on a fishing expedition, claimant experienced sudden and severe pain in his low back and left hip, radiating into the left leg. On September 19, 1975 claimant sought out Dr. Lilly who diagnosed herniated disc L4-5 left and L5-S1 left. On September 24, 1975 claimant underwent a partial laminectomy and excision of herniated disc at L4-5 and L5-S1 on the left. Dr. Lilly causally related claimant's condition and the need for surgical intervention to the injury of September, 1971.

On September 26, 1975 Dr. Lilly filed claimant's claim for aggravation. On November 3, 1975 the Fund denied the claim on the ground that the fishing expedition incident was the cause of claimant's current problems.

Claimant has not been involved in any accidents or injuries except for the fishing incident, since the last claim closure in November, 1973.

The Referee found that when Dr. Lilly was questioned through interrogatories concerning the medical probability of claimant's condition being related to his industrial injury, he responded that claimant did not suffer any significant new injury or accident, based upon a reasonable medical probability, but rather that claimant's condition was directly related to his original injury in September, 1971.

The Referee concluded that claimant had sustained his burden of proving that he had suffered an aggravation of his injury of September, 1971 and he remanded the claim to the Fund for acceptance.

The Board, on de novo review, concurs with the 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 $350, payable by the Fund.

SAIF CLAIM NO. B17282 JULY 15, 1977

BRUCE POULSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order Referred for Hearing

On February 23, 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 9, 1963. In support of his request claimant attached medical reports from the Department of Health, Education and Welfare.

On February 28, 1977 the Board asked claimant for a current medical report indicating that his condition has worsened since the last award of compensation on October 6, 1967 and that the worsened condition is attributable to the industrial injury of 1963.

On April 12, 1977 Dr. Luce submitted medical reports in support of claimant's request.

On April 15, 1977 the Board advised the Fund that it had 20 days within which to respond to claimant's request, and on April 28, 1977 the Fund requested an extension of time for further investigation.

On June 16, 1977 the Fund responded, stating that its investigation revealed that claimant had sustained a serious off the job injury while picking pears on September 24, 1975, that he had fallen and injured his arm and aggravated his back condition.

The Board, after reading the medical reports and the response from the Fund, concludes that it has insufficient evidence before it at this time to determine 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 1963 and, if so, whether his present condition represents a worsening thereof since the last closure on October 6, 1967.

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. 76-2607 JULY 15, 1977

FRANK PRICE, CLAIMANT
John Hilts, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through his attorney, on June 16, 1977, again requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen his claim for further compensation for temporary total disability. In support of his request claimant attached a medical report from Dr. Holzgang which he designated as newly discovered evidence.

The Board, on May 19, 1977 had issued its Own Motion Determination which granted claimant further compensation for temporary total disability, less time worked, but no compensation for permanent partial disability.

On June 23, 1977 the Board advised the Fund to state its position concerning claimant's new request.

On June 28, 1977 the Fund responded, stating that the medical report of Dr. Holzgang indicated that further treatment will continue periodically for sometime in the future. However, this treatment could be provided under the provisions of ORS 656.245. Claimant, for all practical purposes, is medically stationary.

The Board, after giving this matter full consideration, concludes that at the present time all claimant needs is medical treatment which the Fund should provide under the provisions of ORS 656.245 and, therefore, his request to reopen his claim should be denied.

IT IS SO ORDERED.

WCB CASE NO. 76-2523 JULY 15, 1977

MARIA STRACK, CLAIMANT
Benton Flaxel, Claimant's Atty.
Robert Walberg, Defense Atty.
Order

On June 24, 1977 the Board entered its Order on Review in the above entitled matter affirming the order of the Referee dated August 13, 1976 which had remanded claimant's claim to the employer for acceptance and payment of compensation as provided by statute.

On July 5, 1977 the employer, by and through its attorney, filed a motion for reconsideration on the grounds and for the reason that the Order on Review failed to indicate that the Board had

viewed the film of the claimant which was viewed by the Referee and was part of the record. The employer requested the Board to personally view the film and judge the activities of claimant.

On July 7, the claimant, by and through his attorney, responded in opposition to the motion, stating that the film was offered solely on the issue of impeachment and credibility of the claimant and that the Referee had found claimant to be a credible witness; therefore, it was not necessary for the Board to review the film and the motion made by the employer should be denied.

The Board would call to the attention of all parties the first paragraph on page 3 of its Order on Review which states "The Board, on de novo review, concurs with the findings and conclusions reached by the Referee." When the Board makes a de novo review it considers the entire record presented to it, therefore, there is no justification to re-review any portion of the record and the motion for reconsideration should be denied.

IT IS SO ORDERED.

WCB CASE NO. 76-2931 JULY 15, 1977

WILLIAM SULLIVAN, CLAIMANT
James Farrell, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests Board review of the Referee's order which remanded claimant's claim to it to be accepted for the payment of benefits to which he is entitled by law and awarded claimant's attorney $2,000 as a reasonable attorney fee.

Claimant, a Roseburg city fireman, was injured on March 20, 1976 while rapelling from the basket on a snorkel truck which was owned and operated by the Roseburg Fire Department. The incident occurred during a demonstration authorized by the fire department and staged to raise money for the muscular dystrophy drive.

Roseburg city firemen and rural firemen had participated in similar endeavors in prior years, both on and off duty.

Approximately two hours prior to the accident claimant had been collecting money in a firemen's boot as a part of the muscular dystrophy drive at the shopping center; he left to go home for lunch with the intent to return later but as he and his son walked by the snorkel vehicle where several firemen, two of whom

were on duty, were rapelling pursuant to instructions from their superior, claimant, who was in uniform, decided to participate. He borrowed turn-outs and a helmet and while descending on the rope suffered his injury. At the time of his participation claimant was "off-duty" in the sense that he was not on a working shift.

The Referee found that although claimant was not ordered to participate in the rapelling that day he had, like the other firemen, been encouraged to do so. If claimant had been "on duty" when he suffered his injury it would have been compensable, the Referee concluded that to bar compensation rights solely because he was not "on duty" would be avoidance of responsibility based upon an artificial classification of on duty versus off duty.

The Referee, citing several leading cases in Oregon which had ruled on the question of whether an accident arose out of and in the course of employment, found that the activity for which claimant was engaged at the time of his injury was for the benefit of both the employer and the claimant, that the activity was contemplated by both parties and that the risk of injury was incidental to the employment but that claimant was not paid for the activity nor was he on the employer's premises although the activity was acquiesced in and authorized by the employer. Claimant was not on a personal mission of his own, the activity, rapelling, was a drill just the same as if it had been done at the fire station and neither the fact that claimant was not being paid to do it nor that the activity was not on the employer's premises is controlling.

The Referee, in a well-written Opinion and Order, concluded that claimant was simultaneously serving the interests of the fire department, and himself as a member of his community. The dominant motive was to rapell, a drill activity of the employment. He found claimant's injury to be compensable.

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

ORDER

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

Claimant's attorney is hereby granted as a reasonable attorney fee, the sum of $400, payable by the Fund.

WCB CASE NO. 76-3153 JULY 15, 1977

WILLIAM SULLIVAN, CLAIMANT
Gary Jones, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation, as provided by law, and directed it pay to claimant an additional amount of compensation equal to 10% of the compensation for temporary total disability that should have been paid to claimant from March 22 through June 4, 1976.

Claimant is 60 years old, he has owned and operated his own business, Capitol Cabinet Shop since 1955. In March, 1964, while unloading cabinets, claimant experienced a "gasping for breath" before he completed the job. This was claimant's first breathing problem.

In December, 1966 claimant came under the care of Dr. Sanders who has treated claimant since that time. Claimant's initial complaints were a cough and progressive shortness of breath since the incident in 1964. Claimant advised Dr. Sanders about his profession and told him that he had smoked rather heavily for several years and had bronchopneumonia on two occasions. Dr. Sanders found chronic bronchitis and pulmonary emphysema and reported that claimant's condition was certainly aggravated by his work and the illness was a factor in his retirement.

Claimant recalls talking to Dr. Sanders in December, 1966 and asking if he should sell his business and move to Arizona for his health. Dr. Sanders remarked that the business wasn't doing him any good but that he didn't think moving to Arizona was necessary.

Dr. Sanders advised claimant in December, 1966 or thereafter, that dust had a potential to aggravate his emphysema but never did he specifically tell claimant simply and directly that claimant's condition was caused by his work.

Claimant testified that no doctor had ever advised him that he was suffering from an occupational disease. Claimant's condition deteriorated and he sold his business in November, 1972 because of the breathing problems.

The evidence indicates that the Fund did not pay any compensation to claimant between March 22, 1976, when he filed his claim, and June 4, 1976, when the denial was issued.

The Referee found that claimant's last exposure was in November, 1972 when he sold his business and that he had clearly filed his claim within five years of his last injurious exposure. He found no evidence that any doctor had specifically told claimant simply and directly that his condition arose out of and in the course of his employment.

The Referee concluded that claimant had filed his claim in a timely manner.

The Referee further found that 74 days had elapsed between the time claimant filed his claim and the date of the denial, therefore, he assessed the Fund a penalty in the amount of 10% of the compensation for temporary total disability due and owing claimant.

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

ORDER

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

Claimant's attorney is hereby granted as a reasonable attorney fee for his services in connection with this Board review, the sum of $300, payable by the Fund.

WCB CASE NO. 74-2243 JULY 15, 1977

BONNIE TERRY, CLAIMANT
Allan H. Coons, Claimant's Atty.
Eldon Caley, Defense Atty.
Order on Stipulation

This matter comes before the Hearing Division and the Commissioners of the Workmen's Compensation Board for an Order approving the Stipulation of the parties hereto. It appears that a Hearing was convened on June 28, 1977, before a Referee of the Workmen's Compensation Board which procedure had been scheduled in tandem for a decision on those issues within the jurisdiction of the Hearing Division and the making of a record and recommendations on the issues within the jurisdiction of the Workmen's Compensation Board on its own motion. At the Hearing certain medical reports and other medical documents were entered into the record in the own motion file and made exhibits in the matter. Claimant, Claimant's Attorney, and the employer and its insurer through their attorney hereby stipulate as follows:

1. The employer and its insurer shall pay to Claimant and Claimant's Attorney the sum of $4,000.00 as a disputed claim as to all issues arising under ORS 656.245 and ORS 656.278, or otherwise.

2. Claimant's Attorney is authorized to collect a fee of $500.00 from said sum.

3. Claimant shall retain the balance of the disputed claim payment, $3,500.00.

4. The payment of a specified sum to Claimant and to her Attorney is on account of a disputed claim, and it does not constitute the payment of compensation under the Workmen's Compensation Law. Claimant retains her rights as to any change in her bilateral shoulder condition which may occur in the future, and the employer retains whatever defenses it may have. The payment by the employer is in lieu of potential administrative and legal costs of a doubtful and disputed claim. The acceptance by the Claimant of said sum is without prejudice to her rights to receive additional compensation under either ORS 656.245 or ORS 656.278 in the event, at some future time, her condition warrants such relief.

5. The pending Request for Hearing and Petition for Own Motion Relief are withdrawn with prejudice.

6. Claimant's bilateral unscheduled shoulder condition has previously been evaluated at 80% of the maximum for unscheduled disability, and nothing in this agreement shall be construed as a concession on the part of the employer that said permanent partial disability has become compensably aggravated or exceeds the award previously made.

7. Responsibility for making payment of all medical bills including billings of physicians, hospitals, pharmacists, and for mileage and other incidental costs shall remain the responsibility of Claimant; and Claimant shall hold the employer and its insurer harmless from any claim by any medical or pharmeceutical provider for professional services rendered between the date of the last payment by the employer and its insurer to any of said providers and the date of this Stipulation.

The Stipulation of the parties insofar as it disposes of issues arising under the jurisdiction of the Hearing Division is approved. I do recommend that the Board approve the Stipulation of the parties insofar as it disposes of issues arising under ORS 656.278.

IT IS SO ORDERED AND RECOMMENDED.

Those portions of the Stipulation which dispose of issues arising under ORS 656.278 are approved.

WCB CASE NO. 76-5093 JULY 19, 1977

WALTER HAYES, CLAIMANT
Jack Mattison, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

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

Claimant was a 54 year old self-employed operator of a boat lift at Winchester Bay who sustained a compensable myocardial infarction on September 28, 1974 while so employed.

A Determination Order of December 31, 1975 granted claimant an award of 256° for 80% unscheduled disability.

Almost all of claimant's past employment has involved heavy manual labor. Claimant has not worked since his heart attack.

Based upon the evidence presented and the testimony of claimant and his wife who were credible witnesses, the Referee found that claimant is now limited to 15 to 20 minutes of even the lightest type of activity. He experiences shortness of breath, fatigue and a feeling that his chest is "closed in". The medical evidence indicates that the infarction was extensive. The heart specialist restricted claimant to "at most" light activities. Claimant cannot even meet the physical requirements for light activity on a regular basis. A psychologist, who testified as a vocational expert for the Fund, said that claimant could not be employed at light or even sedentary work.

The Referee concluded, based on claimant's age, education, working experience and disability, that claimant is now permanently incapacitated from engaging on a regular basis in any gainful and suitable occupation and is permanently and totally disabled.

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

ORDER

The order of the Referee, dated January 13, 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. 76-6493 JULY 19, 1977

CARL HERZBERG, CLAIMANT
Gary Jones, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

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

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

WCB CASE NO. 75-4007 JULY 19, 1977

EUGENE KING, CLAIMANT
Robert Grant, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

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

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

WCB CASE NO. 75-5358 JULY 19, 1977

JOYCE MCCAMMON, CLAIMANT
Evohl Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which remanded claimant's claim for aggravation to it for payment of compensation as authorized by law and until closure pursuant to ORS 656.268.

Claimant had sustained an industrial injury on June 22, 1972 and her claim was accepted and ultimately closed by a Determination Order dated September 20, 1973 whereby claimant was awarded

48° for 15% unscheduled disability. Claimant requested a hearing after which the Referee, on January 7, 1975, awarded claimant 160° for 50% unscheduled disability. The Fund appealed and the Board, on July 11, 1975, reduced the award to 112° for 35% of the maximum. Thereafter, claimant appealed to the circuit court and a judgment order, on September 5, 1975, reinstated the Referee's award of 160°.

Conflicting psychiatric testimony was presented to the Referee who chose to give the greatest weight to that of Dr. Carter who was claimant's treating psychiatrist and who had filed an initial report of injury or occupational disease on September 10, 1975. Prior to that time no claim had ever been made on behalf of claimant for any psychiatric disabilities in connection with her June 22, 1972 injury. The Fund contends that the psychiatric disability for which Dr. Carter treated claimant in July, 1975 was not related to the June 22, 1972 injury; however, the Referee found the medical evidence and testimony presented at the hearing was to the contrary.

The Referee found that the industrial injury of June 22, 1972 was a material contributing factor to claimant's psychological condition requiring the reopening of her claim for medical care and treatment and for the payment of time loss as recommended by Dr. Carter.

The Referee stated that the worsening of claimant's condition must be subsequent to the judgment order entered on September 5, 1975; however, the initial treatment by Dr. Carter had started a few months prior thereto and has continued since. The Referee found that the evidence presented to Circuit Judge Allen related strictly to claimant's physical disabilities arising from the industrial injury and he was of the opinion that Judge Allen had not considered any other conditions. While the psychiatric problems existed at the time of Judge Allen's opinion, aggravation could not be denied on that technicality.

The Board, on de novo review, affirms the conclusions of the Referee. ORS 656.273(1) states:

> "After the last award or arrangement of compensation, an injured workman is entitled to additional compensation, including medical services, for worsened conditions resulting from the original injury." (Emphasis supplied)

The Board interprets the above statute to mean that although the claim for aggravation must be filed after the last award or arrangement of compensation, which in this case would be the date of the judgment order, nevertheless, the claim, itself, can be for a worsened condition which may have commenced prior to the date of such award or arrangement of compensation.

ORDER

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

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

SAIF CLAIM NO. C 110322 JULY 19, 1977

JOHN MORLAND, CLAIMANT
Keith Tichenor, Claimant's Atty.
Own Motion Order

On July 1, 1977 the Board received from the claimant, by and through his attorneys, a petition to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered on January 2, 1968 while employed at the W. C. Sivers Company, whose workmen's compensation coverage was furnished by the Fund. In support of the petition the Board was furnished an affadavit of claimant's counsel and medical reports of Dr. Hill.

Claimant's claim was closed on or about March, 1968 with no award given for permanent partial disability. On or about April 5, 1977 claimant suffered a recurrence of a subarachnoid hemorrhage at the site of an original aneurysm, identified as a condition developing from the original compensable injury of January 2, 1968.

The Fund was furnished copies of the petition, medical reports and affadavit. The Fund responded on July 11, 1977, stating that the recent hemorrhage was in the area of the previous aneurysm and resulted from a manifestation of claimant's underlying congenital condition (aneurysm). It was the Fund's opinion that it was not responsible for the surgical correction of the long-standing congenital condition.

Dr. Hill in his report dated May 9, 1977 stated his opinion that the subarachnoid hemorrhage suffered by claimant on April 5, 1977 was a result of the previous aneurysm that claimant had and ruptured while he was on the job in 1968.

The Board, after considering the medical report from Dr. Hill and the response made by the Fund, concludes that claimant's request for own motion relief should be granted.

ORDER

Claimant's claim for an industrial injury suffered on January 2, 1968 is hereby remanded to the Fund for acceptance and

payment of compensation, as provided by law, commencing on April 5, 1977, the date claimant was admitted to Providence Hospital and until the claim is closed pursuant to ORS 656.278.

Claimant's counsel is awarded as a reasonable attorney fee for his services, a sum equal to 25% of the compensation paid to claimant for temporary total disability to be paid from such compensation as paid, to a maximum of $500.

WCB CASE NO. 75-4852 JULY 19, 1977

JEROME SHORT, CLAIMANT
Robert Morgan, Claimant's Atty.
Roger Warren, Defense Atty.
Amended Order on Review

On June 28, 1977 the Board issued its Order on Review in the above entitled matter. On page 2 of said order, under the heading, Order, the second paragraph should be amended to read as follows:

> "Claimant's claim is remanded to the employer for acceptance and payment of compensation, as provided by law, commencing September 24, 1976 and until the claim is closed pursuant to ORS 656.268 and to furnish all medical care and treatment as recommended."

In all other respects the Order on Review dated June 28, 1977 is ratified and reaffirmed.

WCB CASE NO. 71-1752 JULY 20, 1977

HOLLIS COURT, SR., CLAIMANT
John D. Ryan, Claimant's Atty.
Kenneth Kleinsmith, Defense Atty.
Order Filing Findings of Medical
Board of Review

Pursuant to an Order Appointing Medical Board of Review dated 20, April, 1977, and Order Substituting Physician on Medical Board of Review dated 6, May, 1977, a Medical Board of Review was appointed to decide the claimant's appeal of a Hearing Officer's Order dated November 19, 1971, which granted claimant permanent partial disability compensation equal to 30% of the maximum allowable for unscheduled disability.

Each physician on the Medical Board of Review submitted a separate finding and two physicians also submitted narrative

medical reports and supporting laboratory studies. Dr. Goodman's Finding, narrative report and laboratory reports are attached hereto as Exhibit "A"; Dr. Reike's Finding and narrative report are attached hereto as Exhibit "B", and Dr. Rosenbaum's Finding is attached hereto as Exhibit "C".

The composite finding of the Medical Board of Review is that claimant's unscheduled disability is equal to 30% of the maximum allowable for unscheduled disability. This finding acts as an affirmance of the Hearing Officer's Order.

Pursuant to ORS 656.814, the Findings of the Medical Board of Review, affirming the Hearing Officer's Order dated November 19, 1971, are hereby filed as final and binding.

WCB CASE NO. 76-595 JULY 20, 1977

LOUISIA MOLVER, CLAIMANT
A. J. Morris, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which denied her claim for aggravation but directed the employer to pay claimant appropriate compensation for temporary total disability from February 13 to June 8, 1976 and an additional amount equal to 25% of that compensation, not to exceed $400, and awarded claimant's attorney a fee of $200 for securing for claimant the additional compensation which the employer was directed to pay to claimant.

Claimant filed a supplemental request contending the employer was directed to pay only a $200 attorney fee, that claimant's attorney secured additional compensation for claimant which amounts to $2,278.78 and had the attorney fee been paid from this compensation he would have received an amount equal to 25% of that compensation or $596.70.

Claimant suffered a compensable injury to her nose and back on June 27, 1972 for which she received conservative treatment, including dental repair. The claim was closed on August 30, 1972 with no award for permanent partial disability. Claimant returned to work for the employer and worked until she was hospitalized in September, 1975 with abdominal discomfort, nausea, vomiting and so forth. Claimant had struck her head and elbows on a cart while at work at some time between the date she returned to work and the date of her hospitalization. She was seen by Dr. Kjaer who diagnosed a chronic brain syndrome with intermittant psychosis, possibly due to physical trauma.

On January 23, 1976 Dr. Myers advised claimant's attorney that claimant's present difficulty was probably organic neurological impairment and that it was related to her industrial injury of June 27, 1972. He stated, in his deposition, that he had examined claimant in September, 1975 and received claimant's history from her and her daughter. At that time he suspected a subdural hematoma. The abnormalities included cerebral atrophy and he felt this could be caused from a blow or from degeneration; he believed claimant to be totally disabled.

On April 29, 1976 claimant was examined by Dr. Dow who found that claimant had a long history of psychiatric illness which pre-dated her industrial injury and that she had real organic brain disease together with a high degree of functional overlay. It was his opinion that claimant's functional disease was not attributable to her industrial injury because of the long history of such which preceded the injury. He did feel that claimant was totally disabled and unable to work but not because of the accident.

The Referee found that prior to the June, 1972 industrial injury claimant had had various illnesses including neurosthenia (weakness), hysteria, thrombophlebitis, varicose veins, enterocolitis and melena, gastro-ententis and anxiety neurosis. In 1971 she had been treated for dizziness, however, claimant had been able to work steadily, despite all these illnesses, until her industrial injury.

The Referee concluded that although the employer takes a workman as he finds him together with any pre-existing emotional, psychological or physical defects or infirmities, nevertheless, claimant, in spite of all the host of problems she had had prior to the industrial injury of 1972, had been able to return to work and to work regularly. In fact, claimant was able to return to work after the 1972 injury and had worked steadily for several years until she developed her psychiatric problems in 1975.

The Referee concluded that claimant had failed to prove that her 1975 condition was causally related to her 1972 industrial injury.

The Referee found that on November 20, 1975 claimant's attorney had advised the carrier that it appeared claimant's condition was deteriorating and that he intended to file a request for hearing for aggravation. Two months later he advised the carrier that he had filed a request for hearing and he enclosed a copy of Dr. Myers' letter. Between January, 1976 and May, 1976 the evidence indicates that medical appointments were set up by the carrier and cancelled and then rescheduled and postponements had been requested on behalf of the carrier. The Referee concluded that the carrier's delay in processing claimant's claim was unreasonable. He construed the letter of January 29, 1976 as a "claim" and, therefore, compensation for temporary total disability should have commenced within 14 days thereafter, as in a claim of the first instance, and continued until the carrier either accepted or denied

the claim. He found that the carrier's appearance at the hearing constituted a de facto denial and he directed it to pay claimant compensation for temporary total disability from the 14th day after the letter of January 29, 1976 until June 8, 1976, the date of the hearing.

The Board, on de novo review, agrees with the findings of the Referee, however, it also agrees with the contention set forth in the supplemental request for review filed by claimant. Through his services claimant's attorney was able to obtain for claimant a sum of $2,278.78. Because the carrier had unreasonably delayed its payment of compensation to claimant the Referee properly awarded claimant's attorney a fee payable by the employer. However, had this situation been one in which the carrier, pursuant to his attorney fee agreement with his client, would have received a fee equal to 25% of the additional compensation which he obtained for claimant then the fee would have been approximately $600 payable out of the compensation as paid.

The Board finds no reasonable explanation of why claimant's attorney should receive only $200 payable by the carrier when he would have received nearly three times as much had it been payable out of the compensation which he obtained for claimant. The Board concludes that the Referee's order should be modified to the extent of increasing the attorney fee awarded claimant's attorney by the Referee.

ORDER

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

The carrier is hereby ordered to pay claimant's attorney as a reasonable attorney fee for his services before the Referee the sum of $600. This attorney fee is in lieu of the attorney fee awarded by the Referee's order, which in all other respects is affirmed.

SAIF CLAIM NO. RC 228129 JULY 20, 1977

AVIS RUSZKOWSKI, CLAIMANT
Lyle Velure, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 24, 1977 claimant, by and through her attorney, requested the Board to reconsider its Own Motion Order of May 18, 1977 on the ground that claimant's condition is not medically stationary and she is in need of further medical care and treatment. He contended that claimant is entitled to a greater award of permanent partial disability, including permanent total disability,

and to make this assessment the matter should be referred to the Hearings Division to take evidence on the merits of claimant's request.

The Board, after giving full consideration to this matter, finds there is no justification for claimant's contentions and, therefore, will not, at this time, reconsider.

Claimant's request should be denied. If, at a later date, claimant can submit support for his contentions the Board will again evaluate the request for own motion relief.

IT IS SO ORDERED.

WCB CASE NO. 75-479 JULY 20, 1977

PHILLIP STEVENS, CLAIMANT
SAIF, Legal Services, 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 the Fund's motion to dismiss and affirmed the Determination Order of August 9, 1974.

Claimant was involved in an automobile accident and sustained a compensable injury to his head on October 23, 1973. Claimant suffered from severe headaches for some time and had some neck stiffness. Although claimant did not immediately report it, he suffered a low pitched whistle-like sound in his right ear.

Prior to this injury claimant had had no hearing in his left ear from his childhood years; and had had prior hearing problems with his right ear. He reported he had been exposed to loud noise for several years.

The medical evidence indicates that claimant did have high frequency hearing loss in the right ear of unknown etiology and the injury could have aggravated that difficulty and causing the tinnitus. Several audiograms were performed after the injury which revealed a hearing loss of the right ear; however, no physician could definately attribute this hearing loss to the October, 1973 injury, nor could claimant positively indicate any greater loss of hearing after the accident than before.

Claimant's headaches and neck stiffness have apparently resolved without permanent impairment.

Claimant's claim was closed by a Determination Order on August 9, 1974 with an award for time loss only. Claimant requested a hearing on this Determination Order.

In late 1974 claimant pursued a claim against the other party involved in the automobile accident, filing a third party suit; he was also receiving workmen's compensation benefits. Claimant settled the third party suit for $5000 with approval of the Fund. Claimant, pursuant to the settlement terms, withdrew his request for hearing in January, 1975.

On February 6, 1975 claimant filed a new request for hearing. Thereafter, the Fund moved for dismissal of this request for hearing, contending the settlement constituted a bar to any further compensation to claimant except under aggravation rights or a petition for relief by the Board's own motion.

The Referee found that claimant's acceptance of the balance of a settlement of a third party suit did not bar him from seeking further workmen's compensation benefits. However, the Referee found that there was no medical evidence establishing a causal relationship between claimant's loss of hearing in his right ear and the October, 1973 industrial injury. He affirmed the Determination Order of August 9, 1974.

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

ORDER

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

WCB CASE NO. 76-4028 JULY 21, 1977

WILLIAM McKINNON, CLAIMANT
Robert Martin, Claimant's Atty.
Dennis VavRosky, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks Board review of the Referee's order which approved the carrier's denial of claimant's claim for workmen's compensation benefits.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, made a part hereof.

WCB CASE NO. 75-5173 JULY 21, 1977

BEADRICK MEADER, CLAIMANT
David Vandenberg, Jr., Claimant's Atty.
R. Ray Heysell, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which approved the denial by the carrier of claimant's claim for workers' compensation benefits.

Claimant was a 54-year-old meat wrapper who filed a claim for an industrial injury on August 12, 1975. The claim indicated that claimant had suffered an injury to her back and right leg in October 1974 which she attributed to pushing a heavy buggy up an incline and lifting and carrying heavy boxes.

Claimant had had a back injury in 1972 and had filed a claim for that injury. She testified that from 1972 until she went to work for the employer in June 1974 her back continued to bother her but she felt that it was arthritis and most the time during this period she felt "fairly good". Claimant had no problem with her right leg until August 1974. During the course of her work for the employer, claimant claims she had to push a shopping "buggy" up a ramp several times a day. The "buggy" was loaded with delicatessen products which weighed between 75 and 100 pounds. She felt that this activity caused pain to develop in her leg.

Claimant cannot remember whether she told her supervisor that she had had an injury or not, but she thought she probably had stated that her back was hurting and she did testify that she told her supervisor she was having difficulty and had to ask for help in getting the "buggy" up the ramp.

The supervisor testified he had no recollection of claimant telling him she was having any difficulty pushing the buggy or having told him that she was having back problems, nor did he know anything about the owner disapproving of claimant receiving help from the box boys as claimant alleged.

Claimant testified that she had told Dr. Tice and Dr. Lilly when she had first seen them that she had hurt herself on the job. Dr. Tice, in a report to claimant's attorney, dated November 25, 1975, stated he had seen claimant on December 21, when she was complaining of a backache and it was his impression that she was suffering from lumbago. He made no notation that claimant indicated the back problem was job related. Dr. Lilly, on February 3, 1976, indicated in a report to the insurance investigator that it was his opinion claimant's difficulty was not employment related; however, in a later report dated May 3, 1976,

Dr. Lilly revised his opinion stating that, based upon the history related to him by claimant, he felt that claimant had an industrially-related problem which would be the responsibility of the industrial insurance carrier.

The Referee found that there was contradictory testimony with respect to how frequently the delicatessen was stocked and he was persuaded that claimant's recollection of the frequency of moving the cart across the ramp was greater than that which actually occurred. He found that claimant had not seen a doctor during her work period from June to October 1974. She had testified that when her right leg commenced to bother her in August she thought it would go away eventually. There is nothing in the record to indicate why claimant left her employment. She had seen Dr. Tice in December 1974 a couple of months after leaving her job and acting upon his advice went to a warmer climate with her husband. She stayed approximately three months and then returned to Oregon because her condition had worsened. In March 1975, she saw Dr. Lilly, who placed her in traction and the following month she saw her attorney regarding the filing of a claim which claim she finally presented to the employer in August 1975.

The Referee found the record inadequate to demonstrate the causal relationship between the claimant's disability and her employment. He did not feel that claimant had made any deliberate misrepresentation of fact, but was inclined to the view that when she reviewed events of 1974 after the passage of several months, her recollection was not entirely clear and quite possibly her mind recreated events more favorable to her interest than the facts would have warranted had they been recalled at a time closer to their occurrence.

The Referee concluded, despite the opinions expressed by Dr. Lilly and Dr. Tice that claimant's back disorder was industrially related, that the weight of the evidence was to the contrary. He further concluded that claimant's claim was barred as untimely and claimant had failed to show good cause for delayed filing. He approved the denial.

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

ORDER

The Order of the Referee, dated September 20, 1976, is affirmed.

WCB CASE NO. 75-3232 JULY 21, 1977
WCB CASE NO. 75-5157

WARREN L. RITCHIE, CLAIMANT
Michael Brian, Claimant's Atty.
Legal Division, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks Board review of the Referee's order which granted claimant and additional 82.5 degrees for a total of 97.5 degrees of a maximum 150 degrees for partial loss of the right leg and an additional 67.5 degrees for a total of 135 degrees of a maximum 150 degrees for partial loss of the left leg and 15 degrees of a maximum 150 degrees for partial loss of the use of the right elbow.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, made a part hereof.

WCB CASE NO. 76-4414 JULY 21, 1977

RIC ROESNER, CLAIMANT
David W. James, Jr., Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of claimant's claim for workmen's compensation benefits.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ERNEST TUM SUDEN, CLAIMANT
John W. Danner, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
SAIF, Legal Division, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The SAIF requests review of the referee's order which remanded claimant's claim to it to be accepted for payment of compensation as provided by law.

There are two claims involved; the question is whether the second incident was a new injury or an aggravation of an earlier injury.

Claimant first suffered a compensable injury on November 15, 1973; his employer, at that time, was furnished workers' compensation coverage by Employers Insurance of Wausau which accepted the claim and processed it. Claimant suffered a second compensable injury on May 7, 1976 while working for the same employer whose workers' compensation coverage,at that time,was furnished by the Fund. Claimant filed claims against both Wausau and the Fund. Both carriers denied responsibility.

An order was issued pursuant to ORS 656.307 which designated the Fund as the paying agent.

Only exhibits were received, no testimony was taken at the hearing. The evidence indicates that claimant had worked for 38 years as an auto upholsterer and suffered the first injury while lifting a seat cushion. The injury was diagnosed as a herniation of the L5-S1, left, and on December 4, 1973, claimant underwent a hemilaminectomy and excision of intervertebral disc extrusion. He made a good recovery, without complications and returned to work without any residual problems.

In the early part of May 1976, just before leaving for vacation, claimant began to experience low back and leg pain. He stayed at home during the vacation and did some work around the house and finally sought medical treatment. On May 21, 1976, claimant underwent a second hemilaminectomy and excision of an intervertebral extrusion at the same site as the 1973 surgery.

Dr. Dennis, the treating physician, thought it probable that the prior injury had made claimant more susceptible to subsequent extrusion at the same level and on the same side; it was also likely that claimant would have had a recurrent disc protrusion if he continued to do the same type of work which he had done. Had claimant not chosen to continue the same type of work, he might not have had this recurrent problem.

The Fund contends that this was an aggravation of the 1973 injury while Wausau argues that it is a new compensable injury.

After claimant's uncomplicated recovery from the 1973 surgery, he was able to expend great exertion in continuing to work as an auto upholsterer and had no residual symptoms, pain or reminder of the first injury until May 1976. At that time and over a very short period thereafter, claimant not only felt his first symptoms, but also was compelled to undergo a second surgery to relieve the symptoms.

The Referee concluded that claimant had suffered a new compensable injury on May 1976, which was the responsibility of the State Accident Insurance Fund and he remanded the claim to it.

The Board, on de novo review, concurs with the conclusion reached by the Referee and affirms his order.

ORDER

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

Claimant's attorney is granted as a reasonable attorney fee the sum of $350, payable by SAIF.

WCB CASE NO. 76-2987 JULY 21, 1977

CAROL TIPPIE, CLAIMANT
Peter O. Hansen, Claimant's Atty.
Roger Leudtke, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant requested Board review of the Referee's order which affirmed the determination order entered May 20, 1976 whereby claimant was awarded 80 degrees for 25% unscheduled mid-back disability.

Claimant was 25 years old when she suffered a compensable injury on April 17, 1974 while working as a bag turner in a bag factory. Claimant twisted her back lifting the bags and the injury was diagnosed as a mild chronic dorsal strain. Claimant also suffers from a mild aggravation of pre-existing nervous tension and anxiety.

Claimant's claim was closed by determination order mailed November 4, 1974 which awarded claimant 80 degrees for 25% unscheduled disability to the mid-back. She was considered medically stationary on July 7, 1974. On December 27, 1974, an administrative determination order set aside the determination order dated November 4, 1974, after finding that claimant had a vocational handicap, and

claimant was referred to an authorized program of vocational rehabilitation and trained to work as a cook. Claimant's time loss payable after July 7, 1974 was reimburseable from the rehabilitation reserve.

Claimant was sent to a commercial cook school where she completed the authorized program and, on May 20, 1976, a determination order was mailed whereby claimant was awarded 80 degrees for 25% unscheduled disability to her mid-back and compensation for temporary total disability inclusively from April 18, 1974 through March 19, 1976.

Claimant worked for a short period of time as a cook's helper but was discharged because her employer was not satisfied with the speed of her work. At the present time she is trying to find a course designed to assist her in finding employment in her new occupation as a cook. Her past work history was limited to babysitting, helping in a nursery school and working in the bag factory.

The Referee found that claimant had graduated from high school, however, she had been placed in special education classes from the 6th grade forward. He also found that claimant's case was complicated by domestic problems, obesity and unrelated dorsal epiphysitis. He concluded that claimant was well-motivated but, after considering all relevant factors, he further concluded that she had been adequately compensated for her loss of wage earning capacity by the award of 80 degrees. He affirmed the determination order of May 20, 1976.

The Board, on de novo review, concurs in the conclusion reached by the Referee.

ORDER

The Order of the Referee, dated September 20, 1976, is affirmed.

WCB CASE NO. 77-1536 JULY 22, 1977

HARVEY BURT, CLAIMANT
Martin W. Van Zeipel, Claimant's Atty.
SAIF, Legal Division, Defense Atty.
Order Vacating Own Motion Determination

On January 26, 1977, the Board entered its Own Motion Determination in the above entitled matter, closing claimant's claim pursuant to ORS 656.278 with an award of 45 degrees for 30% loss of the left leg.

Claimant's claim had been initially closed by a Determination Order entered on October 28, 1970 and claimant's aggravation rights expired on October 27, 1975. On or before July 7,

1975, claimant filed a claim for aggravation which was denied by the Fund on July 7, 1975. Claimant requested a hearing after which the Referee ordered the Fund to accept claimant's claim for aggravation and for payment of all benefits to which he was entitled by law until the claim was closed pursuant to ORS 365.268 [sic].

Although the order of the Referee was entered on April 29, 1976, more than five years after the initial closure of claimant's claim, claimant's claim for aggravation was filed within that five year period and was sufficient to toll the statute and entitled claimant to have his claim closed pursuant to the provisions of ORS 656.268 rather than 656.278.

The Board concludes that its Own Motion Determination entered on January 26, 1977 should be set aside and its Evaluation Division should be directed to mail a Determination Order to all parties concerned, based upon the closing medical report from Dr. Zimmerman, dated November 23, 1976, which accompanied the request for a determination by the Fund on December 17, 1976.

The Board further concludes that this Determination Order should award the compensation recommended by the Evaluation Division in its advisory opinion to the Board and should be dated January 26, 1977.

IT IS SO ORDERED.

WCB CASE NO. 76-1379 JULY 22, 1977

FLOYD O. HILL, CLAIMANT
Steven R. Frank, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Phillips.

SAIF requests review by the Board of the Referee's order which granted claimant an award of permanent total disability, commencing August 4, 1976.

Claimant, a 48 year old chaser,sustained a compensable injury to his back on September 4, 1974 when a one and 1/4 inch guy wire cable broke and lashed against him.

On the same day, claimant saw Dr. Bryson, a chiropractor, complaining of pain in the shoulder and numbness in the fingers. Claimant continued working until economic reasons forced a layoff at the company. Claimant testified his condition became progressively worse during the three month period before the layoff. Claimant has not worked since December, 1974.

Dr. Bryson referred claimant to Dr. Degge, an orthopedist, who found strains of the cervical musculature and periscapular musculature of the right shoulder. Nerve conduction studies proved normal.

On September 22, 1975, Dr. Degge released claimant to return to work. Claimant testified he then sought treatment from Dr. Kerns because he did not feel he could return to work. On September 29, 1975, Dr. Kerns felt that claimant should try to get back to work full time.

On October 31, 1975, Dr. Kerns reported that claimant has a real problem and the regaining of claimant's ability to use the chainsaw in the woods is going to be problematic. Dr. Kerns was concerned as to whether claimant could put out as much work as he had done prior to the injury.

Claimant indicated he did try to return to work but after one day was incapacitated and Dr. Kerns referred claimant to Dr. Robertson, an orthopedist.

Dr. Robertson examined claimant on November 18, 1975; claimant had complaints of pain and stiffness in his neck on the right side and right shoulder; also, a feeling of "sleepiness" in both of his hands, especially at night. Claimant does well and has little pain if he does nothing. Dr. Robertson concluded claimant had very few clinical objective findings. He recommended vocational rehabilitation in less strenous type of work.

Claimant was examined at the Disability Prevention Division by Dr. Van Osdel who diagnosed chronic strain of the cervical and scapula muscles and moderate to moderately severe anxiety reaction with depression.

Claimant got in touch with the Vocational Rehabilitation Division and was referred to a service coordinator on March 9, 1976. The vocational counselor indicated that in "view of claimant's limitations and especially considering the unpredictability of his incapacitation for significant periods of time, it would appear very unlikely that he is able to engage in any kind of regular gainful activity for a full work day". The counselor further found that this included sedentary or lighter types of occupations which would require regular and dependable work activity.

Claimant again sought referral by the Board to VRD and DPD suggested that claimant be reevaluated by another vocational counselor. Claimant saw Wanda Randall who felt it very unlikely that claimant could engage in any kind of gainful activity for a full work day. She also indicated she knew of no sedentary or lighter employment possibilities within claimant's physical limitations.

A Determination Order of June 25, 1976 granted claimant no award for permanent partial disability.

Claimant has a 7th grade education. His work history after World War II has been exclusively in logging. Claimant had been continuously employed up to the time he ceased employment in December, 1974, he has had a number of injuries, several were quite significant. However, claimant was, until this injury, always capable of returning to work.

Defendant contends there was no medical causal connection made between claimant's numbness in the hands and his industrial injury. However, Dr. Myers, in May 1975, indicated that the numbness in the hands could be due to so-called "cervical brachial neurovascular compression syndrome frequently associated with cervical strain type problems" and in June, 1975 indicated this most likely was the cause.

Dr. Brooksby, a psychiatrist, found apart from whatever organic residuals claimant may have had from surgery and deformity of the right achromo clavicular junction together with the osteoarthritis of his spine, claimant had developed a marked secondary mental reaction of a hysterical conversion type. It was his opinion that both the combined organic and mental problems now markedly impair claimant for productive work.

Dr. Parvaresh examined claimant and found claimant had a mild organic brain syndrome, probably caused by drinking. He found claimant educationally deprived and unable to engage in work requiring concentration. Dr. Parvaresh felt claimant should be able "to engage in menial type jobs in which he had engaged in the past".

The Referee found nothing in the record to indicate claimant was malingering or exaggerating his symptoms. Prior to this injury claimant was a self-sustaining individual and able to work regularly. Claimant's residual impairment, both psychological and physical, taken together with his educational, intellectual and experiential limitations places claimant in the odd-lot category and the Fund failed to show any suitable and gainful employment available to claimant on a regular basis. He found claimant to be permanently and totally disabled.

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

ORDER

The order of the Referee, dated December 6, 1976, is affirmed.

WCB CASE NO. 76-1389 JULY 22, 1977

MARSHALL SMITH, CLAIMANT
Dan O'Leary, Claimant's Atty.
G. Howard Cliff, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

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

Claimant, a 61-year-old spray painter, contends that his chronic lung condition is compensable as a result of his job spray painting cars for the employer. Claimant worked as a spray painter for the employer between April 2, 1972 and October 22, 1975, he had worked regularly as an auto spray painter since 1947.

Claimant alleges that he first became aware of lung problems in 1974 when Dr. Kazmierski told him he should watch his lungs. About a year later, Dr. Kazmierski advised him to stop work. Claimant did so.

Dr. Kazmierski's report of January 5, 1976 confirms that he advised claimant of the possibility of the lung changes, although symptomatic, might represent allergic response to the chronic inhalation of spray paint. The x-rays taken in January 1976 showed a striking contrast with the x-rays taken in September 1971. The later x-rays showed extensive small fibronodular densities in both upper lung fields. Dr. Kazmierski stated he encouraged claimant to discontinue this type of work and move himself from the conditions to which he was exposed as a result thereof.

Claimant's job consisted of spray painting cars and he testified that he often had to blow off excess body plastic with an air hose, sand it down and then spray the auto with three to four coats of primer, using a spray gun. Then claimant would sand with a sanding board after which he would apply the paint. There were two exhaust fans on the floor outside the 35' X 25' area in which claimant worked and which was walled on three sides. Also in the area in which claimant worked was a 3' X 3' vent which was used to remove the fumes. Claimant did not feel that either the vent or the fans were adequate to clear the area. Claimant wore a cloth surgical mask while he did small jobs and a respirator mask for heavy spray painting, but there were times during the day when claimant would not have the mask on.

On January 23, 1976, claimant was examined by Dr. Tuhy who felt that claimant had some type of nodular pulmonary fibrosis of an undetermined cause. He believed that the x-ray suggested that the process was, in all probability, present before claimant went to work for the employer and it was his opinion that claimmant's condition was not related to his employment.

On February 18, 1976, the carrier denied responsibility for claimant's lung condition. At the hearing, both Dr. Kazmierski and Dr. Tuhy testified. The former felt that claimant had chronic lung condition, nodular pulmonary fibrosis, which he had reason to believe may have been caused by long-standing exposure to noxious agents in the inhaled air. It was his opinion, based upon reasonable medical probability, and assuming there was dust, paint spray, and thinner in the air where claimant worked, that claimant's work environment was a material contributing factor to his lung disease for its acceleration or exaggeration. He felt that the inhalation of an irritant such as a noxious substance in the air over the course of many years was the most likely source of claimant's lung condition. He felt that talc inhalation stood the best chance of being the agent, but that he would by no means exclude others and would consider the combination of several agents as well as one.

Dr. Tuhy, who is a specialist in the diseases of the heart and lung, testified that the x-rays showed a few tiny nodular shadows as early as 1965 with a slow increase from that date and he felt these findings were compatible with some type of nodular fibrosis of an undetermined cause. He stated there were several etiologies for nodular pulmonary fibrosis and in his opinion, based upon reasonable medical probability, the most likely diagnosis was sarcoidosis, the origin of which is unknown. He found no proof of a causal relation to claimant's occupation or environment; he did not feel that claimant had talcosis although he stated that talcosis never entered his mind before he came to the hearing and that he would have to know the percentage, size of particles and extent of exposure to talc. Dr. Kazmierski stated he had read Dr. Tuhy's report and that although he could not disagree with Dr. Tuhy's diagnosis of sarcoidosis, it was a possibility but he felt that it was quite unlikely.

The Referee found herself faced with two diametrically opposed medical opinions and was more impressed by the testimony and opinion expressed by Dr. Kazmierski and his explanations and reasons for such opinion. Furthermore, Dr. Kazmierski had treated and observed claimant for his conditions in 1971. Based upon the evidence, the Referee concluded that claimant's lung condition was a compensable occupational disease under Workers' Compensation Law.

She did not find that the denial of the claim was unreasonable under the circumstances of this case and, therefore, did not assess any penalties or award an attorney's fee payable by the employer.

The Board, on de novo review, disagrees with the conclusion reached by the referee. The Board finds that Dr. Kazmierski was of the firm belief that claimant was exposed to talc suspended in the air, probably from sanding body filler. The Board finds no evidence that there was any airborne talc in the shop where claimant was employed. All of the evidence is to the effect that the painters did not sand the areas of the automobile on which the body man had used fillers.

The Board is more persuaded by the opinion expressed by Dr. Tuhy that claimant's condition is properly diagnosed as sarcoidosis and of unknown origin, especially when considered together with the lay evidence relating to claimant's duties as a spray painter.

The Board concludes that claimant has not met his burden of proving by preponderance of the evidence that his condition is causally related to his occupation or environment and, therefore, the denial should be approved.

ORDER

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

WCB CASE NO. 76-4150-B JULY 25, 1977

RICHARD D. ABBOTT, JR., CLAIMANT
R. Ladd Lonnquist, Claimant's Atty.
James D. Huegli, Defense Atty.
Robert E. Babcock, Defense Atty.
Request for Review by Leatherby Ins. Co.

Reviewed by Board Members Wilson and Moore.

Leatherby Insurance Company requested Board review of the Referee's order which had approved the denial issued by Liberty Mutual Company on June 23, 1976 of claimant's claim for an injury suffered on May 4, 1976, and disapproved its denial of said claim which had been issued on August 2, 1976, remanding to it claimant's claim for aggravation of his June 1975 injury for the payment of all benefits as provided by law. Leatherby also was ordered to reimburse Liberty Mutual for all sums the latter had paid to claimant pursuant to an order issued under the provisions of ORS 656.307.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 13, 1977, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in connection with this Board review the sum of $100, payable by Leatherby Insurance Company.

WCB CASE NO. 76-5572 JULY 25, 1977

CAROLYN S. BILLINGS, CLAIMANT
R. Kenney Roberts, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and Moore.

Claimant requests review by the Board of the Referee's order which affirmed the denial of September 22, 1976 of claimant's claim for aggravation. Claimant contends that she is not medically stationary and is entitled to temporary total disability benefits.

Claimant, 28 years old at the time, sustained a compensable injury on June 27, 1973 when she slipped and fell down some stairs. The original diagnosis by the doctors at the Permanente Clinic was lumbar sacral strain. Claimant received conservative treatment.

During the period of this treatment it was ascertained that claimant would be unable to return to work in the areas in which she was experienced and she was referred to the Vocational Rehabilitation Division and placed in a dental technician program. Because of domestic problems, claimant was unable to complete her schooling, although she did obtain her GED certificate.

In his October 12, 1973 report to the carrier, Dr. Wade stated that claimant's subjective symptoms could not be explained on the basis of any physical findings. He felt there was some evidence of functional overlay, but indicated that there was nothing he could offer her that had not already been done. Dr. Gerhardt, in his November 5, 1973 report, noted his impression as post-traumatic syndrome with functional disease; sacroiliac syndrome, muscle tension and weakness. He felt that a disc problem was unlikely, but should be looked into.

Dr. Pasquesi's report of February 26, 1974 indicated findings of chronic lumbar myositis and fascitis. He felt she was not yet stationary and that, although she was improving, complete recovery was questionable. He recommended further physical therapy and thought it possible that she could be considered stationary in two to three months.

On June 27, 1974, Dr. Gerhardt reported that claimant had said she was feeling better although she was still having some back pain, but that family problems were increasing her tension. He indicated that her condition was not stationary and advised her to contact the local vocational rehabilitation office for training.

Dr. Pasquesi, in his October 9, 1974 report to the carrier, said that claimant was basically the same as when he saw her in February. He did not feel that claimant would benefit from

further curative care. Her disturbed home life was not helping her condition. He indicated that she would have to change occupations and recommended that the claim be closed.

Dr. Dorsey, a psychologist, opined in his November 7, 1974 report, that claimant's injury was not improved because of her tension and anxiety which, in turn, because of the instability of her condition, caused her to experience more tension.

The November 25, 1974 Determination Order awarded the claimant 64 degrees for a total of 20% unscheduled low back disability.

Claimant returned to work as a waitress in December of 1975. Since that time, her pain has become progressively worse. On May 5, 1976, Dr. Rankin diagnosed partial strain, chronic, with possible degenerative disc disease. He felt that her claim should be reopened for a complete evaluation. In his June 21, 1976 report, Dr. Rankin indicated that a full set of lumbosacral x-rays taken revealed no orthopedic abnormalities. He felt that claimant's major problem was psychological in background and recommended counselling in this area.

Dr. Pasquesi, on August 11,1976 reported that claimant's condition had not changed much from the other times he had seen her, the first visit being in February of 1974. He felt claimant could benefit from palliative care, but that her claim should not be reopened for time loss.

Claimant based her claim for aggravation on the two reports from Dr. Rankin. She dates the onset of the worsening of her pain to September, 1975. She claims she can't do "anything any more" as a result of the sharp pain. The testimony of a friend seemed to substantiate claimant's statements.

Based upon the opinion of Dr. Pasquesi in his August, 1976 report and claimant's testimony as to the nature and extent of her pain in November 1974 and in 1976, the Referee concluded that claimant did not have an aggravation of her industrial injury to the extent that she was entitled to receive compensation for temporary total disability.

The Board, on de novo review, concurs with the conclusions of the Referee and affirms his order. However, claimant is entitled to medical care and treatment under ORS 656.245 and, as the Referee's order indicates,the carrier has not refused to provide claimant with and pay for all medical or psychological treatment received since November 1974.

ORDER

The order of the Referee, dated January 24, 1977, is affirmed.

WCB CASE NO. 76-278 JULY 25, 1977

STEVE BREWER, CLAIMANT
Dan O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which held that claimant's condition was stationary as of October 22, 1975 and the continued payment by the Fund until February 25, 1976 constituted an overpayment for which credit could be granted pursuant to ORS 656.268(3) and granted claimant 37.5 degrees for 25% loss of the right leg, to be paid in lieu of and not in addition to the award made by the Determination Order of February 25, 1976. The employer filed a cross-request for Board review of the order.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

WCB CASE NO. 76-1131 JULY 25, 1977

DANIEL CLARK, CLAIMANT
Ronald J. Podnar, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks review by the Board of the Referee's order which found that claimant had proven by the preponderance of the evidence that his claim was compensable, but approved the denial of said claim by the carrier because of claimant's failure to process a timely appeal from the denial pursuant to ORS 656.319(1).

The Board, after de novo review, affirms and adopts as its own the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

The order of the Referee, dated February 2, 1977, is affirmed.

WCB CASE NO. 75-3484 JULY 25, 1977

MELVIN INMAN, CLAIMANT
Ackerman & DeWenter, Claimant's Atty.
Lyle Velure, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which set aside a "Disputed Claim Settlement, Stipulation and Order", dated August 2, 1974 and remanded claimant's claim to the carrier for payment of compensation benefits from March 13, 1974 until closure was authorized pursuant to ORS 656.268. The Referee allowed the carrier to offset from any amounts due or to become due claimant for temporary or permanent disability the sum of $1,512, which represented the net sum advanced to him on August 2, 1974 by the voided disputed claim settlement. He also awarded claimant's attorney an attorney's fee of $1,000, payable by the carrier.

Claimant contends he suffered a compensable industrial injury on October 23, 1973 when he hit his head on a beam and was momentarily dazed. Evidently claimant was not wearing a hard hat as he testified that his foreman witnessed the incident and commented "That's why we wear hard hats". Claimant finished his shift on Tuesday and worked the balance of that week. On Saturday, while riding as a passenger in a car driven by his wife, claimant states he felt sharp disabling pain in his neck and shoulder; so severe that the next day he contacted Dr. Larson, osteopathic physician, who took x-rays which were negative but, according to claimant, told claimant that didn't necessarily indicate that no injury had occurred.

The following day, Monday, claimant missed work in order to obtain the x-rays and also at Dr. Larson's suggestion that he rest for a day to see if it would alleviate his pain. He returned to work the following day and worked continuously until March 1974.

On December 15, 1973, claimant signed a claim for industrial injury (Form 801). Claimant was unable to satisfactorily explain why he waited until December to fill out a claim for an injury alleged to have occurred in October and for which disability did not commence until March 1974. However, the employer accepted the claim as a non-disabling medical-only claim as of December 20, 1973.

In March 1974, claimant stated his back and neck pain became so severe that he again contacted Dr. Larson who referred him to Dr. Perkins, a neurosurgeon. Dr. Perkins examined claimant on March 26, 1974 and, after a variety of tests, stated his findings were essentially normal. On April 18, 1974, claimant saw Dr. Overton, an osteopathic physician, who indicated a finding of

somatic dysfunction of the dorsal cervical spine with myofascitis. It was her opinion that there was a causal connection between the symptoms and the industrial accident of October 23, 1973.

Apparently the carrier was aware that claimant had ceased working sometime in March 1974 as it directed an inquiry to a safety engineer for the company who in turn sent a memo to the claims department, triggering the affirmative action, according to Mr. Clemons, a claims examiner for the carrier at that time. Mr. Clemons received a telephone call from Dr. Perkins and as a result of that conversation, decided that an investigation was not required and negated his request for affirmative action on April 9, 1974. Mr. Clemons testified, by deposition, that he informed claimant either on or immediately after April 9, 1974 of his conversation with Dr. Perkins and of the carrier's decision not to pay compensation benefits for time loss since March because it was the carrier's opinion that such time loss was not related to the industrial accident. No formal denial was mailed to the claimant at that time.

In July 1974, the carrier received the report from Dr. Overton indicating causal relationship between the claimant's complaint and the industrial accident and they assigned the claim for investigation; however, instead of having their own claims office investigate, they assigned the claim to a private investigating firm situated in Medford. Mr. Clevidence, who had been with the carrier, Industrial Indemnity, was now employed by this private adjusting firm and the claim was given to him to investigate. Mr. Clevidence testified that he immediately went to Eugene and contacted claimant on July 29, 1974 and obtained from him a three-page typewritten statement; he also obtained medical authorizations and spent the rest of the day soliciting the reports personally from the physicians' offices. He then reported his findings by telephone to Mr. Clemons and as a result of this investigation and his conversation with Mr. Clemons, he returned to the claimant's home in Eugene the following day and negotiated the disputed claim settlement in the sum of $1,650.

In a period of three days, the disputed claim settlement was agreed upon, drawn up and signed by all parties. At the time claimant signed the disputed claim settlement, he had no attorney. Mr. Clevidence testified that he explained to claimant in full detail what would be the result of his signing of the document, that it would be a full and final closing of his claim and would terminate forever any rights claimant might have arising out of the alleged industrial accident.

Claimant testified that he was generally aware of what a disputed claim settlement was and admitted that he had been told by the carrier's representatives the general meaning of it, but claimant contends that at the time of the actual signing he was upset and irrational because of the language in the document, particularly the allegation concerning Dr. Perkins' report.

The claimant contends that because his claim was accepted there could be no "bona fide" dispute, therefore, he was not bound

by the stipulation. The carrier admitted that the first written denial furnished claimant was dated August 2, 1974, the date of the disputed claim settlement, but contends that claimant had been advised, unequivocally, on numerous previous occasions, that his claim was being denied and would continue to be denied.

The Referee found that the so-called disputed claim settlement was, in fact, a compromise and release and should be set aside. There had been no formal denial of the claim at the time; in fact, the claim had been accepted. Denials may be made by a carrier at any time, however, the procedure called for a written denial which sets forth the reasons therefore and advises claimant of his right of appeal. The Referee found that an oral denial at this point was statutorily insufficient.

The Referee also found there was no "bona fide" dispute existing at the time the stipulation was signed. The claim had been accepted and the carrier had in its possession a report from Dr. Overton which causally connected the complaint to the injury and, in fact, requested reopening for treatment; however, this report was not shown nor given to claimant nor was it mentioned in the alleged "bona fide" disputed agreement. The Referee found there was a breach in the fiduciary relationship existing between the carrier and the claimant when it failed to disclose the contents of Dr. Overton's report; also, by the manner in which the alleged agreement was obtained.

For the foregoing reasons, the Referee set aside the disputed claim settlement dated August 2, 1974 and remanded the claim to the carrier for payment of compensation from March 13, 1974, the date claimant ceased working, until the claim was closed pursuant to ORS 656.268.

The Board, on de novo review, agrees with the findings and conclusions of the Referee insofar as they relate to the validity of the alleged "disputed claim settlement". However, the Referee has made no findings nor conclusions in his order on the issue of compensability. He finds that the carrier did have in its possession a report from Dr. Overton which causally connected claimant's complaint to the industrial injury and requested a reopening for treatment, he also finds that the claim initially had been accepted as a non-disabling medical-only claim and he finds that the first formal written denial was dated August 2, 1974, the date the "disputed claim settlement" was signed by claimant. All of these findings might imply that the Referee had concluded that claimant had suffered a compensable injury, but that is not sufficient basis to remand the claim to the carrier for the payment of compensation.

Pursuant to the provisions of ORS 656.295(5), the Board hereby remands the matter to Referee Ray S. Danner to make a determination on the issue of compensability and, if necessary, to hold a hearing to take evidence on this issue.

ORDER

The order of the Referee dated September 16, 1976 is affirmed insofar as it settles the issue of validity of the "Disputed Claim Settlement, Stipulation and Order", dated August 2, 1974.

The balance of the Referee's order, which remanded the claim to the carrier for payment of compensation benefits from March 13, 1974 until closure pursuant to ORS 656.268, allowed the carrier to offset from any amounts due or to become due to claimant for temporary or permanent disability the sum of $1,512 and awarded claimant's attorney a $1,000 attorney's fee, shall be held in abeyance pending a determination by Referee Raymond S. Danner on the issue of compensability of claimant's claim for an injury alleged to have occurred on October 23, 1973.

WCB CASE NO. 76-4283 JULY 25, 1977

PATRICK KOKAS, CLAIMANT
Allan H. Coons, Claimant's Atty.
R. Kenney Robert, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which affirmed the determination order mailed July 27, 1976 whereby claimant was granted no award of permanent disability.

The Board, after de novo review, affirms and adopts as its own the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

The order of the Referee, dated January 7, 1977, is affirmed.

NO NUMBER JULY 25, 1977

JESSE MARKHAM, CLAIMANT
John McCourt, Claimant's Atty.
Own Motion Order

On June 6, 1977, the Board issued its own motion order in the above entitled matter, denying claimant's request to reopen his claim for an industrial injury suffered on April 25, 1969.

At the time this order was entered the surgery recommended by Dr. Eckhardt could only be classified as a future possibility

and the order stated that should that surgery be performed in the future, claimant would be entitled to compensation for time for the period of his hospitalization and surgery. The order did not specifically set out the period during which claimant would be entitled to compensation for time loss because, at that time, the need for surgery was purely speculative.

The Board has now been informed that on June 30, 1977, claimant was admitted to Emmanuel Hospital for the surgery recommended by Dr. Eckhardt, therefore, claimant is entitled to compensation for temporary total disability commencing from June 30, 1977 and until his claim is closed pursuant to ORS 656.278.

ORDER

Claimant's claim for his compensable injury suffered on April 25, 1969 is hereby remanded to the carrier, Fireman's Fund Insurance Company, for the payment of compensation, as provided by law, commencing on June 30, 1977 and until the claim is closed pursuant to the provisions of ORS 656.278.

Claimant's attorney is awarded as a reasonable attorney fee a sum equal to 25% of the compensation paid to claimant, payable out of said compensation as paid, not to exceed $300.

WCB CASE NO. 76-1069 JULY 25, 1977

LILLIAN MARTIN, CLAIMANT
Richard T. Kropp, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks review by the Board of the Referee's order which awarded her 240 degrees for 75% unscheduled disability, an increase of 176 degrees over the total previous awards. Claimant contends she is permanently and totally disabled.

Claimant suffered a compensable injury to her low back on January 26, 1969 while lifting a patient during the course of her employment as a nurse's aide. Since that time she has been examined and/or treated by many doctors all of whom have diagnosed claimant's claim as an acute and chronic lumbar strain and sprain with intermittent right sciatica, except Dr. Jones. Dr. Jones diagnosed a right lumbosacral facet subluxation, which had been persistent with the referral of pain into the right fifth lumbar nerve root zone, but no definite compression of the root. All of claimant's treatment has been conservative in nature; she has had no surgery.

Dr. Raaf rated claimant's physical impairment at 25% loss of function for unspecified injury. Dr. Robinson rated it at 20%. The Physical Rehabilitation Center felt claimant demonstrated only minimal physical disability and Dr. Robinson concurred. Later Dr. Robinson rated claimant's loss of function and disability as "mild". Dr. Anderson found only minimal objective findings as such related to claimant's low back condition. Dr. Eusterman felt claimant was 100% disabled for work as a nurse's aide, but only 25% for work which did not involve lifting or stressing the low back.

With respect to claimant's psychopathology, various diagnoses were made. The Psychological Center felt claimant experienced moderate/severe anxiety depression and that the prognosis for restoration and rehabilitation was poor. The Physical Rehabilitation Center rated the psychopathology as "moderately severe" and indicated that the industrial injury was responsible for only a minimal degree of it. Both Dr. Anderson and Dr. Robinson had noted functional overlay to a considerable degree and Dr. Ackerman believed claimant's mental state was chronic and "moderate". Dr. Quan felt claimant's mental state was generally of a "mild to moderate intensity" and he rated her psychiatric disorder at 45% impairment of the whole man, using the AMA Guides, with the total neurosis being in the range of 25-30%.

It was the medical consensus that claimant's physical impairment together with her psychopathology prevented her return to her former occupation as a nurse's aide and also precluded her return to the general industrial labor market in jobs which required heavy lifting, bending, or stooping, prolonged standing, walking, or sitting, and twisting and turning movements. The one exception was the report from the Physical Rehabilitation Center which indicated claimant could return to her former occupation without restriction. On the other hand, Dr. Ackerman believed that claimant's psychopathology rendered her permanently and totally disabled.

Claimant is 46 years old, she has an eighth grade education and she received on-the-job training as a nurse's aide which has been her primary occupation since she was 18 years old. She has no other formal education or experience, although she does have limited experience as a lab technician which was acquired while working in a cannery.

After considering the conflicting medical, psychological and psychiatric evidence relating to claimant's physical and mental impairments and her employability status, the Referee found that claimant's physical and mental impairments were not so severe as to render her incapable of regularly performing any work at a gainful and suitable occupation. Furthermore, claimant's motivation to be retrained or to return to work is questionable. He concluded that claimant was not permanently and totally disabled.

Based upon the finding that claimant's physical impairment and residual psychopathology precluded her from returning to work

in her primary occupation as well as returning to work in other occupations which involved heavy lifting, bending, etc., and considering claimant's age, education, training, and experience, the Referee concluded that claimant was entitled to an award equal to 75% of the maximum allowable for unscheduled disability to compensate her for her loss of wage earning capacity.

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

ORDER

The order of the Referee, dated January 20, 1977, is affirmed.

SAIF CLAIM NO. KC 120599 JULY 26, 1977

EDNA AICHELE, CLAIMANT
William A. Galbreath, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order Referring for Hearing

Claimant, by and through her attorney, petitioned the Board on March 14, 1977 to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen her claim for an industrial injury suffered on March 20, 1968 while employed by Milton-Freewater Convelescent Hospital, whose workmen's compensation coverage was furnished by the SAIF. In support of the request, a report from Dr. Donald Smith, dated December 9, 1968 was submitted.

Claimant's attorney was advised by the Board that it would need a current medical report establishing that claimant's condition was attributable to her original injury and represented a worsening since the last award or arrangement of compensation and also that a copy of such medical report should be furnished to the Fund which would have 20 days thereafter to respond.

On April 21, 1977, the Board was furnished a copy of a medical report from Dr. Donald Smith, dated June 14, 1976, which had been directed to the Fund. Claimant stated that said medical report would be the basis for the request for reopening of the claim on Board's own motion.

On July 14, 1977, the Fund responded stating that Dr. Smith's report indicated that claimant's present condition was a thoracic outlet syndrome on the right side and it was the opinion of the Fund that this was not the result of the chest and rib strain suffered on March 20, 1968, but rather the progression of a pre-existing condition; claimant's anatomy and other causes have contributed to her present condition.

At the present time, the Board does not have sufficient evidence before it on which to make 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 present condition is directly attributable to her injury of March 20, 1968 and, if so, does her present condition represent a worsening since the last award or arrangement of compensation received by claimant for said injury.

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

WCB CASE NO. 76-5087 JULY 27, 1977

DONNA COMPTON (BENNETT), CLAIMANT
Noreen Saltveit, Claimant's Atty.
Delbert Brenneman, Defense Atty.
Order

On July 6, 1977 the Board received from claimant, by and through her attorney, a renewed motion for remand of the above entitled matter for additional evidence which was not available at the time of the hearing, namely, the results of an examination and report from Dr. Pasquesi, dated May 25, 1977.

In the alternative, the claimant asked the Board to admit the attached report from Dr. Pasquesi and consider it in its de novo review, together with all of the other evidence from the hearing.

The Board, after due consideration and careful study of the report from Dr. Pasquesi, concludes that the renewed motion for remand should be denied. Dr. Pasquesi states in his report that although he found claimant's impairment to be equivalent to 5% of the "whole man", he was unable to determine the responsibility for such impairment.

With respect to the alternative relief, the Board cannot consider any evidence which is not a part of the record made before the Referee at the hearing.

ORDER

Claimant's renewed motion for remand and the alternative request that the Board consider the report from Dr. Pasquesi dated May 25, 1977, in its de novo review, are hereby denied.

WCB CASE NO. 76-6162-SI JULY 27, 1977

In the Matter of the Petition of
BRAND S CORPORATION
For Reimbursement from the
Second Injury Reserve Fund
In the Case of
CATHERINE HANKINS
SAIF, Legal Services, Defense Atty.
Order on Review

Reviewed by Board Members Wilson, Moore and Phillips.

On April 22, 1977, Referee J. Wallace Fitzgerald recommended that the Board affirm the Determination Order of October 20, 1976 denying to Brand S Corporation any second injury benefits.

Subsequent to the issuance of the Recommended Order of Referee Fitzgerald, exceptions were filed by the claimant and by Brand S Corporation. A response to the exceptions was filed on behalf of the Workers' Compensation Board.

The Board, after de novo review of the transcript of the proceedings and careful consideration of the exceptions to the Recommended Order and the response to said exceptions, accepts the recommendation of the Referee and adopts as its own the findings of fact and conclusions of law set forth in said Recommended Order, a copy of which is attached hereto and, by this reference, made a part of the Board's order.

WCB CASE NO. 76-210 JULY 27, 1977

NITA HARRIS, CLAIMANT
Peterson, Susak & Peterson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

SAIF requests Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation until claim closure pursuant to ORS 656.268. The Fund contends that claimant, who was the employer of record, had not filed a personal election and, therefore, was not a subject employee under the Workers' Compensation Law at the time of her injury.

The employer, Resource Service Company, purchased a grocery store prior to the claimed injury by claimant and obtained Workers' Compensation coverage under the employer's policy from

the Fund. Apparently the grocery store was a "husband and wife" type operation and it was decided to use the same basic name used by claimant's husband in his roofing business. Claimant's husband owned Resources Roofing Company.

Claimant alleges that as she was getting ready to do the billing for the grocery store about mid-day on December 1, 1975, she slipped and fell on the floor and sustained an injury. No one was in the store at the time, but claimant's husband later came in and picked his wife up off the floor. A physician's initial report of work injury was filed by Dr. Cichoke on December 5, 1975, which indicated that the claimant's complaints were of pain in her back. Chiropractic adjustment and physio-therapy was suggested by Dr. Cichoke.

No evidence was offered to the contrary on the factual situation and the Referee found both claimant and her husband to be credible witnesses. He was satisfied that claimant did sustain an injury based on the evidence and the sole question left to determine was whether or not claimant, at that time, was a subject employee under the act.

A representative of the Fund testified he recalled in June 1975, that he had received a telephone call requesting that claimant be put on as a subject employee. However, after the claim was filed the Fund issued a denial on December 31,1975 and an amended denial on May 18, 1976 on the grounds that claimant did not have personal coverage as a workman at the time of her injury and was not a subject employee.

Based upon several exhibits received relating to the application for Workers' Compensation coverage and notations in the record that the coverage had been accepted prior to the date of the injury, the Referee concluded that claimant was a subject employee under the act. Because of the manner in which the application was made and because of the resulting confusion, he felt penalties were not warranted, but he awarded a reasonable attorney's fee to claimant's attorney because of the impropriety of the denial.

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

ORDER

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

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

WCB CASE NO. 76-4364 JULY 27, 1977

MICHAEL KORMAN, CLAIMANT
Rolf T. Olson, Claimant's Atty.
Richard Davis, Defense Atty.
Request for Review by Employer
and Claimant

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of the Referee's order which remanded claimant's claim for aggravation to it for acceptance and payment of compensation, as provided by law, commencing on July 25, 1975 and until the claim is closed pursuant to ORS 656.268; ordered that such compensation should include, but not be limited to, temporary total disability compensation and the therapy treatments undergone by claimant at St. Joseph's Hospital; ordered that claimant's claim for his hypertension condition be remanded to the carrier for acceptance and the payment of compensation as provided by law; ordered claimant to be paid an additional amount equal to 25% of the compensation payable to him from July 25, 1975 up to January 22, 1976, the date of the first hearing on his claim, and awarded claimant's attorney $1,500 as a reasonable attorney's fee, said sum to be paid by the defendant.

The claimant cross-requested review by the Board of the order, contending that the fee awarded claimant's attorney should be increased.

The Board, after de novo review, affirms and adopts as its own, the Referee's Opinion and Order, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

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

WCB CASE NO. 76-5985 JULY 27, 1977

BARBARA LINGO, CLAIMANT
Rolf T. Olson, Claimant's Atty.
Robert Joseph, Jr., Defense Atty.
Order of Dismissal

On April 25, 1977, claimant requested Board review of the Referee's order entered in the above entitled matter.

On July 19, 1977, the Board was informed that the carrier, based upon a report from Dr. Spady dated June 29, 1977, had reopened claimant's claim for curative medical care and treatment and that claimant was now being paid compensation for temporary total disability. Inasmuch as claimant's claim will now have to be closed pursuant to ORS 656.268 and another Determination Order issued when claimant's condition becomes medically stationary, the counsel for the carrier asks that the request for review be dismissed as the issue of permanent disability is,at the present time, moot.

Claimant's counsel was contacted and stated that he had no objection to the carrier's request for dismissal.

The Board concludes that the reopening of the claimant's claim by the carrier makes the issue of permanent disability, which was decided by the Referee and presented to the Board for review, moot.

THEREFORE, the Referee's Opinion and Order entered in the above entitled matter on April 18, 1977, which affirmed the Determination Order of October 8, 1976, is set aside and claimant's request for Board review of that order is hereby dismissed.

WCB CASE NO. 76-4823 JULY 27, 1977

JAMES RIMER, SR., CLAIMANT
Richard E. Kingsley, Claimant's Atty.
Ronald J. Podnar, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which granted claimant an additional 15 degrees for a total award of 22.5 degrees for scheduled left leg disability and affirmed the Determination Order entered August 18, 1976 in all other respects.

Claimant, a 35-year-old journeyman lineman, suffered a compensable injury in September 1975 when he accidentally came in contact with 7,200 volts and suffered first and third degree electrical burns on his hands, left thigh and left knee.

Dr. Park, a vascular surgeon, stated in December 1975 that claimant was still complaining of knee pain but that the burns had completely healed. Also in December 1975, claimant was examined by an orthopedist who noted that claimant's principle problem was the softening of the left knee cartilage; he did not feel that it required treatment, but would resolve itself.

In May 1976, claimant was examined by Dr. Throop, a neurologist, who noted claimant had a neurological sensory nerve deficit that would most likely improve; he was of the opinion that claimant's pain resulted from soft tissue injury.

After Dr. Throop's examination, the Determination Order was entered on August 18, 1976 which granted claimant an award of 7.5 degrees for 5% loss of the left leg.

Later Dr. Throop reported complaints of pain and weakness in claimant's left arm and left knee and he found sensory distribution abnormalities in the left ulnar nerve and left lateral cutaneous nerve of the calf.

The Referee found that claimant's main problem areas were the left knee and the left elbow, both scheduled disability areas, therefore,the sole test for determining the extent of his disability was loss of use.

He found that claimant's knee bothered him when any pressure was put on it. With respect to the left elbow, excessive lifting such as working with 65-pound hay bales all day on his farm, carrying sacks of feed or repetitive lifting and hammering necessitated by building fences or corrals on the farm aggravated the pain.

Based on Dr. Throop's medical report, received after the entry of the Determination Order, the Referee found that the problems claimant experienced were diminished weight bearing ability and reduced endurance and he found that the loss of function of the knee was approximately 15%. The Referee found no showing that claimant's pain in the elbow, although noticeable and predictable, affected coordination, strength or endurance to the extent that it constituted a permanent loss of function.

The Referee concluded that claimant was entitled to an additional award for his left leg disability, but that he had suffered no permanent loss of function of his left elbow.

The Board, on de novo review, concurs in the conclusion reached by the Referee. Undoubtedly, the injury has resulted in a loss of wage earning capacity, however, claimant's disability does not extend into the unscheduled area of the body, therefore, as the Referee correctly stated, the sole test in determining the extent of disability is loss of use.

ORDER

The order of the Referee, dated January 13, 1977, is affirmed.

WCB CASE NO. 76-3338 JULY 27, 1977

BARBARA WILLIAMS, CLAIMANT
Dean Quick, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which affirmed the denial by the State Accident Insurance Fund on June 18, 1976 of claimant's claim for aggravation.

The Board, after de novo review, affirms and adopts as its own the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

The order of the Referee, dated January 26, 1977, is affirmed.

CLAIM NO. 1585 JULY 28, 1977

RALPH E. BELL, CLAIMANT
Michael J. Kavanaugh, Claimant's Atty.
Robert E. Joseph, Defense Atty.
Own Motion Order

On May 3, 1977, the Board received from claimant, through his counsel, Michael J. Kavanaugh, a request for alternative relief under the Board's own motion jurisdiction granted pursuant to ORS 656.278. Claimant had suffered a compensable injury on April 30, 1970 while in the employ of Sears, Roebuck & Company. The claim was accepted and closed on a "medical only" basis.

On April 20, 1977, claimant, by and through his attorney, had requested a hearing on the employer's denial of his claim for aggravation.

On May 25, 1977, the Board advised claimant's attorney that claimant was entitled to have his claim closed pursuant to the provisions of ORS 656.268, inasmuch as his injury had occurred prior to the amendment of ORS 656.268 by Section 3, Chapter 620 Oregon Laws 1973. Furthermore, that claimant would be entitled to one year from the date of the issuance of the Determination Order within which to appeal the adequacy of the award mady by such order and he would have five years from the date of its issuance within which to file a claim for aggravation.

The Board is now advised that claimant desires to withdraw his request for own motion relief and that he also will inform the Hearings Division of the Board by letter that he wishes to withdraw his request for hearing.

ORDER

The request received from claimant that the Board exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for compensable injury suffered on April 30, 1970 while in the employ of Sears, Roebuck & Company, is hereby dismissed.

CLAIM NO. 05X-005891 JULY 28, 1977

ROBERT CHENEY, CLAIMANT
Warner E. Allen, Claimant's Atty.
Own Motion Order

On March 21, 1977, the Board received a request from claimant, by and through his attorney, to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for compensable injury suffered on March 13, 1968 while in the employ of Portland Wire and Iron Works whose carrier was Argonaut Insurance Company.

On July 20, 1976, an order of dismissal had been entered by the Board on a prior request for own motion relief because Argonaut had advised the Board it would pay for claimant's medical expenses. Claimant's attorney was made aware of this and, on June 9, 1976, stated he would let the Board know if this was satisfactory to his client; however, no response, after repeated telephone calls, was received and the Board concluded that the payment of claimant's expenses was sufficient and satisfactory. Therefore, it dismissed the request.

The renewed request stated that at the time the first request had been dismissed, claimant did not have sufficient verification of time loss to furnish to the Board for its consideration. Accompanying its renewed request was a letter from Portland Wire and Iron Works which stated that claimant left work for the required surgery on July 16, 1974 and returned to full time employment on August 5, 1974.

On March 30, 1977, the carrier, Argonaut, was advised of the renewed request for own motion relief and asked to inform the Board within 20 days of its position with respect thereto. No response has been received from the carrier.

The Board, after due consideration, concludes that the claimant's claim for his industrial injury, suffered on March 13, 1968 should be remanded to the carrier, Argonaut Insurance Company,

to be accepted and for the payment of compensation, as provided by law, commencing on July 16, 1974 and until this claim is closed pursuant to ORS 656.278, less time worked, and claimant's attorney should be allowed as a reasonable attorney's 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.

IT IS SO ORDERED.

WCB CASE NO. 75-2925 JULY 28, 1977

RAYMOND GETCHELL, CLAIMANT
Richard Noble, Claimant's Atty.
James Gidley, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which found that claimant had failed to show by preponderance of the evidence that his work activity was a material contributing cause to a cerebral vascular accident and upheld the carrier's denial of claimant's claim therefor, which was made on May 20, 1975.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 25, 1977, is affirmed.

WCB CASE NO. 76-2378-B JULY 28, 1977

PATRICIA GRIFE, CLAIMANT
Hugh K. Cole, Claimant's Atty.
Edward V. O'Reilly, Defense Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

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

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 26, 1977, is affirmed.

Claimant's counsel is awarded, as a reasonable attorney's fee, the sum of $150, payable by the State Accident Insurance Fund.

WCB CASE NO. 76-1379 JULY 28, 1977

FLOYD O. HILL, CLAIMANT
Steven R. Frank, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Supplemental Order Awarding
Attorney's Fee

The Board's Order on Review issued July 22, 1977 in the above entitled matter, failed to include an award of a reasonable attorney's fee.

THEREFORE, IT IS HEREBY ORDERED that claimant's counsel receive, as a reasonable attorney's fee for his services in connection with Board review in the above entitled matter, the amount of $350, payable by the State Accident Insurance Fund.

WCB CASE NO. 76-3286 JULY 28, 1977

RICHARD A. LEWIS, CLAIMANT
Richard A. Sly, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On July 1, 1977, claimant, by and through his attorney, filed a motion requesting the Board to issue an order dismissing the State Accident Insurance Fund's request for review of the Referee's order entered in the above entitled matter on the ground, and for the reason, that the Board had no jurisdiction over the remaining issue, i.e., the issue of payment of attorney's fees and their amount. The request for review had been received on April 20, 1977.

On July 20, 1977, the Fund, by and through its counsel, responded in opposition to the motion.

The Board, after due consideration of this matter, concludes that the sole issue before the Referee was the amount of the reasonable attorney's fee which the Fund should be directed to pay claimant's attorney. This is a reviewable issue and the Board does have jurisdiction to decide an issue of contested attorney's fees under such circumstances.

THEREFORE, claimant's motion for dismissal of the request for review by the State Accident Insurance Fund dated April 18, 1977, is hereby denied.

Briefs are due August 10, 1977. If either party, because of this intervening motion and the order denying same, requires additional time within which to file its brief, such request should immediately be presented to the Board. Such request shall be granted only if both parties agree that such extension of time is necessary.

WCB CASE NO. 74-2359 JULY 28, 1977
WCB CASE NO. 75-4849

LEONARD NASH, CLAIMANT
Bob Grant, Claimant's Atty.
Keith Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which denied claimant's claim for aggravation filed in both WCB Case Nos. 74-2359 and 75-4849; directed the employer to pay the cost of medical services provided to claimant for treatment of his injury as specifically set forth in the order; awarded claimant additional compensation in the nature of a penalty in an amount equal to 15% of certain portions of the medical services rendered to claimant and awarded claimant's attorney an attorney's fee of $250 payable by the employer.

Originally a hearing was held in this matter under the designation WCB Case No. 74-2359. At that time, Referee Harold M. Daron granted the employer's motion to dismiss claimant's claim for aggravation but allowed the hearing to proceed on the remaining issues which were set forth in Referee Daron's Opinion and Order entered in WCB Case No. 74-2359 on March 4, 1975. Subsequently, claimant requested Board review of that order, contending that the Referee was in error in dismissing his claim for aggravation and the allowance of attorney's fees for a rejected claim. The Board, by its Order on Review dated November 21, 1975, and based upon a

change in the interpretation by the Court of Appeals of the applicable statute, remanded the claim for aggravation to the Referee for a hearing on the merits.

In the meantime, claimant had made what was subsequently considered to be another claim for aggravation against the employer and filed a new request for hearing which was designated WCB Case No. 75-4849 and consolidated with the earlier hearing inasmuch as the primary issue was identical, i.e., aggravation.

Based upon the Board's Order of Remand, the issue before the Referee was whether claimant was entitled to increased compensation for aggravation pursuant to ORS 656.273, whether the employer should be required to pay, under the provisions of ORS 656.245 for certain medical services rendered to claimant and, if so, should the employer be required to pay a penalty and attorney's fees pursuant to ORS 656.268(8) and 656.382.

On January 6, 1972, a hearing had been held before Referee J. Wallace Fitzgerald pursuant to a request therefor by the claimant and an Opinion and Order was entered as a result of that hearing on January 28, 1974. The only issue considered at that hearing was the extent of claimant's permanent disability and claimant received an additional award, making his total award 80 degrees for 25% unscheduled low back disability. This was the last award or arrangement of compensation prior to the hearing before Referee Daron on March 16, 1976.

The first request to reopen the claim on grounds of aggravation was denied by the carrier on July 23, 1974; another request to reopen was made by the claimant in 1975 which was also deemed to have been denied by the carrier.

Claimant had his final fusion on January 7, 1974 and spent most of that year recovering therefrom. Claimant's claim had initially been closed on November 2, 1970 and therefore his aggravation period expired on November 2, 1975.

The Referee found no evidence in the record which indicated that claimant's condition at the time of the hearing was held on the claim for aggravation up to November 2, 1975 was any worse than his condition on January 28, 1974, the date of Referee Fitzgerald's order, whether claimant's immediate post-surgery state was considered or his immediate pre-surgery condition. In fact, consideration of the entire record reflects that there was improvment in claimant's condition following this final fusion and no evidence that it has since become worse than any condition pictured just prior to or immediately after the surgical treatment was rendered by Dr. Peterson and Dr. Melson in January 1974; Dr. Peterson did note in his report of October 23, 1975 that claimant should be considered permanently disabled.

The Referee concluded that claimant had failed to sustain his burden of proof that he was entitled to any increase in compensation for aggravation under ORS 656.273.

With respect to the medical treatment which was given claimant, the Referee did not interpret the Order of Remand to constitute an actual reversal of his findings and conclusions regarding those issues which were also decided in his original order which related to entitlement to certain compensation for medical services, penalties and attorney's fees. He reiterated his findings with repect to those issues in his order of October 14, 1976 and also set forth the same conclusions which resulted in ordering the carrier to make payment for certain medical services, payment of penalties and payment of attorney's fees provided such payments have not been previously paid by the employer or its carrier. It was not the Referee's intention for claimant to receive double compensation for those items, therefore, he stated that only if the carrier had failed to comply with his original order of March 14, 1975, were such payments to be made to claimant.

The Board, on de novo review, agrees with the Referee's ultimate finding that there was no evidence of sufficient weight to grant claimant compensation for aggravation. The report of Dr. Peterson is not sufficient to offset the inability of claimant's testimony to demonstrate any change in his physical condition since the last award or arrangement of compensation which was made by Referee Fitzgerald's Opinion and Order dated January 28, 1974.

The Board also concurs in the assessment of penalties and award of attorney's fees made and granted by the Referee in his order and affirms them.

ORDER

The order of the Referee, dated October 14, 1976, is affirmed.

SAIF CLAIM NO. GODC 1254 JULY 28, 1977

JOYCE J. STEPHENS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 10, 1977, the State Accident Insurance Fund requested a determination of claimant's disability by the Evaluation Division of the Board. Based upon the medical information supplied, a Determination Order was entered on March 15, 1977. Subsequently, the Fund advised the Evaluation Division that claimant's claim had first been closed on December 26, 1967, which was prior to the time the Compliance Division of the Board maintained any of the Fund's files and, therefore, this information was not available to the Evaluation Division until after the issuance of the Determination Order on March 15, 1977.

Claimant's aggravation rights had expired on December 26, 1972. The Fund apparently reopened claimant's claim voluntarily on June 11, 1976 and, therefore, their request for determination should have indicated that claimant's aggravation rights had expired and requested a closure pursuant to the provision of ORS 656.278.

It is further noted that the March 15, 1977 Determination Order was in error in stating the number of degrees awarded and the monetary value of the permanent partial disability award. The compensation awarded for claimant's permanent partial disability should have been equal to 6.05 degrees for a monetary value of $332.75.

The Board, after due consideration, concludes that it should exercise its own motion jurisdiction, pursuant to ORS 656.278, and set aside the March 15, 1977 Determination Order. The Board further concludes that claimant should have her claim closed pursuant to ORS 656.278 with the same award which was made by the March 15, 1977 Determination Order.

ORDER

The Determination Order entered March 15, 1977 is set aside in its entirety.

Claimant is awarded compensation for temporary total disability inclusively from April 20, 1976 through June 6, 1976, less time worked and 6.05 degrees for 5% loss of her right forearm. This is in lieu of, and not in addition to, the award made by the invalid Determination Order entered March 15, 1977. Presumably all compensation due claimant has previously been paid by the Fund pursuant to the aforesaid Determination Order, if so, no further compensation is to be paid claimant as a result of this own motion determination order.

WCB CASE NO. 76-539 JULY 28, 1977

JAMES G. WESLEY, CLAIMANT
Dan O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks review by the Board of the Referee's order which affirmed the Determination Order mailed December 23, 1975, whereby claimant was awarded 16 degrees for 5% unscheduled head disability.

Claimant suffered a compensable injury on August 20, 1974 while working for the employer as a fire suppression crewman. The pumper truck on which he was a passenger rolled over, causing injuries to claimant's face, nose, back, head, right ear and eyes and for which he was hospitalized. Claimant was released to return to work by Dr. Echevarria on November 13, 1974 and the claim was initially closed with no award of compensation for permanent disability.

Before claimant was injured, he had enrolled at Southwestern Oregon Community College for the fall term classes. Claimant had been a high school athlete and had the potential for obtaining a college athletic scholarship. He commenced the fall term but, afger the injury, was unable to play sports and by Thanksgiving Day, 1974, claimant had dropped out of school because of continued headaches.

Claimant went to California where, after complaining of severe headaches aggravated by physical activity and also a decreased ability to concentrate, he was examined by a Dr. Reiter on November 5. 1975. A brain scan was within normal limits, however, an electroencephalogram was listed as "mildly abnormal". Dr. Reiter felt claimant had suffered a post-traumatic syndrome and that he should be on limited activity only and should not try to enroll in school until the fall of 1975. He felt the headaches which were continuing on a daily basis could be blamed on the scarring of claimant's scalp region. By July 1975, the headaches had eased, but the doctor did not feel claimant should return to work that summer, however, claimant did attend college during the 1975-76 school year and participated in intramural basketball.

In September 1976, after a spell of lightheadedness and nausea, claimant was examined by Dr. Tennyson. The neurological examination was normal and Dr. Tennyson felt claimant could return to work; he thought there was moderate subjective and very little objective evidence of permanent partial disability involving highest integrative neural function. Based upon Dr. Tennyson's report, the claim was closed by a Determination Order mailed December 23, 1975, which granted claimant an award of 16 degrees.

On January 11, 1976, claimant was involved in an automobile accident, he received emergency room treatment for face and lip lacerations. Claimant denies any headaches stemming from that injury. He continued at Southwestern Oregon Community College and plans to return again in the fall of 1976, hoping to become a basketball coach and history teacher.

On June 13, 1976, he returned to work for his former employer building fire trails. He works 8 hours a day, 5 days a week and has taken no sick leave since his return to work. His supervisor said claimant had not experienced any physical difficulty in performing his job nor had he made any physical complaints to him. Claimant testified that he continues to suffer headaches several times a week and he is unable to concentrate on his school work and also he has a problem with coordination while playing basketball.

The Referee concluded that claimant had been adequately compensated for the permanent disability which could be attributed to his industrial injury. Dr. Tennyson's reports failed to reveal any serious physical impairment and claimant has not been seen by Dr. Tennyson for injury-related problems since his claim was closed. Claimant does not, at the present time, require medicine for relief of injury-related symptoms except for an occasional aspirin and he has not suffered any "blackouts" within the last year.

The Referee found that although claimant does suffer headaches at the present time, there is little evidence that they have had any significant effect upon his loss of earning capacity; claimant has worked regularly and he has been able to adequately keep up with his school work and compete in basketball.

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

ORDER

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

WCB CASE NO. 76-6532 AUGUST 1, 1977
WCB CASE NO. 77-1307

STEVEN L. ALMOND, CLAIMANT
Rolf Olson, Claimant's Atty.
Donald E. Murray, Defense Atty.
Order of Dismissal

A request for review having been duly filed with the Workers' Compensation Board in the above entitled matter by the Legal Services 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. 76-1911 AUGUST 1, 1977

CHESTER V. CAIRNS, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order on Review

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the denial of claimant's claim for workmen's compensation benefits which was dated April 7, 1976.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 26, 1977, is affirmed.

WCB CASE NO. 76-1825 AUGUST 1, 1977

ROBERT L. CLOUGH, CLAIMANT
Alan M. Scott, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which found its denial dated March 16, 1976 of claimant's claim was not proper and remanded the claim to it for acceptance and for payment of compensation from March 15, 1976 and until the claim was again closed pursuant to ORS 656.268, ordered the Fund to pay claimant an additional amount equal to 15% of the compensation due for the period September 16, 1975 through November 19, 1975 and awarded claimant's counsel an attorney's fee of $1,000.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 20, 1977, is affirmed.

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

WCB CASE NO. 76-2242 AUGUST 1, 1977

GARY L. CORBETT, CLAIMANT
Gary D. Rossi, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund requests Board review of the Referee's order which disapproved its denial mailed April 2, 1976 of claimant's claim, remanded the claim to be accepted for payment of benefits from January 16, 1976 until claim closure pursuant to ORS 656.268, and awarded claimant's counsel a reasonable attorney's fee fixed at $650.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

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

WCB CASE NO. 76-6542 AUGUST 1, 1977
WCB CASE NO. 76-6257

MARTIN HUNT, CLAIMANT
James Vick, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Approving Stipulation

IT IS HEREBY STIPULATED AND AGREED by and between Martin E. Hunt, acting personally and by and through his attorney, James D. Vick, and the State Accident Insurance Fund (SAIF) acting by and through Lester R. Huntsinger Associate Counsel, as follows:

That claimant suffered an alleged industrial injury to his neck and back on or about August 3, 1976, and filed a claim therefor; that the employer at the time of this alleged industrial injury was Jack Datsun Sales; that SAIF assigned said claim the number ZD 182902;

That claimant suffered an alleged second industrial injury to his neck and back while working for Eyerly Volkswagon

on or about October 26, 1976, and filed a claim therefor; that said claim was assigned the number ZD 192008 by SAIF:

That SAIF filed a timely denial of responsibility in regards to claimant's alleged industrial injury occurring on or about August 3, 1976;

That claimant through his attorney filed a timely request for a hearing in regards to SAIF's denial of his industrial injury occurring on or about August 3, 1976; that in said request for hearing claimant protested the denial by SAIF of said claim and also requested penalties and attorney fees because of said denial;

That SAIF filed a timely denial of responsibility in regards to claimant's alleged second industrial injury occurring on or about October 26, 1976;

That claimant through his attorney filed a timely request for a hearing in regards to SAIF's denial of his second industrial injury occurring on or about October 26, 1976; that in said request for hearing claimant protested the denial by SAIF of said claim and also requested penalties and attorney fees as a result of said denial;

That the hearing in regard to SAIF's denial of responsibility for claimant's alleged second industrial injury occurring on or about October 26, 1976, was heard by Referee Raymond Danner on December 29, 1976; that said hearing was continued for the purpose of taking the deposition of Dr. Cash; that on May 9, 1977, Referee Danner issued an Opinion and Order in which he affirmed SAIF's denial of responsibility for claimant's alleged second industrial injury occurring on or about October 26, 1976, and also refused to award either penalties or attorney fees in connection with said denial by SAIF;

That the hearing in regard to SAIF's denial of responsibility for claimant's alleged industrial injury occurring on or about August 3, 1976, was heard by Referee Albert Menashe on February 22, 1977; that on March 17, 1977, Referee Menashe issued an Opinion and Order in which he ordered SAIF to accept responsibility for claimant's industrial injury occurring on or about August 3, 1976, and further awarded a penalty to be paid to claimant of 25 percent of the compensation due claimant, not to exceed a maximum of $300, and an attorney fee of $700 to be paid by SAIF to claimant's attorney;

That SAIF filed a timely request for review of the aforesaid Opinion and Order issued by Referee Menashe;

NOW, THEREFORE, IT IS FURTHER STIPULATED AND AGREED between the above-named parties that the issues raised and all issues which might have been raised in connection with the above-described SAIF claim numbers ZD 182902 and ZD 192008 may be fully

compromised and settled by SAIF accepting full responsibility for claimant's industrial injury occurring on or about August 3, 1976; that SAIF further agrees to pay all medical bills relating to claimant's neck and back subsequent to the aforesaid August 3, 1976, industrial injury or the alleged October 26, 1976, industrial injury; that SAIF also agrees to withdraw its Request for Review in regard to the Opinion and Order issued by Referee Menashe on March 17, 1977, and to comply in all regards with the Order portion of said Opinion;

That in consideration of the above-described action voluntarily taken by SAIF, claimant and his attorney agree not to contest or otherwise seek review at any level or by any means either the Opinion and Order of Referee Danner issued in regard to WCB Case Number 76-6257 and SAIF claim number ZD 192008 or the Opinion and Order of Referee Menashe issued in regard to WCB Case Number ZD 182902;

IT IS FURTHER STIPULATED AND AGREED that James D. Vick, claimant's attorney, shall be allowed as a reasonable attorney fee the additional sum of $100 to be paid by SAIF and not out of or from any compensation due or owing to claimant.

It is so ordered.

WCB CASE NO. 76-2720 AUGUST 1, 1977

WILLIAM MARTIN, CLAIMANT
Jerome F. Bischoff, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks review by the Board of the Referee's order which granted him an additional 2.5 degrees for a total of 9 degrees for 90% loss of the right ring finger.

Claimant was a 17 year old fish cleaner at the time he sustained a laceration of his right hand and virtual amputation of the ring finger on July 11, 1972. Dr. James, an orthopedic surgeon, diagnosed multiple lacerations of the right hand, laceration of the extensor mechanism tendons to the right finger and open fracture through the proximal phalanx of the ring finger. Five surgeries were performed by Dr. James, the last was in November 1975.

The Referee found that claimant did not return to work for the employer because he had obtained better employment and at the time of the hearing was regularly employed operating a hyster in a mill for considerably more money than he was earning at the time of the injury.

According to claimant's testimony, he was not, at the present time, having any problem with the wrist, thumb, index finger, or fifth finger of his right hand, but he had substantial loss of gripping strength. The ring finger is practically useless for gripping and major reliance is placed upon the thumb, index and middle finger. Claimant has received no medical attention since he was last seen by Dr. James on March 23, 1976. Dr. James' closing evaluation report of that date concerned itself almost exclusively with the condition of the ring finger, however, he did make a comment on the reduced gripping strength of the hand. He found no impairment of the middle finger nor the hand itself.

The Referee found that the claimant had failed to establish by medical proof that the loss of gripping strength resulted from injury to the hand as such, but rather merely as a collateral effect of the impaired function of the injured ring finger. He found the same to be true with respect to the causal relationship with the impairment of the middle finger to the industrial injury. He concluded that the evidence indicated that effective remaining functional usefulness of the ring finger was no more than 10%.

The issue of whether claimant had a vocational handicap was raised. The record indicated that claimant had made no contact with the Vocational Rehabilitation Division or with the Disability Prevention Division concerning an application for vocational rehabilitation. Insurers are responsible for recognizing the need for vocational rehabilitation and for instituting timely action to obtain assistance if appropriate. OAR 436-61-010(3).

The Referee found that no recommendation for vocational rehabilitation had been made by Dr. James and no request for such assistance had been made by claimant. He concluded there was no obligation on the part of the Fund to obtain assistance for vocational rehabilitation and that it would be inappropriate under the Board rules for him to direct or recommend vocational rehabilitation.

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

ORDER

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

WCB CASE NO. 74-1843 AUGUST 1, 1977

VERNON MICHAEL, CLAIMANT
Evohl Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests Board review of the Referee's order entered in the above entitled matter on January 28, 1975, whereby claimant's claim was remanded to the Fund for medical care and treatment including, but not limited to, that recommended by Dr. Dunn, and for payment of compensation, as provided by law, commencing November 19, 1974 and until closure was authorized pursuant to ORS 656.268. The Referee's order also awarded claimant's attorney the sum of $700 to be paid by the Fund.

The original request for review had been made by the employer, D.R. Johnson Lumber Company, whose Workmen's Compensation coverage was furnished by the State Accident Insurance Fund. Claimant moved to dismiss this request, contending that only the Fund, and not the contributing employer, was given standing by the law to seek Board review. The motion was granted by the Board on August 14, 1975. On July 30, 1976, a circuit court judgment order remanded the matter to the Board for acceptance of the employer's request for Board review and for hearing thereon and for such other appropriate appellate relief as was provided by the Workmen's Compensation Act. Pursuant to this judgment order, the Board assumed jurisdiction and briefs were filed in behalf of the Fund and the claimant. The foregoing is set forth in this order merely as an explanation of the lapse of time between the entry of the Referee's order and the date of the Order on Review.

Claimant, who was a yarder operator, suffered a compensable injury on January 5, 1972 when he fell from the yarder. The initial diagnosis was a crushed first lumbar vertebra. Claimant continued to have pain in that area but it later moved down into the lower lumbar area and within three weeks of the injury claimant was having pain in his right leg.

Claimant was seen by Dr. Harper, an orthopedic surgeon, and later by Dr. Hockey, a neurosurgeon. The latter performed a lumbar laminectomy L4-5 right on September 18, 1973. On November 15, 1973, claimant was released to return to light work by Dr. Hockey.

Claimant, on May 6, 1974, was released by Dr. Hockey to return to work. Thereafter, a Determination Order was entered on May 14, 1974 whereby claimant was awarded 64 degrees for 20% unscheduled low back disability.

In July, 1974, Dr. Mason, after examining claimant, was of the opinion that claimant would be a poor psychological candidate for a fusion, although such surgery had been recommended by Dr. Luce. On November 19, 1974, Dr. Dunn, a neurosurgeon, examined claimant and expressed his opinion that claimant's pain had progressively increased and, at that time, was being particularly aggravated by movement. Dr. Dunn felt that there was lumbosacral instability with S1 root compression bilaterally. He recommended an orthopedic consultation with Dr. Wilson and hospitalization for a myelogram and exploration with fusion.

At the request of the Fund, claimant was examined on January 14, 1975 by Dr. Kilgore, a psychiatrist, who felt that claimant was a poor surgical risk because of his pyschological problems which were of long-standing chronic type. However, the industrial injury had exacerbated claimant's emotional difficulties and Dr. Kilgore felt the prognosis for a psychological rehabilitation of any type was extremely poor.

The Fund contended that claimant had failed to prove his need for further medical care and treatment. The Referee found, based upon the report from Dr. Dunn, following an orthopedic consultation with Dr. Wilson, that claimant should have a myelography and an exploration with fusion. The Fund offered no evidence to show that claimant's present condition was not directly connected to, or a result of, his industrial injury.

The Referee remanded the claim to the Fund for the medical care and treatment recommended by Dr. Dunn. Although both Dr. Mason and Dr. Kilgore had found claimant to be a poor risk psychologically for further surgery, the Referee was more persuaded by the evidence presented in Dr. Dunn's report that further surgery could substantially improve claimant's present condition. Furthermore, claimant was willing to accept and undergo such surgery.

The Referee found that although claimant's condition might have been medically stationary when he was examined by Dr. Hockey on April 11, 1974, claimant had not been medically stationary since he was examined by Dr. Dunn on November 19, 1974.

Dr. Dunn had found that claimant's pain had progressively increased since he had been seen by Dr. Luce and there was no evidence relating to when that was, however, Dr. Mason's report of September 23, 1974 mentions that claimant had previously seen Dr. Luce, therefore, the Referee assumed that Dr. Dunn was saying that claimant's condition on November 19, 1974 was worse than it was sometime prior to 1974. He found that was sufficient basis to order the claim reopened as of September 23, 1974.

The Referee did not feel that the case warranted imposition of penalties, however, he treated the presence of the Fund at the hearing as a de facto denial of claimant's claim to reopen for further care and treatment and, therefore, awarded claimant's attorney a reasonable attorney's fee payable by the Fund.

The Board, on de novo review, affirms the findings and conclusions of the Referee.

ORDER

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

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

CLAIM NO. B53-115738 AUGUST 2, 1977

WILLIAM J. LEEMAN, CLAIMANT
Own Motion Determination

On January 10, 1967, claimant suffered a compensable disc injury to his back while employed by Tektronix Company, whose workmen's compensation coverage was furnished by Employers Insurance of Wausau. The claim was initially closed on September 26, 1967 by Determination Order which awarded claimant 15% loss of function of an arm for unscheduled disability. Claimant had suffered a prior injury on May 29, 1959, for which he had been awarded 40% loss of function of an arm for unscheduled disability. Claimant's aggravation rights have expired.

On June 13, 1973, Dr. Nash, who treated claimant in 1967, reported that claimant had a definite neuromuscular deficit, left, and should have an EMG and myelogram. Claimant was hospitalized on August 27 for this. On October 15, Dr. Nash reported that claimant should have a re-exploration when pain became intolerable. Compensation for time loss was paid claimant from August 27 through September 7, 1973.

The final medical report received from Dr. Nash, dated May 11, 1977, indicated claimant had continued working until October 1977, when he had surgery for vascular deficiency. Claimant is now 65 years of age and Dr. Nash was of the opinion that there was definite subjective improvement in claimant's low back and left leg. A determination of claimant's disability was requested by the carrier.

The Evaluation Division of the Board recommends that claimant's claim be closed with no additional award of compensation for permanent partial disability, but with an award of compensation for temporary total disability from August 27, 1973 through September 7, 1973, which compensation has already been paid by the carrier.

The Board accepts the recommendation of its Evaluation Division.

ORDER

Claimant is awarded compensation for temporary total disability from August 27, 1973 through September 7, 1973.

CLAIM NO. B 114296 AUGUST 2, 1977

MELVIN H. LINDSEY, CLAIMANT
Richard T. Kropp, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 5, 1977, the claimant, by and through his attorney, petitioned the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopened his claim for an injury suffered on March 18, 1965 while employed by Corvallis Sand and Gravel whose workmen's compensation coverage was furnished by State Compensation Department, predecessor to the State Accident Insurance Fund. Claimant has been awarded compensation for permanent partial disability equivalent to 70% loss of function of the arm for his unscheduled disabilities. Claimant's aggravation rights have expired and the last award or arrangement of compensation was made on or about July 10, 1970.

On July 11, 1977, the Board furnished the Fund copies of the own motion petition and its medical attachments and advised it to respond within 20 days stating its position with repect to the request for own motion relief.

On July 23, 1977, the Fund responded, stating that, in its opinion, the medical evidence presented in support of the own motion petition did not indicate any progression or worsening of claimant's condition since 1970.

The Board, after thorough consideration of the medical reports furnished by the claimant and the response made by the Fund, concludes that claimant's condition, at the present time, does not represent a worsening since the last award or arrangement of compensation in 1970 and that claimant is not entitled to compensation for temporary total disability commencing March 15, 1977, nor is he entitled, as requested in the alternative, to an award for permanent total disability. The Board finds that the previous awards which total 70% of the maximum allowable for unscheduled disability, at the present time, adequately compensate claimant for such disabilities.

Dr. Knox stated that surgery would be scheduled shortly. If claimant does undergo surgery, then he can, at that time, in the Board's opinion, again petition for own motion relief.

ORDER

Claimant's petition for own motion jurisdiction received July 5, 1977 is hereby denied.

WCB CASE NO. 75-4820 AUGUST 2, 1977

CARL OAKES, CLAIMANT
Richard Hammersley, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On July 26, 1977, the Board received from the State Accident Insurance Fund a motion to reconsider the Board's Order on Review entered in the above entitled matter on July 15, 1977 on the ground and for the reason that the Board did not pass upon the request by SAIF that the case be remanded back to the Referee to consider Dr. Lilly's deposition which the Fund was denied the right to obtain in the instant case but eventually obtained in WCB Case No. 77-72. A copy of Dr. Lilly's deposition taken in WCB Case No. 77-72 was attached to the request for reconsideration.

The Board, after due consideration, finds no justification for reconsidering its Order on Review dated July 15, 1977.

ORDER

The request by the State Accident Insurance Fund for reconsideration of the Order on Review entered in the above entitled matter on July 15, 1977 is hereby denied.

SAIF CLAIM NO. PB 94443 AUGUST 2, 1977

LINCOLN PENCE, CLAIMANT
Robert H. Grant, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant had suffered a compensable injury on November 9, 1964 involving a fracture of the left tibia and fibula. His claim was closed July 12, 1975 with an award of 15% loss of function of the left foot. Claimant's aggravation rights have expired.

On July 6, 1977, claimant, by and through his attorney, Robert H. Grant, requested the Board to reopen claimant's claim based upon the medical report from Dr. David A. Ross, dated June 27, 1977.

The State Accident Insurance Fund was advised by the Board of the request for own motion relief and furnished a copy of Dr. Ross's medical report. On July 21, 1977, the Board was informed by the Fund that it would reopen claimant's claim for further medical treatment and pay him compensation for time loss from the date he was admitted to the hospital which appeared to be June 18, 1977.

The Board concludes, based upon the medical report from Dr. Ross which apparently was sufficient to convince the Fund that claimant's current condition was causally related to his 1964 injury, that claimant's claim should be reopened for medical treatment and for the payment of compensation, as provided by law, commencing June 18, 1977 and until the claim is again closed pursuant to the provisions of ORS 656.278.

The Board further concludes that the claimant's attorney should be granted an attorney's fee in a sum equal to 25% of the compensation paid claimant for temporary total disability as a result of this order, payable out of said compensation as paid, to a maximum of $500.

IT IS SO ORDERED.

SAIF CLAIM NO. EC 77622 AUGUST 2, 1977

HARRY J. SCHELSKE, CLAIMANT
Galton & Popick, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on June 15, 1967 while working as a welder for Northwest Natural Gas Company. His claim was initially closed by a Determination Order mailed May 24, 1968 which awarded claimant 19.2 degrees for 10% loss of an arm by separation for unscheduled disability. Claimant's aggravation rights expired on May 24, 1973.

Since the initial closure, claimant has been granted additional awards of compensation which, at present, give claimant a total award for 60% loss of an arm by separation for his unscheduled disability. Claimant requested and received a 100% lump sum payment.

On April 29, 1976, after a medical examination, claimant was hospitalized for treatment of his low back condition. He was subsequently released to return to work on June 1, 1976. A Board's Own Motion Order, dated July 22, 1976, reopened the claim for benefits from April 29, 1976 until closure pursuant to ORS 656.278.

Claimant was again hospitalized on January 8, 1977 and thereafter released to return to work on January 31, 1977. He returned on that date and still remains employed. The employer is

the same employer for whom claimant was working at the time of his 1967 injury.

The Fund requested a determination from the Evaluation Division of the Board, based upon the medical report dated May 25, 1977, which indicated claimant had some residuals of the 1967 injury, however, he has already received 60% of the maximum for his unscheduled disability. The report also indicates the expected progression of the unrelated degenerative changes and recommends no further medical treatment, stating that claimant's condition was medically stationary.

The Evaluation Division recommended that claimant be awarded compensation for temporary total disability from April 29, 1976 through January 30, 1977, less time worked. It felt that the 60% which claimant had already received for his unscheduled disability adequately compensated him.

The Board, after due consideration, accepts the recommendation of its Evaluation Division.

ORDER

Claimant is awarded compensation for temporary total disability from April 29, 1976 through January 30, 1977, less time worked.

WCB CASE NO. 76-5928 AUGUST 2, 1977

CHARLES STEMBRIDGE, CLAIMANT
Jerome Bischoff, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the Determination Order, mailed October 19, 1976, awarding claimant compensation for temporary total disability only.

Claimant suffered a compensable injury on March 19, 1976 when a conveyor belt under which claimant was standing and attempting to repair, dropped on him, striking him on the right side of the head. Claimant suffered lacerations of the lip and broken dentures.

Dr. Young, an orthopedic surgeon, diagnosed a neck strain and prescribed a course of physical therapy, massage, exercise and traction. This treatment did not seem to help and claimant, in June 1976, was referred to Dr. Andersen, a neurosurgeon, who indicated on August 3, 1976 that claimant was essentially normal, neuro-

logically, and that he doubted there was significant lesion there, however, if the complaints did not lessen, Dr. Andersen felt that a myelogram might be necessary.

On September 7, 1976, Dr. Andersen reported that claimant had a full range of painless motion of the head and neck and that a myelogram was not indicated.

On October 19, 1976, a Determination Order awarded claimant no compensation for permanent partial disability. Thereafter, claimant was referred by the carrier to the Orthopaedic Consultants on December 2, 1976. It was their opinion that claimant's condition was stationary and the claim could be closed; no treatment was recommended although it was recognized that claimant might seek review of his status in the future. At that time and prior thereto, claimant had been performing his customary occupation without limitation and the physicians found no reason for him to deviate from such activity.

The Referee found that the medical evidence indicated claimant had suffered no permanent partial disability. Claimant testified that he still has pain in his neck and sometimes this pain develops into severe headache, also the pain in his shoulder was persistent, however, claimant acknowledged that he had lost only two shifts from his regular work. His present occupation is that of a sander/grader and is a relatively easy job.

The Referee found that claimant had suffered no loss of wage earning capacity; he was continuing to do the same work that he had done prior to his injury. He affirmed the Determination Order.

The Board, on de novo review, finds that although claimant has considerable pain, there is no evidence that such pain is disabling and, therefore, compensable. The Board concurs in the conclusion reached by the Referee.

ORDER

The order of the Referee, dated January 21, 1977, is affirmed.

WCB CASE NO. 75-2446 AUGUST 2, 1977

LOWELL J. TERRELL, CLAIMANT
Gary K. Jensen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Referee's order which awarded claimant 54 degrees for 40% scheduled right foot disability and 54 degrees for 40% scheduled left foot disability.

In July 1973, claimant had filed a claim for foot problems which occurred while working as a machinist. The claim was denied and, after litigation, the circuit court, in January 1975, reversed the previous approval of the denial by the Board and remanded the claim to be processed as an occupational disease. The claim was then closed by a Determination Order, mailed May 19, 1975, which awarded claimant compensation for temporary total disability only.

The Referee found claimant's main problem to be pain in both heels resulting from prolonged standing. Claimant is unable to stand for more than 1/2 hour. Claimant was treated by Dr. Hogan, a podiatrist, whose opinion was that claimant's symptoms resulted from the partial rupture of both the plantar facia of the feet for which arch supports were fitted and provided significant benefit.

At the present time, claimant is a log truck driver and is on his feet less than one hour each day, therefore, his job has created no substantial problems with his feet and vice versa. Much of claimant's alleged disability stems from subjective complaints and the record contains unexplained inconsistent statements made by the claimant with respect to said disability. Although these inconsistencies caused the Referee to view claimant's testimony regarding the extent of his disability with some caution, he could not consider them proof that claimant was without symptoms of disability.

Based upon the report from Dr. Hogan and one from Dr. Collis, an orthopedist who examined claimant on several occasions, the Referee found that claimant, as a result of his injury, had pain which is compensable by virtue of limiting his endurance, therefore, he awarded claimant 40% of the maximum allowable by statute for his right foot and 40% for his left foot.

The Board, on de novo review, finds that the medical evidence indicates that claimant has suffered little, if any, loss of function of either his right foot or his left foot. Therefore, based on the medical evidence, the Board reduces the awards made by the Referee to 10% of the maximum for the right foot and 10% of the maximum for the left foot.

ORDER

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

Claimant is awarded 13.5 degrees of a maximum of 135 degrees for scheduled right foot disability and 13.5 degrees of a maximum of 135 degrees for scheduled left foot disability. These awards are in lieu of those made by the Referee's order which, in all other respects, is affirmed.

WCB CASE NO. 75-2148 AUGUST 3, 1977

The Beneficiaries of
ERNEST GILE, DECEASED
Rolf T. Olson, Claimant's Atty.
Scott M. Kelley, Defense Atty.
Request for Review by Employer
Cross-request by Claimant

Reviewed by Board Members Wilson and Phillips.

The employer requested Board review of the Referee's order which directed it to accept claimant's claim, process it and pay compensation as provided by the Workmen's Compensation Act and awarded claimant's attorney an attorney's fee in the amount of $700.

The Beneficiaries of Ernest Gile, deceased, hereinafter referred to as claimant, cross-requested Board review of that portion of the order awarding claimant's attorney an attorney's fee of $700.

Mr. Gile, the decedent workman, died in his sleep on May 19, 1974, approximately 6-1/2 hours after his last work activity. Claimant filed a claim for benefits under the Workmen's Compensation Law sometime in January 1975, approximately 8 months after her husband's death. The claim was denied.

The decedent workman had been regularly employed by the employer as an appliance salesman and assistant manager. Approximately 80% of his time had been spent inside the store selling appliances and handling paper work; the balance of his time had been spent delivering appliances. He had been required to perform physical work, however, but not on a regular basis. When he had been required to move appliances he usually had used his truck which had a hydraulic power lift.

Two weeks prior to his death, the workman's work load had increased because of relocating the store. In addition to performing his regular duties he had to move 100 appliances to the new warehouse. Such activity had been finished on Friday, May 17, and

on the following day he had helped company employees move approximately 1500 tires which had required extensive physical activity as well as stacking tires overhead. Although he had made no physical complaints, he had asked to be relieved from work early and had, in fact, left the job site prior to completion of the moving. After he had reached home, and during the evening, he had complained to his wife of being very tired.

Prior to May 2, 1974, the workman's health and physical condition had appeared to be and were considered good. On May 2, claimant had complained of chronic headaches as well as a general tiredness; this was about the time the moving activities started. Between May 2 and 14, 1974, Dr. Wadsworth had examined or treated the workman because of these complaints which he diagnosed as elevated blood pressure due to hypertension. The use of medication apparently had resolved claimant's headaches and Dr. Wadsworth, who is a general practioner, testified that, in his opinion, the probable cause of the workman's death was a myocardial infarction or coronary thrombosis and he felt that the work activity on May 18, 1974 was "possibly related" to the workman's heart condition and had caused his death.

Dr. Grossman, a specialist in internal medicine, expressed his opinion that cause of death was coronary thrombosis and not a myocardial infarction, furthermore, that the physical exertion which had been put forth by the workman on May 18, 1974 was a "significant material contributing cause" to the coronary thrombosis and death.

Dr. Rogers, cardiologist, was of the opinion that the workman had experienced cardiac arrhythmia. It was his opinion that there was no probable material relationship between the death and the workman's work activities of May 18, 1974, because there was no excessive mental or unusual physical activity involvment by the workman on May 18, 1974 and that the death had occurred approximately 6-1/2 hours after the workman had completed a physical activity and that he had not complained of any cardiac symptoms preceding his heart problem, at work or shortly thereafter.

The Referee noted that Dr. Rogers conceded that lack of cardiac symptomatology only suggested, did not prove, that there was no relationship between the work activity and death; he also distinguished between "fatigued" and "exhausted".

The carrier contends that claimant is barred from pursuing her claim because of untimely notice of the claim and because of untimely filing of the request for hearing. The Referee found that the employer had knowledge of the death on the same day that it occurred and there was no showing that the employer or its carrier had been prejudiced in making an investigation, preparing or presenting a case and, furthermore, claimant had filed her request for hearing contesting the denial on May 28, 1975, which was within 60 days from the denial of her claim on April 22, 1975.

The Referee found that claimant had proven by preponderance of the evidence that her claim was compensalbe, primarily because of the events and circumstances of May 18, 1974, which preceded the apparent heart problem and death of the workman. The workman had experienced a coronary thrombosis and that the work activity of May 18 had been a significant material cause to the coronary thrombosis which resulted in the death of the workman. The type of work activity which the workman had been performing on May 18 was not the type in which he was normally engaged and to which he was accustomed.

The Referee concluded that it was more probable than not that the work activity was a significant material contributing cause to the workman's coronary thrombosis which ultimately resulted in his death. Dr. Rogers' opinion, at best, only suggested that there was no relationship between the work activity and death because of lack of prior cardiac symptomatology.

The Referee did not think it proper under the circumstances of this particular case to assess penalties. There was no evidence of any misconduct on the part of the employer or its carrier; to the contrary, an investigation was made regarding a heart problem, death and the surrounding circumstances and apparently no medical evidence connected the heart condition, work activity and death until such testimony was induced at the hearing. However, since claimant prevailed on her claim from the denial, he awarded claimant's attorney a reasonable attorney's fee, payable by the employer and its carrier.

The Board, on de novo review, agrees with the Referee that the additional effort required of, and put forth by, the workman shortly before his death was a significant material contributing cause to his coronary thrombosis which ultimately resulted in the workman's death and it affirms the Referee's order. However, after studying awards granted in other heart cases in which similar testimony was offered and legal expertise utilized, the Board concludes that claimant's attorney is entitled to a greater attorney's fee than that awarded by the Referee. The Board concludes that claimant's attorney should be allowed, as a reasonable attorney's fee, the sum of $1500, rather than $700.

ORDER

The order of the Referee, entered November 30, 1976, is affirmed in all respects except that the employer and carrier are directed to pay to claimant's attorney, as a reasonable attorney's fee, the sum of $1500 rather than $700.

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

WCB CASE NO. 76-1679 AUGUST 3, 1977

ANDRE J. GOODHART, CLAIMANT
Jerry E. Gastineau, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks review by the Board of the Referee's order which affirmed the denial by the State Accident Insurance Fund on April 7, 1976 of claimant's claim for an alleged industrial accident which was filed on March 8, 1976.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

WCB CASE NO. 76-1379 AUGUST 3, 1977

FLOYD O. HILL, CLAIMANT
Steven R. Frank, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On July 29, 1977, the Board received from the State Accident Insurance Fund a motion to reconsider its Order on Review entered in the above entitled matter on July 22, 1977.

The Board, after due consideration, concludes there is no justification for reconsidering its Order on Review and the motion should be denied.

ORDER

The motion made by the State Accident Insurance Fund that the Board reconsider its Order on Review entered in the above entitled matter on July 22, 1977 is hereby denied.

SAIF CLAIM NO. YC 85849 AUGUST 3, 1977

DIANA HUBBS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On July 8, 1977, an Own Motion Determination was entered in the above entitled matter. The number of degrees granted claimant as shown on Page 2 should be 20.25 rather than 22.25.

With the exception of this correction, the Own Motion Determination is hereby reaffirmed.

WCB CASE NO. 76-2916 AUGUST 3, 1977

RICHARD L. MARKUM, CLAIMANT
Dan O'Leary, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review which affirmed the Determination Order mailed May 21, 1976 awarding claimant compensation for temporary total disability from April 22, 1974 through February 3, 1976 and 16 degrees for 5% unscheduled upper and lower back disability. Claimant contends that he should have been found to be permanently and totally disabled.

Claimant suffered a compensable injury to his back on April 22, 1974, diagnosed, originally, as thoracic and lumbosacral strain with a possible herniated disc. A lumbar myelogram, performed on June 4, 1974, failed to reveal any herniated disc and claimant continued on conservative treatment to which his low back and left leg pain responded slowly.

Claimant was re-hospitalized in September 1974 and a discogram was performed at L3, L4 and L5. There was evidence of a ruptured anulus at L5-S1, however, the disc was not degenerated and surgery was not performed. Claimant has been hospitalized on five separate occasions for short periods of time.

On September 5, 1974, claimant was given a psychiatric evaluation by Dr. Truax who found some indications of a possible predisposition to development to a conversion reaction but he did not schedule further consultation since claimant, at that time, had decided to return to work. Claimant has refused hospitalization for the Pain Clinic and for psychiatric treatment. Since his industrial accident of April 1974, claimant has been seen by 17 different physicians, including 6 orthopedists, 2 neurologists, and 4 psychiatrists.

In December 1974, claimant was evaluated at the Disability Prevention Division and received psychological examination at that time. Based on the initial examination, it was noted that claimant was cooperative but remained quite suspicious of the physician examining him and the situation; there was a constant feeling of latent hostility which the medical examiner was unable to dissolve. Also in December 1974, claimant was examined by Dr. Fleming, a psychiatrist, who felt that claimant had a moderate-severe psychopathology but that it did not interfere with claimant's return to work. He stated that claimant had completed barbering school but that he did not want to return to that type of work because of the low pay. Both Dr. Halferty and Dr. Zimmerman conclude that claimant should not return to his prior type of employment, but that he was capable of working at some other occupation.

Dr. Grewe stated that he was at loss to know to whom to refer claimant; he felt that everything that could be done had been done and, therefore, he suggested that claimant be referred to the Pain Clinic. Claimant refused.

Dr. Seres, in his report of December 29, 1975, stated that there appeared to be significant motivational factors present. On March 9, 1976, Dr. Schuler reported that there were no significant objective findings and he felt that the claim should be closed with minimal disability. He did not find any reason why claimant should not return to work. Based upon this report, the claim was closed on May 21, 1976 with an award of 15 degrees for 5% unscheduled disability.

After the closure of the claim, the claimant was referred by his attorney to Dr. Phillips, a psychiatrist, who stated his opinion that the industrial injury had precipitated a paranoid, delusional state in claimant who had had an underlying schizophrenic reaction which was previously asymptomatic. He felt that without in-hospital treatment, claimant, in all likelihood, was permanently and totally disabled because of the nature of his underlying thought disorder.

Claimant was also examined by Dr. Quan, a psychiatrist, who, after examining all of the medical reports admitted at the hearing and the report from Dr. Turner, a psychiatrist who had treated claimant from March 18 through March 26, 1975, concluded that claimant appeared to have a pre-existing psychiatric disorder, as reflected in Dr. Turner's report, and that this condition was aggravated by the industrial injury of April 22, 1974. Dr. Quan's opinion was that the maximum disability impairment would be 50% of the whole man.

The Referee found that claimant had been examined by at least three psychiatrists during the course of his claim and that there was a medical consensus that claimant's need for psychiatric assistance was causally related to his industrial injury. At the hearing, claimant testified he would refuse psychiatric treat-

ment, he also testified that although he was in too much pain to go to work he did not plan to consult a doctor as he did not trust them. He stated that he had a desire to "get better" but feels that doctors make him "get worse".

With respect to claimant's contention that he is permanently and totally disabled, the Referee found that he had not met the test set out in Deaton v. SAIF, 13 Or App 304, concerning motivation. Although both Dr. Phillips and Dr. Quan felt that the prognosis for rehabilitating claimant was poor whether or not he accepted treatment, nevertheless, claimant is obligated at least to attempt to try the treatment to determine whether or not it would improve his situation. Claimant had suffered an industrial injury in 1966 for which he had received an award for 20% unscheduled disability and, at that time, the prognosis for returning him to work was poor, but claimant had been able to return to work and had continued to work for nearly 8 years after that injury.

In Scown v. SAIF, 22 Or App 354, the court held that a workman's failure to continue with psychological counseling when the psychologist felt that there was a slight chance of helping claimant, precluded claimant from being found to be permanently and totally disabled. In Suell v. SAIF, 22 Or App 201, the workman refused to submit to a myelogram which would have aided the physicians in making a positive diagnosis and the court held that the workman was properly denied an award for permanent total disability because of this refusal.

Having determined that claimant was not permanently and totally disabled, the Referee then gave consideration to the extent of claimant's disability remaining as a residual of the industrial injury. From a psychiatric standpoint, Dr. Phillips had stated claimant was 100% disabled, and Dr. Quan felt claimant's impairment was equal to 50% of the whole man. The latter also felt that claimant's refusal of psychiatric treatment was not the result of any mental defect. The objective physical findings made by some of the neurologists and orthopedic physicians who had treated claimant indicate minimal, if any, physical impairment. At least two reports indicate an inconsistency between claimant's symptomatology and his physical ability in performing certain procedures. The Referee felt that, at best, the credibility of claimant was suspect. The testimony regarding the type of work he was doing and the amount he was doing represented gross exaggeration.

After giving full consideration to the evidence, the Referee concluded that claimant had not done all that he could do to alleviate his condition. ORS 656.325 imposes a duty on the workman to submit to such medical treatment as is reasonably essential to promote his recovery and, in this case, claimant has made no effort to fulfill this obligation. This refusal on the part of claimant, in the Referee's opinion, was unreasonable and, because the objective physical findings indicated rather minimal physical impairment situation, he concluded that the award of 16 degrees adequately compensated claimant for his loss of wage earning capacity and he affirmed said order.

After de novo review, the Board concurs in the findings and conclusions of the Referee.

It was Dr. Quan's impression that claimant had been schizophrenic for a long time and under certain circumstances and stresses that disorder is more easily recognized. When claimant sustained his back injury, he then developed many other psychophysiologic symptoms. According to Dr. Quan, a dilemma is presented by claimant's refusal for treatment and to complicate it further his prognosis is not good with or without treatment. Based purely on the psychiatric diagnoses, it appears that claimant is unable to do any productive work because his industrial injury triggered the pre-existing schizophrenia; furthermore, claimant is apparently paranoid about doctors and feels that they cannot help him.

Accepting this, the only conclusion remaining is that claimant is unable to make a reasonable decision regarding his medical treatment and, therefore, someone else would have to make the decision for him, even though it might result in his hospitalization.

It is Dr. Quan's opinion that claimant could not be involuntarily hospitalized and because claimant is unwilling to submit to a voluntary hospitalization or the recommended treatment which quite possibly could make him employable, the Board feels that claimant has placed himself in the same situation as the workmen in Scown and Suell, to-wit: he has refused treatment recommended as a possible means for returning him, in some manner, to the work force; therefore, claimant has made it impossible to determine with any accuracy his disability.

ORDER

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

WCB CASE NO. 75-5358 AUGUST 3, 1977

JOYCE McCAMMON, CLAIMANT
Evohl Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On July 28, 1977, the Board received from the State Accident Insurance Fund a letter designated as a motion requesting the Board to reconsider its position taken in their Order on Review entered in the above entitled matter on July 19, 1977.

The Board, after due consideration of the arguments set forth in the letter from the counsel for the Fund, concludes that there is no justification for reconsidering of its Order on Review.

ORDER

The request that the Board reconsider its Order on Review entered in the above entitled matter on July 19, 1977 is hereby denied.

WCB CASE NO. 76-2966 AUGUST 3, 1977

WILLIAM C. WORMAN, CLAIMANT
William Barton, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On August 1, 1977, the Board received from the State Accident Insurance Fund a motion to reconsider its Order on Review entered in the above entitled matter on July 26, 1977.

The Board, after due consideration, concludes there is no justification for reconsidering its Order on Review and the motion should be denied.

ORDER

The motion made by the State Accident Insurance Fund that the Board reconsider its Order on Review entered in the above entitled matter on July 26, 1977 is hereby denied.

WCB CASE NO. 77-2034 AUGUST 4, 1977

RONALD JAMES, CLAIMANT
Keith Tichenor, Claimant's Atty.
William H. Stockton, Defense Atty.
Order

On July 22, 1977, the Board received from the State Accident Insurance Fund a Petition for Review of Reimbursable Time Loss, pursuant to OAR 436-61-055(6), requesting the Board to review and determine whether or not the Fund is entitled to reimbursement or temporary total disability compensation paid claimant subsequent to May 18, 1976.

The Board, after reviewing the affidavits attached to the petition and the evidence in the file relating to this issue, finds that on July 6, 1976 the Fund submitted a Form 802 to the Board requesting a determination which noted thereon that claimant had said he was working with vocational rehabilitation at that time and further noted that if the claim was not active it should be referred to vocational rehabilitation. On July 28, the Fund was advised by the Evaluation Division of the Board that the claimant had not completed or been terminated from his authorized course of vocational

rehabilitation; that claimant had been found to be medically stationary on May 17, 1976 and the Fund would be entitled to be reimbursed for compensation for temporary total disability from May 18, 1976. On March 16, 1977, claimant's claim was closed and his compensation for temporary total disability was terminated as of January 31, 1977.

The Board concludes that the State Accident Insurance Fund is entitled to be reimbursed pursuant to OAR 436-61-055(6) for all compensation it has paid claimant for temporary total disability from May 18, 1976 through January 31, 1977.

IT IS SO ORDERED.

WCB CASE NO. 76-2798 AUGUST 4, 1977

JOHN JOHANSON, CLAIMANT
Fred Allen, Claimant's Atty.
Robert F. Walberg, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks review by the Board of the Referee's order which affirmed the Determination Order dated May 12, 1976 whereby claimant was awarded 32 degrees for 10% unscheduled back disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

WCB CASE NO. 76-3426 AUGUST 4, 1977

FREDERICK MAY, CLAIMANT
J. W. McCracken, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which approved the denial by the State Accident Insurance Fund on July 1, 1976 of claimant's claim for Workmen's Compensation benefits.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 4, 1977, is affirmed.

WCB CASE NO. 75-3136 AUGUST 4, 1977

MIKE McKEE, CLAIMANT
Donald Atchison, Claimant's Atty.
Merlin Miller, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of the Referee's order which found claimant to be permanently and totally disabled as of May 31, 1974 and allowed the carrier to set off all payments made under the Determination Order of October 2, 1974 except offsets they may have obtained for temporary total disability and directed the carrier to reimburse the claim for the offset, if any, for temporary total disability from May 31 until October 4, 1974.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated December 14, 1976, is affirmed.

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

WCB CASE NO. 76-6056 AUGUST 4, 1977

REVA MCLAIN, CLAIMANT
William M. Horner, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

On May 13, 1977, the State Accident Insurance Fund requested Board review of the Referee's order entered in the above entitled matter and on May 19, 1977, the claimant filed a cross-request for Board review of the Referee's order.

It now appears that claimant was referred for vocational rehabilitation by the Disability Prevention Division of the Board on April 20, 1977 and is entitled to receive compensation for temporary total disability from that date and until her completion or termination of the authorized program at which time the Evaluation Division of the Board shall issue a subsequent determination order.

Therefore, the Board concludes that the request for Board review as well as the cross-request for Board review are now moot and each should be dismissed.

Claimant is entitled to receive compensation for permanent partial disability between the date of the Referee's order, April 7, 1977, and the date of her referral for vocational rehabilitation, April 20, 1977, and the Fund shall be allowed to offset as a credit against any future award for permanent partial disability the sums it has paid to claimant pursuant to the Referee's order entered in the above entitled matter.

ORDER

The request by the State Accident Insurance Fund and the cross-request by the claimant for Board review of the Referee's order in the above entitled matter, are hereby dismissed.

WCB CASE NO. 75-3020 AUGUST 4, 1977

GLENN SMETANA, CLAIMANT
David Vandenberg, Claimant's Atty.
Michael D. Hoffman, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the award of 15 degrees for 10% loss of the left forearm, 30 degrees for 20% loss of the right forearm, and 80 degrees for 25% unscheduled permanent partial disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 14, 1977, is affirmed.

WCB CASE NO. 76-2580 AUGUST 4, 1977

JOE STEWART, CLAIMANT
Benton Flaxel, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which dismissed his request for hearing on the grounds that there was no showing by claimant that the closure of his claim on August 1, 1972 by administrative closure was improper and that he was, in fact, disabled from such injury. The Referee found that claimant had not sustained his jurisdictional requirements to support the remedy for reopening due to aggravation, that his remedy, if any, would be pursuant to the provisions of ORS 656.278 which authorizes the Board to reopen a claim on its own motion if justified.

Claimant had requested a hearing to consider the denial of his claim for compensation benefits arising out of his injury of July 1, 1972. The denial was dated May 7, 1976 and advised claimant that, in the opinion of the medical staff of the Fund, claimant's current disability did not relate to the non-disabling injury which he had suffered in 1972, although it did admit that the Fund had paid medical costs to that date.

At the hearing, claimant's attorney indicated that the issue was properly one of failure to pay medical bills and temporary total disability benefits, that the claim had never been closed, therefore, aggravation rights could not have commenced and the denial of claimant's claim for aggravation rights was, in effect, a nullity. He indicated that he was not prepared to go forward and prove an aggravation claim pursuant to ORS 656.273 because claimant had never received a "last award", that the claim remains in an open status until the Fund requests that the claim be closed by Determination Order issued pursuant to ORS 656.268.

The Fund moved for an Order of Dismissal, alleging that the request for hearing was based solely on compensability, and that claimant failed to sustain the requirements set forth in ORS

656.273(3). Claimant requested a continuance rather than dismissal for the reason that more than 60 days had lapsed since the letter of denial had been received and if claimant was forced to refile a new request for hearing he might be prejudiced by the terms of ORS 656.262(6) which provides that any request for hearing on a denial must be made within 60 days after mailing of said denial.

The Referee found that the documents which were received in evidence indicated that claimant was not disabled as a result of the 1972 injury which was itself an aggravation of an injury suffered in 1967 and, furthermore, that claimant had worked continuously since 1974 when he retired. For that reason he granted the motion and dismissed the hearing.

The Board, on de novo review, finds that claimant's injury was suffered prior to the amendment of ORS 656.268 by Chapter 620, Section 3, Oregon Laws 1973, and, therefore, claimant is entitled to have his claim closed pursuant to ORS 656.268. Article 4, Workmen's Compensation Board Administrative Order No. 4-1970, as amended, provides as follows:

> "4.01 The law requires the Board to make a determination of compensation due on every compensable injury. (ORS 656.268).
>
> "4.01A Exception: Claims involving no compensable loss of time from work, claims involving no medical services, and claims involving only medical services will be administratively closed. This closure does not constitute a determination pursuant to ORS 656.268."

Therefore, although the claim was properly closed on a "medical only" basis, nevertheless, claimant still is entitled to a determination of compensation pursuant to ORS 656.268 to establish a commencement date for his hearing rights and his aggravation rights.

The Board further finds that claimant was medically stationary on or about August 1, 1972.

ORDER

The order of the Referee, dated November 23, 1976, is reversed.

Claimant's claim for an industrial injury suffered on July 21, 1972 is hereby remanded to the Evaluation Division of the Board to close the claim by the issuance of a determination order in conformance with this order.

Claimant's counsel is awarded, as a reasonable attorney's fee for his services at the hearing before the Referee, the sum

of $600, payable by the State Accident Insurance Fund.

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

WCB CASE NO. 76-922 AUGUST 4, 1977
WCB CASE NO. 76-923
WCB CASE NO. 76-924

EDDIE TATE, CLAIMANT
Roger D. Wallingford, Claimant's Atty.
Frank Moscato, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of the three claims which claimant filed. The first claim was for an alleged back injury in November 1974. The other two claims were for occupational disease, essentially for contact dermatitis arising out of work exposure to cement on January 27 and again on February 17, 1975.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 28, 1977, is affirmed.

CLAIM NO. B53-133555 AUGUST 8, 1977
CLAIM NO. B53-133711

HERMAN DOUGLAS, CLAIMANT
Murley M. Larimer, Claimant's Atty.
Roger R. Warren, Defense Atty.
Own Motion Order

On July 26, 1977, the Board received a motion from claimant, by and through his attorney, Murley M. Larimer, requesting the Board to consider the matters alleged in claimant's affidavit which was the basis for the motion, and to consider an award to claimant of permanent total disability under the above claim numbers.

The affidavit states that the affiant was the claimant in both the above numbered claims, that he is now completely disabled and unable to work gainfully in any way, that he never received any permanent disability, either permanent or temporary under Claim No. B53-133555 and that the settlements set forth in the Board's Own Motion Order entered May 23, 1973 were made when claimant did not have full possession of his faculties and was emotionally upset and distraught and that he did not understand the consequence of his action.

The Board finds that its Own Motion Order of May 23, 1973 had awarded claimant 320 degrees, the maximum allowable for unscheduled permanent disability. Claimant had entered into a stipulation which set aside a Determination Order entered on January 6, 1972 awarding claimant compensation for permanent and total disability and awarded claimant 320 degrees so that claimant could receive a lump sum payment of the latter award from the carrier. The Board had found in its Own Motion Order of May 1973 that although the settlement had been approved by a hearing officer and claimant had been advised of the consequences should he sign the stipulation, nevertheless, the payment by the carrier to claimant of the lump sum of $17,600 had been in violation of the provisions of ORS 656.230(2) which limits advance payments to a maximum of 50% of the total award and only with the prior approval of the Workmen's Compensation Board.

Because of the carrier's failure to seek Board approval of the advance payment, the Board had concluded that the prior illegal ayment must be ignored and, therefore, the carrier still owed claimant $17,600 and should immediately begin payment of that liability in accordance with the provisions of the Workmen's Compensation Law. The carrier was ordered to pay claimant benefits for permanent partial disability in the amount of $17,600. The carrier did not appeal this order.

The Board now concludes that there is no medical evidence presently before it which would justify a finding that claimant is permanently and totally disabled. Furthermore, claimant not only has received a lump sum payment of $17,600 pursuant to the stipulated award for 320 degrees but, in addition, has been entitled to receive Workmen's Compensation benefits from the carrier for 320 degrees commencing on the date of the Own Motion Order entered May 23, 1973.

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

IT IS SO ORDERED.

WCB CASE NO. 77-232 AUGUST 8, 1977

ROBERT A. FARMER, CLAIMANT
David W. James, Claimant's Atty.
Earl M. Preston, Defense Atty.
Stipulation

IT IS HEREBY STIPULATED by and between the parties, the claimant appearing personally and by and through David W. James, attorney for claimant, and the State Accident Insurance Fund appearing by and through Earl M. Preston, Associate Counsel, of attorneys for the Fund, that the Request for Board Review in this case and the Request for Hearing shall be settled and disposed of, including any and all issues that were raised or that could have been raised in either the Request for Board Review or the Request for Hearing, by the State Accident Insurance Fund awarding to the claimant permanent partial disability equal to 7.5% for unscheduled back disability.

IT IS FURTHER STIPULATED that the claimant requests a lump sum payment of said award.

IT IS FURTHER STIPULATED that David W. James should be awarded 25% of said award as a reasonable attorney fee.

IT IS SO STIPULATED.

IT IS SO ORDERED this 8th day of August, 1977, and the Request for Board Review and Request for Hearing are hereby dismissed.

WCB CASE NO. 76-2721 AUGUST 8, 1977

SEUNG K. KIM, CLAIMANT
John W. Smallmon, Claimant's Atty.
Merlin Miller, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks review by the Board of the Referee's order which affirmed the carrier's denial dated May 25, 1976 of claimant's claim for Workmen's Compensation benefits.

Claimant is a Korean who has lived in the United States for approximately 22 years. Claimant, while working as a process operator for the employer, suffered a compensable injury about May 1, 1975 when he was hit on the right side of his head and on the right shoulder by heavy pipe.

The evidence is not clear as to whether claimant was knocked down or whether he lost consciousness, however, shortly after the alleged injury, claimant started dropping things with his left hand and he now has headaches in his right frontal region and his vision, at times, is dimmed, according to Dr. Lahiri, a neurologist, who examined claimant in July 1975.

An electroencephalogram and a brain scan were performed, both of which were normal. The claimant was examined in March 1976 by Dr. Simmons, an eye specialist, who found some presbyopia, which is far-sightedness and impairment of vision due to advancing years; except for that, the examination was normal. Dr. Simmons was unable to causally relate claimant's visual disturbance and headache problems to his industrial injury.

Dr. Smith, an orthopedic physician, examined claimant in April 1976 and found claimant still had complaints of pain or headache on the right side of his skull and that there was a feeling of numbness involving chiefly the ring finger of the left hand which weakened the grip and caused him to drop articles. He also found claimant had some discomfort in his neck which was not severe and continued to have the discomfort around his eyes and the blurring of vision.

Dr. Smith recommended claimant be examined by Dr. Silver, a neurologist, who, after examining claimant, stated that claimant seemed to have intermittent non-progressive attacks that could be related to a disturbance in the circulation or electrical activity of the right cerebral hemisphere. The problem has been stable and he did not think that it was related to the injury of May 1, 1975. He recommended a repeat EEG, brain scan and EMI scan although he did not feel they were mandatory since his neurological examination was negative. Claimant did not have the procedures repeated. Dr. Smith stated he agreed with Dr. Silver's findings and had no recommendations for further treatment or investigation.

Claimant testified that he had none of the symptomatology prior to his injury and he contends that there was a causal relationship between such symptomatology and the injury.

In May 1976, the carrier advised claimant it would continue to provide benefits in connection with claimant's cervical strain, however, it denied benefits for his cerebral condition, vision problems, headaches and numbness of the hands.

The Referee found claimant's contention that his present symptomatology was causally related to the industrial injury was not supported by the medical evidence. Dr. Lahiri's report of April 15, 1976 stated that occasionally an episodic migraine of the vasospastic type will be contributed to by an injury; however, all the tests which were suggested failed to reveal findings of an objective nature to substantiate the conclusion made by Dr. Lahiri that this was probably true in claimant's case. Dr. Silver thought

claimant might have had transient ischemic attacks or a right cerebral lesion, but he did not feel it was necessary to repeat the various tests since his neurological examination revealed nothing abnormal.

The Referee found that this was a complicated medical situation and claimant must prove his case with expert medical opinion; he cannot do so with lay testimony. The Referee concluded that in this case the medical evidence failed to connect claimant's symptomatology as it related to his cerebral condition, vision problems, headaches and numbness of the hands to the industrial injury of May 1, 1975, therefore, the denial by the carrier of responsibility for those conditions should be affirmed.

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

ORDER

The order of the Referee, dated January 25, 1977, is affirmed.

WCB CASE NO. 77-2082 AUGUST 8, 1977

ROY P. KRUTSCH, CLAIMANT
Harold W. Adams, Claimant's Atty.
Allen W. Lyons, Defense Atty.
Contentions of the Parties;
Stipulations of Parties; Order
Approving Disputed Claim Settlement
and Dismissing Request for Hearing

SECTION I

CONTENTIONS OF THE PARTIES

(A) CLAIMANT'S CONTENTIONS

Claimant contends that:

1. He has a valid claim for an occupational disease, namely the aggravation of his hypertension.
2. The aggravation of his hypertension is the direct result of his employment with the Department of General Services.
3. His claim was improperly denied.

(B) DEFENDANT'S CONTENTIONS

Defendant contends that:

1. The circumstances alleged by the claimant to have resulted in the elevation of his hypertension are not sufficient

to constitute a compensable claim under the Workers' Compensation law of the State of Oregon.

2. The denial of the claim is in all respects proper.

SECTION II

STIPULATIONS OF THE PARTIES

The parties stipulate that:

1. Claimant filed a claim, which was processed and denied by defendant.

2. A timely request for hearing was filed, and a hearing held.

3. The denial by the State Accident Insurance Fund was overturned and the claimant's claim found compensable by the hearing referee.

4. Defendant has requested review by the Workers' Compensation Board of the Opinion and Order of the hearing referee.

5. Claimant's claim is doubtful and disputed and ought to be, and may be settled and disposed of as a doubtful and disputed claim in the manner and upon the terms and conditions set forth in Section III hereof which follows.

SECTION III

FINDINGS AND ORDER OF THE BOARD

The Board having considered the matter and having noted both the contentions of the parties and the stipulations of the parties hereinbefore set forth plus all of the other documents in the file, the Board finds that claimant's claim is doubtful and disputed and that the pending request for Board review should be settled and disposed of. Therefore, it is hereby ORDERED that the matter is settled and disposed of upon the following conditions:

1. Defendant shall pay jointly to the claimant and to claimant's attorney the sum of $3,600 and claimant and claimant's attorney shall receive from defendant the sum of $3,600 as full and final settlement and disposition on a disputed claim basis of the claimant's claim and request for hearing.

2. Claimant's attorney shall receive and have out of said $3,600 the sum of $1,000 as and for his attorney fees.

3. The defendant's request for Board review is dismissed with prejudice.

WCB CASE NO. 75-3675 AUGUST 8, 1977

HOMER NICHOLS, CLAIMANT
Nick Chaivoe, Claimant's Atty.
James Huegli, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks review by the Board of the Referee's order which granted claimant an award of 160 degrees for 50% unscheduled low back disability and disabling sciatic pain.

Claimant suffered a compensable injury to his lower back on February 7, 1974. After a period of conservative chiropractic treatment, claimant was referred to Dr. Gripekoven, an orthopedic surgeon, who performed a laminectomy on April 4, 1974. He limited claimant's work thereafter with no heavy lifting over 20-30 pounds on a repetitive basis. On September 9, 1974, Dr. Gripekoven reported that claimant had been released for regular work on July 22, 1974 and had returned to his previous employment; although he had been advised to avoid heavy lifting, claimant had told the doctor that heavy lifting was required by his job.

The claim was closed by a Determination Order dated August 15, 1975 which awarded claimant compensation for temporary total disability from February 7 through July 22, 1974 and 64 degrees for 20% unscheduled low back disability. Claimant contends that he is entitled to compensation for temporary total disability until the date of the claim closure, August 15, 1975.

The Referee found that claimant's contention was not well taken inasmuch as Dr. Gripekoven's report had indicated that he not only was able to return to work on July 22, 1974, but had returned to work on that date. Furthermore, there had been a stipulation approved by Referee Rode covering the amount of compensation for temporary total disability issued based on a dismissal of a hernia claim. The Referee concluded that claimant had received all the compensation for temporary total disability to which he was entitled.

On the question of extent of claimant's disability resulting from his back injury, the Referee found claimant had a long history of back problems incurred both on and off the job. Dr. Gripekoven reported on December 4, 1975 that claimant still remained symptomatic although he was gainfully employed on a full time basis and the doctor could see no specific evidence of reaggravation and worsening of the condition. He considered claimant's condition was still medically stationary as of that date. Claimant had a mild moderate permanent disability for lifting and heavy physical labor but could be employed on a full time basis in a more sedentary type job.

The Referee found that claimant was 50 years old and had a 9th grade education, that he had taken mechanical training by correspondence and had been a truck mechanic. Claimant complained of numbness in his leg and also cramps which bothered him more in his right leg. Driving a car and prolonged sitting apparently bothered claimant's back.

The Referee found claimant to be a credible witness who did not seem to overemphasize his complaints and, because of his compensable back injury, claimant was going to be limited to the types of work he could find in the future, although he did not appear to have any substantial loss of earning capacity at the time of the hearing.

The Referee concluded, based upon Dr. Gripekoven's report, that the Evaluation Division had underestimated claimant's disability and that he was entitled to a substantially greater award for it. He increased the award from 20% to 50% of the maximum allowable for the unscheduled disability, based primarily upon the finding that the work that claimant will be able to do in the future will be necessarily limited by his back injury and leg symptoms.

The Board, on de novo review, finds that Dr. Gripekoven, who performed the surgery and has examined claimant subsequent thereto, was of the opinion that claimant had a mild to moderate permanent disability for lifting or heavy physical labor but could be employed on a full time basis in a more sedentary type job. Furthermore, the Referee, although granting claimant a substantial increase for his disability, had found that it did not appear that claimant had suffered any substantial loss of earning capacity at the time of the hearing.

Unscheduled disability is determined by the measurement of claimant's loss of earning capacity caused by the industrial injury. In this case, there is no conflicting medical evidence, the treating and operating doctor found a mild impairment of the spine to be the only residual of the injury. Claimant is presently working at his former occupation and earning more than he had been at the time of his injury. He is able to perform his job without any disability.

The Board concludes that claimant has suffered some loss of earning capacity because of the limitation on heavy lifting and heavy physical labor, however, the claimant would be adequately compensated for this loss by an award equal to 35% of the maximum. The Referee's order should be modified accordingly.

ORDER

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

Claimant is awarded 112 degrees of a maximum of 320 degrees for unscheduled low back disability and disabling sciatic

pain. This is in lieu of the award made by the Referee's order which, in all other respects, is affirmed.

WCB CASE NO. 76-1245 AUGUST 8, 1977

LOYCE D. ROBINSON, CLAIMANT
Rick McCormick, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which granted claimant 160 degrees for 50% unscheduled low back disability, an increase of 128 degrees over the award granted by the Second Determination Order of March 4, 1976. Claimant contends he is permanently and totally disabled or, in the alternative, is entitled to an award far in excess of the 50% granted by the Referee's order.

Claimant suffered a compensable injury on May 6, 1974, diagnosed as a lumbar strain and facet subluxation. Dr. Cronk, an orthopedist, indicated claimant could return to work and the claim was closed on August 7, 1974 with no award for permanent disability.

Claimant was examined by Dr. Harwood, a medical examiner for the Fund, on December 30, 1974; he found exaggeration and motion withholding and felt that the subjective symptoms and complaints were not confirmed by the objective findings. Dr. Cook, chiropractic physician who had initially treated claimant, concurred with Dr. Harwood.

In September 1975, claimant was referred to Dr. Ellison, an orthopedist, who found lumbosacral degenerative disc disease and felt that claimant would have difficulty in engaging in lifting, bending, etc. He said surgery was a possibility. In September 1975, claimant was referred to the Disability Prevention Division where severe degenerative changes of the lumbosacral interspace were found. Claimant was given a psychological evaluation which indicated average intellectual capacity, nervousness and depression. It was suggested that claimant receive psychological counselling.

Claimant was examined by Dr. Ackerman, a clinical psychologist, in September 1975. Dr. Ackerman felt it was doubtful that claimant could maintain employment as a security guard and that he was a poor candidate for GED. Also, in November 1975, claimant had suffered a fractured leg not related to his work. Claimant's referral for vocational rehabilitation was withdrawn in January 1976 for the reason that claimant had poor vocational rehabilitation potential.

In February 1976, Dr. Ellison reiterated his findings of September 1975 and was of the belief that claimant had significant clinical and radiographic evidence for the low back pain. As a result of this report, a Determination Order was issued on March 4, 1976, which awarded claimant 32 degrees for 10% low back unscheduled disability.

The physicians at the Orthopaedic Consultants in May of 1976 found lumbosacral sprain, degenerative disc disease and functional overlay. Claimant's condition was stationary and the prognosis for claimant's return to the same occupation was poor; however the physicians felt that the total loss of function for the back was mild and the loss of function due to the injury was minimal.

The Referee found that claimant has an 8th grade education and that most of his adult working life has been in farming and sawmill work, although he has also done some work as a mechanic and millwright. At the time of the hearing, claimant was 46 years old; he had had two prior back incidents which did not cause him to lose any time from work.

The Referee concluded that although claimant's credibility was made somewhat suspect by the evidence that he could do some of the things which he said he couldn't, and although the doctors were not entirely consistent in their evaluation of claimant's cooperation and the extent and severity of his pain and claimant's motivation was not the best, nevertheless, the totality of the evidence, especially the evidence of Dr. Ellison, justified additional permanent disability.

The evidence does not justify an award for permanent total disability, however, a substantial portion of the general industrial labor market is no longer open to claimant because of his injury. For that reason, the Referee increased claimant's award from 32 degrees to 160 degrees.

The Board, on de novo review, affirms the order of the Referee. No brief was filed in behalf of the Fund, therefore, the Board was not afforded the opportunity of evaluating its contentions.

ORDER

The order of the Referee, dated December 6, 1976, is affirmed.

WCB CASE NO. 76-2353 AUGUST 8, 1977

HAROLD J. WELLER, CLAIMANT
Keith E. Tichenor, Claimant's Atty.
Noreen K. Saltveit, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which rescinded his Order of Joinder, dated September 9, 1976, whereby Aetna Insurance Company was made a party to the above entitled matter and upheld the denial by the carrier, dated June 17, 1976, of claimant's claim for an occupational disease.

At the time of the hearing, claimant was a 58-year-old crane operator who terminated his employment with the employer on or about March 15, 1975 and filed a claim with Aetna, a non-occupational carrier, for arthritis and spondylosis. Claimant terminated because of these conditions and subsequently Dr. Martin Johnson performed surgery. Claimant received off-the-job benefits although his subsequent attempt to secure permanent total disability was turned down by the non-occupational carrier and is presently on appeal. Claimant has also applied for and is receiving social security benefits.

On April 15, 1976, claimant first notified his employer that he was claiming an occupational disease on the theory that his job had aggravated his arthritis. Claimant, initially, had been seen by Dr. Vore at the emergency room of the Holladay Park Hospital on March 17, 1975. The hospital records indicate that he had advised Dr. Vore that he had originally sustained a back injury in 1968 while lifting an oil tank at work and developed pain in his right hip, that he had had symptoms ever since that episode. The carrier at that time was Aetna.

The employer immediately issued a denial, contending that the filing of the claim was not timely and also questioning whether there was a medical/legal relationship between claimant's employment and the condition for which he required treatment.

The Referee found, contrary to the information contained in the hospital record based on claimant's 1975 surgery by Dr. Vore, that the 1968 injury was not incurred on the job but, in fact, the incident occurred at home on Sunday, a non-work day for claimant.

After conservative treatment by Dr. Johnson had failed to produce satisfactory results, a lumbar laminectomy with nerve root decompression L5-S1 on the right, was performed. Dr. Johnson, who did the surgery, as well as Dr. Vore, was under the impression that the 1968 incident occurred on the job. He testified

that he had seen the 1968 x-ray report which showed changes common in persons over 40 years of age and in discussing his surgery, Dr. Johnson stated that a later myelogram showed advanced lumbar stenosis which, taking into consideration claimant's age, was severe enough to dictate surgery.

Dr. Pasquesi was of the opinion that claimant's symptoms started in 1968 as a probable aggravation of a pre-existing condition and that it was quite probable that claimant, without a specific injury such as sustained in 1968, would have deteriorated anyway. Dr. Johnson agreed. Claimant continued to aggravate the pre-existing condition, e.g., he was overweight, the natural process of aging, and repetitive bending, stooping and twisting at work and off work, to the point that ultimately he had to submit to surgery.

Dr. Church's opinion was that the original precipitating event that culminated in the 1975 surgery was the non-industrial off-duty accident on Sunday, March 24, 1968. Dr. Johnson could not, with any medical probability, state that claimant's activity at work hastened the underlying degeneration, it simply made the symptoms worse.

Claimant's last work day was March 15, 1975. The Referee found no evidence that claimant actually was advised that his hospitalization, myelogram and subsequent surgery were the result of his work. It was during September 1975 in the consultation with his doctors that claimant was first told that he should not go back to work because of the relationship between the crane operation and his symptoms. Mr. Stanley testified in behalf of the employer that he assisted employees in filling out the injury forms and that he had completed an off-the-job injury form for claimant during March 1975. He also testified that he was advised later that claimant was claiming an on-the-job injury and he then gave claimant the proper claim form which was signed by claimant on April 9, 1976.

The Referee concluded that although the employer knew claimant was in the hospital, there was nothing indicating any work connection, in fact, claimant received the employer's help filling out a non-occupational disease. Dr. Johnson sets the date on which he discussed work connection with claimant's pain as September 1975 and claimant agrees with this statement. By the end of March 1976, the statutory 180 days had passed and therefore claimant's claim which was made in April 1976 was barred by ORS 656.807.

The Referee found that even if the claimant's claim had not been barred by statute, the evidence received at the hearing was such as to leave a reasonable person with the belief that the underlying problem would have progressed to the present state in any event and that it would be impossible to do more than speculate as to whether claimant's activities at work had anything more to do with his disease and his ordinary daily activities. The

Referee found that claimant had failed to meet his burden of proving that he had suffered an occupational disease.

The Board, on de novo review, agrees with the conclusion of the Referee that claimant has failed to meet his burden of proving that he had suffered an occupational disease and therefore, affirms his order.

ORDER

The order of the Referee, dated January 4, 1977, is affirmed.

WCB CASE NO. 77-202 AUGUST 10, 1977

DAVID M. WAGNER, CLAIMANT
Thomas A. Huntsberger, Claimant's Atty.
Earl M. Preston, Defense Atty.
Stipulation and Order

IT IS HEREBY STIPULATED by Thomas A. Huntsberger, of attorneys for the Claimant, David M. Wagner, and Earl M. Preston, Assistant Attorney General, of attorneys for the State Accident Insurance Fund, that the Claimant's Request for Review and the Cross Appeal Request for Board Review filed by the State Accident Insurance Fund shall each be dismissed.

The above stipulation is approved, and IT IS SO ORDERED.

WCB CASE NO. 76-2353 AUGUST 11, 1977

TED BERNARDS, CLAIMANT
Rolf T. Olson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order dated January 17, 1977 which remanded claimant's claim to it to be accepted for payment of compensation from March 10, 1975 until termination is authorized pursuant to ORS 656.268.

Claimant, a 49-year-old carpet salesman, sustained a low back injury on November 26, 1974 when he twisted his back while lifting carpet. The injury was diagnosed as a lumbar sprain by Dr. DeMarco the day following the injury. The claim

was subsequently closed. After the industrial accident, claimant continued to work but the pain in his left leg and lower back became progressively worse. Because he thought his problems would eventually take care of themselves, claimant did not seek medical treatment. He had had back problems prior to his injury, but had not undergone treatment of any kind since two or three years before November 1974.

In March of 1975, claimant suffered a flare-up of back pain while working in his mother's yard. Three weeks later, he was hospitalized with acute back pain. X-rays taken during that time showed marked degenerative arthritis of the lumbar spine with marked narrowing of the disc spaces of L-4, L-5 and L-5, S-1. An EMG test was negative and at the time of his discharge from the hospital, his back was much improved.

At the time claimant's injury occurred, he filed a claim with Blue Cross Insurance rather than the State Accident Insurance Fund. His wife was employed at Blue Cross and since he had only worked for the employer six weeks, he did not want to risk antagonizing it. His physical condition underwent a noticeable change after the injury; he walked very carefully in a stooped position and complained of back pain.

Claimant gave a history of having had back pain throughout most of his life. It was Dr. Burr's contention that it would not take much to trigger a recurrent problem with his back; he had no doubt that working in the yard could have something to do with his condition, although that was not the only thing that would have affected claimant's present condition. He felt that the yard work related back to the November 1974 work-related incident, while that injury related back to his previous problems as far back as 1948.

It was pointed out by the Referee that when a disability results from a succession of accidents, the most recent injury which bears a causal relationship to the disability is responsible. Also, if the second injury (in this case the yard work) is merely a recurrence of the first (the November 1974 on-the-job accident), and it does not add to the causation of the disability, then the first injury is responsible for the second. However, if the second incident contributes independently to the injury, it is responsible, even if the condition would have been much less severe in the absence of the prior accident.

Claimant's hospitalization came about as a result of the yard work claimant did for his mother, including pruning grapes and rose bushes. The question involved here is whether the second injury was a result of the original incident on the job, or if the yard work was of the magnitude so as to be considered a new injury. Dr. Burr opined that claimant's second injury was just a further aggravation of his continuing back problems and he relates claimant's disability to the November 1974 industrial injury. The Referee concluded that there is no question that claimant suffered

a compensable injury on November 26, 1974. Claimant continued to have back problems up until the time of his work with the grape vines and rose bushes. There is evidence that the work he was doing at that time was not excessively heavy and that the pain he suffered was similar to that suffered with his previous injury. Dr. Burr established satisfactorily the medical-causal relationship to the compensable on-the-job injury. The Referee found that claimant's present disability is a result of his industrial injury on November 26, 1974.

The Board, on de novo review, agrees with the conclusion of the Referee that claimant's claim should be accepted for payment by the State Accident Insurance Fund.

ORDER

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

Claimant's attorney shall receive a reasonable attorney's fee for services in connection with this Board review in the amount of $300, payable by the State Accident Insurance Fund.

WCB CASE NO. 76-7038 AUGUST 11, 1977

ORVILLE W. COLE, CLAIMANT
Jack L. Mattison, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

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

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

WCB CASE NO. 76-1796 AUGUST 11, 1977

LILA DERKSEN, CLAIMANT
Rolf T. Olson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson, Moore and Phillips.

The State Accident Insurance Fund requests review of the Referee's order which disapproved its denial, dated April

1, 1976, of claimant's claim for aggravation and remanded the claim to it for payment of compensation, as provided by law, from September 16, 1974 and until claim closure pursuant to ORS 656.268 and awarded claimant's counsel an attorney's fee of $900.

After de novo review, the majority of the Board adopts as its own order the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

The order of the Referee, dated February 9, 1977, is affirmed.

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

Board Member Moore dissents as follows:

This reviewer respectfully dissents from the majority opinion of the Board and finds that claimant has not sustained the burden of proving by a preponderance of the evidence a claim for aggravation; that is, claimant has not proven a causal relationship between the industrial injury of September 1974 and the surgery of February 1976.

The question is: given a claimant with a history of back problems since at least 1962, who sustained a minor, and nondisabling injury in 1974, and eventually had surgery approximately one and one-half years later, can it be said that the claimant has established that the surgery was necessitated by that particular injury?

Claimant filed a claim for an industrial injury occuring on September 16, 1974 while she was employed by Agripac. The claim was accepted as a nondisabling injury. Although claimant testified there were times when she could not work because of pain, these periods of time occurred concurrently when the employer had no work available. On February 18, 1976, surgery was performed to explore for a possible intervertebral disc (which was not found) and a fusion from L3 to S1 was performed [Claimant's Ex. 10].

On April 1, 1976, SAIF denied responsibility for the surgery asserting it was not an aggravation of the industrial injury for which the claim had been filed.

In 1962 the claimant had injured her low back in a non-industrial injury and had had a laminectomy at the L4-5 area. A fusion had been suggested at that time, but for some reason, was not performed. Although claimant testified that she had had little, if any, problems between the surgery of 1962 and the injury of 1974, the evidence is certainly to the contrary. Dr. Bosatti indicated claimant had frequent complaints of back pain and he had administered ACTH injections over the past 20 years.

According to Dr. Tiley, who saw the claimant in July of 1975, the claimant had had difficulty ever since the original surgery in 1962, and a myelogram had been performed in 1970 because of increased difficulty. The findings which he made on that particular examination were minimal and he said it was "questionable" whether they were related to any new problem or were merely the result of the old laminectomy [Claimant's Ex. 4]. Claimant had earlier admitted to Dr. Melgard she had been having a lot of pain for a long time [Claimant's Ex. 3]. Dr. Rankin mentions the myelogram in 1970 and says that the claimant had been advised then to have a laminectomy and fusion, but she had declined because she was having stomach trouble at the same time and this resulted in the repair of a hiatal hernia in 1972.

Dr. Raaf's testimony in his deposition is the most important medical evidence in this case. He indicated that the strain at work was only mild and was simply one of a number which led to a continuation of the claimant's symptomatology [Claimant's Ex. 9]. Dr. Raaf is careful not to say that it led to an acceleration of the symptoms or that it changed the symptomatology in any way. He says merely that the symptoms continued. Dr. Raaf noted that the only problems he found in surgery were the existence of excessive motion between the L3-4 joint which was a longstanding problem and not related to trauma, and excessive motion between the L5-S1 which is a congenital problem. Dr. Raaf also found adhesions around the nerve root which were related to the 1962 surgery, but there was no evidence of recent trauma or an acceleration in pathology [Depo., pp. 7 and 8].

When asked if the injury of September 1974 necessitated the fusion, Dr. Raaf said that he was still not sure that a fusion was ever necessary, not even in February of 1976. It had been performed, he said, because of claimant's continuing complaints over so many years. It was further stated that there was no increase in pathology after September of 1974, and that the fusion that had been considered before 1974 was for the same symptoms that the claimant continued to complain of [Depo., p.20]. Dr. Raaf denied that the work trauma of September 16, 1974 was a material contributing factor in the decision for surgery, instead saying that the trauma "could have been a small contributing factor". The doctor phrases this in terms of possibility rather than medical probability.

Dr. Raaf stated:

> "Assuming she didn't have any pain from the time she had surgery in 1962 until the lifting incident in 1974, then I would say the lifting accident probably was a factor in the production of her pain subsequent to 1974. My record would indicate that this is not the fact" [Depo., p. 17].

Dr. Raaf was then asked, "What was the reason for doing the surgery in February of 1976 and his response was:

"Mainly the history that she had had back pain over a long period of time, going back even prior to when I saw her in 1962; that she was continuing to have the back pain; that spinal fusion had been considered on previous occasions, but had never been done. Therefore it seemed to me and to Dr. Rankin in that if she was continuing to have all this pain, we should try to give her relief with a spinal fusion" [Depo., p.18].

From the evidence, then, a spinal fusion had been considered for years prior to the accident in 1974. It was only coincidentally performed subsequent to that accident, and there is no medical evidence that says the accident was a material factor in the decision to proceed with the surgery which had already been recommended.

This reviewer recommends reversing the order of the Referee and finding claimant has not sustained the burden of proving a compensable claim of aggravation.

/s/ George A. Moore, Board Member

WCB CASE NO. 75-4355 AUGUST 11, 1977

RICHARD L. DUTTON, CLAIMANT
Don Atchison, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which granted claimant 80 degrees for 25% unscheduled low back disability. Claimant contends he is entitled to a greater award.

Claimant is a 44-year-old beer route salesman; he has done this type of work since 1951. On November 13, 1973, claimant suffered a compensable injury while pulling a handcart loaded with beer up some stairs. He was seen by Dr. Kai, an osteopathic physician, who diagnosed an acute lumbosacral strain and hospitalized claimant for traction. Claimant's condition did not improve and Dr. Kai referred him to an orthopedic evaluation by Dr. Goodwin, who diagnosed a strain of the lumbar spine.

An unsuccessful myelogram was attempted in April 1974 and in the summer of 1974, Dr. Goodwin stated that claimant's "physical findings are not remarkable" and "I do not find a great deal to prevent him from working".

Claimant was then seen by Dr. Rarey, a chiropractic physician. He diagnosed an acute lumbar strain, complicated by narrowing of the lumbosacral disc base; also strain of the cervical dorsal junction. He recommended chiropractic manipulations including muscle balancing and also a lumbosacral support.

Claimant was then evaluated by Dr. Berg, an orthopedic physician, at the request of the Fund. After examining claimant, Dr. Berg made clinical findings of a herniated disc and he recommended that claimant be referred back to Dr. Goodwin for an additional myelographic study. Dr. Berg stated that there was considerable obesity involved, claimant was approximately 6'1" and weighed about 240 pounds.

After being examined by Dr. Rarey and by Dr. Heusch, claimant was again evaluated by Dr. Berg in January 1975. It was Dr. Berg's opinion that claimant had made considerable improvement since he was last seen by him and that the evidence of what appeared to be herniation of the disc in the lower lumbar area with possible residual pressure neuritis no longer existed. He suggested that claimant be allowed to continue for a period of time with his chiropractic therapy and that he change his occupation so as to avoid heavy lifting and strenuous activity.

The claim was closed by Determination Order dated April 23, 1975 which awarded claimant 32 degrees for 10% unscheduled low back disability. In May 1975, Dr. Rarey requested the claim be reopened because in the last few weeks claimant's condition had deteriorated, both physically and psychologically.

In September 1975, Dr. Rarey reported claimant's condition was "erratic to say the least" and his condition had its ups and downs.

The counselor at the Vocational Rehabilitation Division told claimant he would have to change his way of living and learn to get by on about $3.85 an hour; claimant felt his condition would improve and that he would not have to take a job paying such low wages. He testified at the hearing that he made approximately $8 an hour at the time of his injury, however, the report of the injury records his wage at $6.15 an hour.

At the present time, claimant spends most of the day watching television or riding around with friends; he takes about two pain pills a week. Claimant has a hypertension condition and had a recent urinary bladder surgery. He also has a false right eye.

Claimant contends he is entitled to additional compensation for temporary total disability on the basis of Dr. Rarey's report of May 1975, however, the Referee found that the facts indicated that claimant's claim did not require a formal reopening but that the treatment required could be furnished him under

the provisions of ORS 656.245. He disallowed claimant's request for additional compensation for temporary disability.

On the extent of claimant's permanent disability, the Referee found that claimant had a limited education and that for most of his adult working life he had been a route truck driver, however, there was no evidence that this was the only type of work that claimant was able to do. The Referee felt it was logical to conclude that, in addition to using his back which obviously was necessary in making deliveries of beer both in cases and kegs, a part of claimant's value to the employer must have been his ability to maintain a good rapport with his customers and endeavor to increase the volume of his sales. The Referee felt it was reasonable to assume that upon proper evaluation by the Vocational Rehabilitation Division, there would be various aptitudes brought forth, but the claimant had not made much of an effort to rehabilitate himself.

The Referee found the medical evidence indicated claimant should not do any heavy work or any work involving heavy lifting. Based on all the evidence, the Referee concluded that claimant would be adequately compensated for his loss of wage earning capacity resulting from the industrial injury by an award of 80 degrees which represents 25% of the maximum allowable by statute for unscheduled disability.

The Board, on de novo review, affirms the findings and conclusions of the Referee. The Board strongly urges claimant to take advantage of the many rehabilitative services available to him, both through the Workers' Compensation Board and Vocational Rehabilitation Division. Claimant is not an old man and, as the Referee believed, he may have hidden potential for types of work which would pay him a wage comparable to that he was earning at the time of his injury.

ORDER

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

WCB CASE NO. 76-4702 AUGUST 11, 1977

LEWIS C. HOMAN, JR., CLAIMANT
Frank J. Susak, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which affirmed the Determination Order as entered on August 30, 1976 and amended on September 7, 1976. By these orders claimant

received temporary total disability compensation from September 4, 1974 through May 25, 1976 together with 32 degrees for 10% unscheduled low back disability. Claimant contends that his vocational rehabilitation and temporary total disability benefits should be reinstated or, in the alternative, what is the extent of his permanent disability resulting from his industrial injury.

Claimant slipped and fell on September 3, 1974 while working as a grounds-keeper for the employer. The original diagnosis was low back strain. He came under the care of Dr. Rusch in October 1974 who diagnosed "lumbar back pain with right buttock radiation due to a lumbosacral back strain superimposed on a mild congenital boney abnormality of the lumbosacral articulation severely aggravated by the accident of September 3, 1974". He recommended a back support along with a physical therapy program. In December 1974, Dr. Rusch advised claimant to become active in a vocational rehabilitation program. The doctor was concerned about an emotional problem resulting from the accident, but Dr. Wolgamott, a psychiatrist, in October of 1974, did not feel this was true. After a psychological examination in February of 1975, Dr. May opined that claimant's return to gainful employment is somewhat uncertain. He questioned claimant's motivation, noting that his work record for the past three years had not been good. He did not feel that psychological counseling would be of benefit to claimant at that time.

On February 4, 1975, Dr. Van Osdel diagnosed claimant's problem as a chronic lumbar strain superimposed on an old compression fracture. There was no evidence of nerve root compression or irritation and, seemingly, no psychological interference. It was at the time of this evaluation that claimant was enrolled for a major in business management approved in March 1975. Because of his pain, claimant stopped attending classes but was not terminated until January 1976.

On April 18, 1975, claimant was examined by Dr. Pasquesi who felt that claimant's impairment was equivalent to 5% of the whole man on the basis of chronic moderate to severe pain which he expected to be permanent. He felt his case was stationary and recommended closing the claim. Vocationally, he felt claimant did need retraining. On June 9, 1975, Dr. Rusch fully agreed with Dr. Pasquesi's final opinion.

Dr. Wisdom saw claimant on August 15, 1975 and recommended that he be evaluated and treated at The Psychology Center. The claimant felt that his biofeedback therapy with Dr. Fleming was helping him to some extent. Dr. Wisdom felt he should be allowed to complete his program of biofeedback treatment and counseling before attempts were made to close his claim.

On December 11, 1975, Dr. Fleming indicated that claimant was psychologically capable of making a decision about retraining, but that he was procrastinating. The doctor had no desire to encourage claimant in his "game plan" as he feels claimant does not want to change his present situation.

On June 28, 1976, the Orthopaedic Consultants noted their diagnoses as back strain (by history), Darvon habituation and residuals from an earlier polio condition. They felt claimant's condition was stationary, he should discontinue using the drugs he was on, and that his claim should be closed. The loss of function from his injury was mild. Subsequently the Determination Order of August 30, 1976 along with the amended order of September 7 were issued.

The Referee found that claimant received all the help he could possibly get from Mr. Norman, his vocational rehabilitation counselor, in fact, probably more than he deserved. Not only did claimant not cooperate, it appeared that his actions in this regard were deliberate. Claimant has no desire to return to work of any kind. Authorized programs of rehabilitation have been suggested by several doctors, but by all the evidence, there is no reason to think that claimant would cooperate in any way in these attempts. Except for claimant's complaints, there is nothing to support the extent of disability that he thinks he has. The Referee found that neither the evidence in the record, nor claimant's appearance, attitude and demeanor give any reason for believing claimant's testimony. He felt that the award for permanent partial disability was adequate.

The Board, on de novo review, concurs with the conclusion of the Referee and affirms the Determination Order of August 30, 1976 together with the Amended Determination Order of September 7, 1976.

ORDER

The order of the Referee, dated January 14, 1977, is affirmed.

WCB CASE NO. 76-4940 AUGUST 11, 1977

RICHARD JOHNSON, CLAIMANT
Bernard Jolles, Claimant's Atty.
Ronald Podnar, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which affirmed the disability awards previously awarded by a Determination Order and Stipulation and dismissed claimant's request for hearing. The claimant contends that he is permanently and totally disabled as a result of his industrial accident.

On November 17, 1973, claimant suffered a compensable neck and back injury when his feet slipped out from under him

while operating an electric hoist. He was admitted to Woodland Park Hospital that same day for low back strain. There was no evidence of an acute injury but several old healed fractures did show up. Claimant was tentatively released for work on November 20, 1973 and again on November 26 by Dr. Goodwin. On January 14, 1974, the same doctor said claimant was not released, but then released him again on February 18, 1974.

Claimant underwent a myelogram which was reported normal on March 7, 1974. There was a central defect of L3-L4, L4-L5, and L5-S1 in the lower back. On April 16, 1974, Dr. Goodwin reported that claimant continued to have symptoms in the low back with positive physical findings. He suggested a laminectomy which claimant was opposed to, at least until the summer was over.

Dr. Carlson, in his July 15, 1974 report, found chronic thoraco-lumbar sprain together with chronic lumbosacral sprain of lesser degree. He also found a mild chronic cervical sprain. The Radiology Consultants, on July 15, 1974, found a normal cervical spine, essentially normal thoracic spine, and "narrowing of two interspaces and deformity of the upper portion of the bodies of three segments, thought to represent old vertebral epiphysitis although old compressions are not entirely excluded".

Dr. Munsey, Ph.D., found claimant's prognosis for restoration and rehabilitation to be fairly good on July 15, 1974. He recommended that steps should be taken to attempt to get claimant into an occupation, whether it be his old job or a lighter activity.

On July 26, 1974 the Back Consultation Clinic diagnosed claimant's disability as: "(1) Post-traumatic low lumbar back strain, superimposed upon old, pre-existing compression deformities of the 1st and 4th lumbar vertebral bodies, due to his previous auto accident in 1968; (2) Possible posterior bulging of the annulus at 4th and 5th lumbar levels." They did not feel that claimant was stationary.

In November 1974, claimant was referred to Dr. Freiermuth because of a problem with ulcers. It was the doctor's opinion that the ulcers resulted from the medication used to treat claimant's back difficulties. In April, 1975 and November, 1975, Dr. Goodwin noted that claimant had remained stationary for the past several months. During this time, in September 1974, Dr. Goodwin found that claimant's disability in the cervical spine was mild while his disability in regards to the lumbar spine would be moderate to moderately severe. On November 24, 1975, Dr. Goodwin stated that claimant was totally disabled and would continue to be for at least one more year or until his training for a sendentary type job was complete. Shortly thereafter, on February 10, 1976, the Determination Order was issued awarding claimant 96 degrees for 30% unscheduled disability resulting from his low back injury. In April, 1976, claimant's award was increased by a Stipulation granting him a total of 144 degrees or 45% low back disability.

The December 13, 1976 report of the Orthopaedic Consultants indicated that claimant's total loss of function was felt to be moderate in the lower back, the loss of function in the same area due to his injury was mild. They considered the total loss of function in his neck as a result of the injury to be mild. The report seemed to indicate that the award granted claimant was sufficient.

According to the claimant, his back hurts continuously. He has tried to further his education but has difficulty sitting for long periods of time and both attempts at taking classes were unsuccessful. He bought a truck to enable him to engage in his own business, but the driving caused his back to hurt too much. He then sold the truck and bought a house in Portland. Claimant went to the Division of Vocational Rehabilitation during November 1976 and states that he felt that he was rejected. When he feels that he is not limited, he may return to DVR for another attempt.

The Board, on de novo review, concurs with the conclusion of the Referee that the Determination Order of February 10, 1976 and the Stipulation of April 28, 1976 were adequate.

ORDER

The order of the Referee, dated January 25, 1977, is affirmed.

CLAIM NO. B53-141693 AUGUST 11, 1977

LAURA SMITH, CLAIMANT
Own Motion Determination

Claimant sustained a compensable injury on April 20, 1971 consisting of a strain to her neck while weaving baskets. The claim was originally closed as a medical only. Claimant was examined by Dr. Campagna on June 10, 1971 who diagnosed cervical sprain and post-traumatic aggravation of thoracic outlet syndrome. On November 12, 1971, Dr. Campagna found claimant's condition medically stationary with minimal impairment.

A Determination Order of November 26, 1971 granted claimant time loss benefits and an award of 5% unscheduled neck disability.

During the years 1973, 1974 and 1975 claimant was under treatment by Dr. Campagna but missed no time from work. On August 3, 1976, Dr. Campagna diagnosed cervical sprain and bilateral carpal tunnel syndrome. Claimant's claim was reopened and she was hospitalized and on February 21, 1977 a decompression of the right median nerve with tenosynovectomy was performed by Dr. Campagna as well as a right middle trigger finger release by Dr. James.

Claimant returned to work on March 14, 1977. In his closing examination of June 7, 1977 Dr. Campagna indicated claimant was medically stationary and claimant had mild impairment.

On March 7, 1977, the employer requested a determination. The Evaluation Division of the Board recommended claimant be granted compensation for temporary total disability from February 20, 1977 through March 13, 1977 and to an additional award of 5% disability for loss of the right forearm.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from February 20, 1977 through March 13, 1977 and an award of 5% loss of the right forearm.

OWN MOTION AUGUST 11, 1977

PERRY D. SMITH, CLAIMANT
Stanley Sharp, Claimant's Atty.
Merlin Miller, Defense Atty.
Order of Dismissal

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

IT IS THEREFORE ORDERED that the request for own motion now pending before the Board is hereby dismissed.

WCB CASE NO. 76-5342 AUGUST 11, 1977

JOYCE STRACHAN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which affirmed the Determination Order of September 23, 1976 which granted claimant temporary total disability from December 21, 1974 through September 7, 1976 and no award for permanent partial disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee,dated January 26, 1977, is affirmed.

WCB CASE NO. 76-3777 AUGUST 11, 1977

CLAIR STUPFEL, CLAIMANT
Brian Welch, Claimant's Atty.
Marshall Cheney, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the Referee's order which remanded claimant's claim for his obstructive pulmonary disease to it for acceptance as an occupational disease and awarded his attorney a reasonable attorney's fee of $750. The employer contends that claimant's condition is not a result of his occupation.

The claimant, 60 years of age, has been employed by the employer as a machine set-up man, feeder and clean-up man for approximately 27 years. He first noticed respiratory problems during 1970 or 1971 which progressively worsened and resulted in his work termination in April 1976. He filed a claim on April 29, 1976, contending that the respiratory condition arose out of and in the course of his employment. Shortly thereafter, the carrier issued its denial.

Pulmonary function testing was done at the request of Dr. Cutter; on March 25, 1976, the results were noted as being chronic obstructive pulmonary disease. Chest x-rays indicated pulmonary emphysema. Dr. Cutter reported on April 20, 1976, that he could not state catagorically that claimant's only disability stemmed entirely from his occupation. However, it was obvious to him that the inhaling of the wood dust in the course of his work activity, was an exacerbating factor in claimant's condition.

On June 22, 1976, Dr. Tuhy indicated that claimant's history and physical, x-ray, and spirometric findings all pointed to the presence of chronic obstructive pulmonary disease with chronic bronchitis and bronchospasm. He considered the possibility of an allergy to pinedust but ruled this out because the primary symptom, acute wheezing, coughing and shortness of breath 4 to 6 hours after exposure and continuing for several hours, was

not present in claimant's condition. Also, if claimant was allergic to pinedust, his symptomatology would have changed after his termination of work in mid-April 1976. This was not the case.

Dr. Tuhy disagreed with Dr. Cutter's contention that the work conditions exacerbated claimant's problem. He believed that claimant's disease was exhibiting its natural course and that because of his history of smoking, his condition would have been basically the same whether or not he was employed at the mill.

On October 11, 1976, Dr. Greve diagnosed chronic obstructive pulmonary disease with a definite component of reactive airway disease. He noted that people with this problem frequently have family members with similar diseases, which was true in claimant's case (his father had asthma and his brother, hay fever). He had no doubt that claimant's work environment contributed to his condition, but he could not speculate as to whether claimant's work exposure actually caused the chronic lung disease.

At one time claimant had been a chronic smoker. He smoked one package of cigarettes a day up until October 14, 1975 when, by his own testimony, his condition worsened for a period of six months and then "leveled off".

The Referee found that claimant had proven by a preponderance of the evidence that he suffered from a compensable occupational disease. The reports of Dr. Cutter and Dr. Greve made it quite clear that claimant's condition was exacerbated by continuous exposure to dust at work. They indicated that claimant's condition had progressed to the point that his external dyspnea was the primary reason for his job termination.

Considering claimant's long-term employment with the mill (approximately 27 years), during which time he was constantly exposed to dust, along with the reports of Drs. Cutter and Greve, the Referee concluded that the claimant had proven his claim and he instructed the carrier to accept claimant's claim as a compensable occupational disease claim.

After de novo review, the Board concurs in the findings and conclusions of the Referee.

ORDER

The order of the Referee, dated January 25, 1977, is affirmed.

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

WCB CASE NO. 76-6461 AUGUST 11, 1977
WCB CASE NO. 76-6779
WCB CASE NO. 76-6890-E

MARY B. TAYLOR, CLAIMANT
Chris L. Lillegard, Claimant's Atty.
Jerome L. Noble, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

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

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

WCB CASE NO. 77-2470 AUGUST 15, 1977

DANIEL P. BERG, CLAIMANT
Keith Tichenor, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 20, 1977, the Board entered an Own Motion Order referring claimant's request that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen for further medical care and treatment and time loss benefits its claim for injury suffered in 1956. Previously claimant had requested a hearing on the denial by his employer, Boise Cascade Corporation, of a claim for a new injury sustained on July 30, 1976 and the Board ordered that the hearing on the denial be held in conjunction with the hearing on the merits of claimant's request for own motion relief.

On June 9, 1977, the hearing was held on both issues, and as a result thereof, on July 28, 1977, the Referee recommended to the Board that it exercise its own motion authority and order the reopening of claimant's claim for the November 8, 1956 injury. On the same date, the Referee entered his Opinion and Order which affirmed the employer's denial of the claimant's claim for an alleged on-the-job injury of July 30, 1976. The latter is an appealable order.

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

ORDER

Claimant's claim for an industrial injury suffered on November 8, 1956 is hereby remanded to the State Accident Insurance Fund for acceptance and for the payment of compensation, as provided by law, commencing July 30, 1976 and until closed pursuant to the provisions of ORS 656.278.

Claimant's attorney is hereby granted a reasonable attorney's fee equal to 25% of the compensation awarded to claimant for temporary total disability, not to exceed $500.

WCB CASE NO. 76-4697 AUGUST 15, 1977

NITA BYERLY, CLAIMANT
Roger D. Wallingford, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Order of Dismissal

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

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

WCB CASE NO. 76-5675 AUGUST 15, 1977

WILLIAM L. FARRIS, CLAIMANT
Dennis J. Graves, Claimant's Atty.
Michael D. Hoffman, Defense Atty.
Request for Review by Employer

The employer requests review by the Board of the Referee's order which granted claimant an additional award of 48 degrees for 15% unscheduled disability.

Claimant, 32 years old at the time of injury, sustained a compensable injury on November 7, 1974. Claimant informed his foreman and went home. Claimant first saw Dr. Atkinson who referred him to Dr. Burr. On November 26, 1974, Dr. Burr diagnosed strain, left trapezius levator scapula. Claimant's claim was first closed by a Determination Order on October 15, 1975 which awarded claimant an award of 32 degrees for 10% unscheduled disability to the left shoulder.

Dr. Burr continued to treat claimant and first released him for work on January 17, 1975 but claimant did not return to the defendant-employer. Dr. Burr found continued grating in the left scapular area and indicated claimant might have to undergo surgery in the future. Dr. Burr suggested claimant go back to a different type of job not lifting heavy objects. Dr. Burr released claimant for work on March 21, 1975.

On March 14, 1976, claimant was hospitalized for surgery for a scapuloplasty of claimant's left shoulder. Claimant was released for work by Dr. Burr on June 15, 1976 and he indicated claimant had not returned to his former occupation but wanted to be a musician.

On August 24, 1976, Dr. Burr indicated claimant had progressed well from the surgery and that there was no increase in his impairment rating and indicated that the award of 32 degrees was fair.

A Second Determination Order of October 8, 1976 granted claimant time loss only.

Claimant was evaluated by Dr. Hickman who found that returning claimant to full time employment in the near future was possible; that it was desirable to get claimant into a training situation at an early date before his symptoms became more fixed and that psychotherapy was not recommended; however, the need for psychotherapy might be necessary if there was delay in putting claimant in a training program.

Claimant finished high school but has significant reading disability indicating claimant to be borderline literate with the English language.

Claimant's occupation was that of a welder. Claimant contended, after the hearing to the present time, that he has pain in his left shoulder and it is impossible for him to return to his occupation. However, since the surgery in March, 1976, claimant no longer suffers from the grating noise in his left shoulder. Claimant has done many other types of work. Claimant is currently drum playing in a club and finds this very suitable to him and he can do it without pain. It was noted that claimant would like a Division of Vocational Rehabilitation referral to learn to read music. Claimant informed the Orthopaedic Consultants that he has no desire whatsoever to do any type of work other than in music.

The Referee found that claimant does experience pain in his left shoulder when he lifts heavy objects. Further, that although Dr. Burr found the award granted by the Determination Order to be fair, this was the duty of the trier of fact, whereas Dr. Burr's responsibility is to judge impairment.

The Referee concluded that a musician could possibly make as much as, or more than, a welder but this is only one fact to be considered. Claimant does have this pain problem and claimant now experiences physical limitations by not being able to perform work which requires lifting due to this disabling pain. Therefore, claimant has permanent disability in his left shoulder that will interfere with, and reduce, his chances in the labor market. The Referee granted claimant an additional 48 degrees for 15% unscheduled disability.

The Board, on de novo review, finds, based on the medical evidence presented, that claimant has not sustained any greater loss of wage earning capacity than that granted by the Determination Order which must be affirmed.

ORDER

The order of the Referee, dated January 26, 1977, is reversed.

The Determination Order of October 8, 1976 is affirmed.

WCB CASE NO. 75-5240 AUGUST 15, 1977

DALTON FOX, CLAIMANT
SAIF, Legal Division, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Phillips and Moore.

The employer seeks Board review of the Referee's order which disapproved the employer's denial and approved the State Accident Insurance Fund's acceptance of the claim.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

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

CLAIM NO. GB 15618 AUGUST 15, 1977

HENRY L. HARVEY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on July 31, 1963. On May 4, 1964, Dr. Grewe performed a laminectomy and fusion of L4 through S1. On May 27, 1965, a Determination Order granted claimant an award of 50% loss of the arm for unscheduled disability. Subsequently the claim was reopened for further treatment of non-union fusion and claimant was then retrained by vocational rehabilitation as a machinist. On May 11, 1966, the claim was again closed with an additional award of 10% loss of function of an arm for unscheduled disability. On January 30, 1967 a judgment order from the circuit court granted claimant an additional 20% for a total award of 80%.

Dr. Fitch indicated in his report of September 3, 1975 that claimant had gone back to work in 1971 but was forced to quit in 1972 due to increasing back and leg symptoms. These symptoms he related to claimant's 1964 surgery. On April 24, 1975, claimant underwent another laminectomy at the L3 level, a resection of portion of the fusion and a partial laminectomy at L2. On March 15, 1976, Dr. Fitch indicated he released claimant from treatment but with little likelihood of his returning to work.

On April 29, 1976, Dr. Pasquesi examined claimant and rated his disability at 59% of the whole man. On November 17, 1976, Dr. Hickman requested the claim be reopened for psychological treatment as claimant's psychological condition had deteriorated significantly. By a Board's Own Motion Order dated December 13, 1976 claimant's claim was reopened and claimant is receiving on-going psychological treatment which he feels has not helped him.

On January 26, 1977 claimant was examined by the physicians at the Orthopaedic Consultants who found a severe degree of functional interference and x-rays revealed osteoarthritis of the lumbar spine and lower thoracic spine with a massive degree of adhesions at L4 to the sacrum. They found claimant to be unemployable and not in need of psychological counseling. Dr. Hickman's comments were asked for but were not forthcoming.

Dr. Grewe saw claimant on June 28, 1977 and concurred with the severity of both claimant's physical and emotional problems and found him essentially unemployable.

On April 14, 1977 the Fund requested a determination. The Evaluation Division of the Board recommended, based on claimant's age, his ninth grade education, work history and severe medical problems, that claimant is permanently and totally disabled.

ORDER

Claimant is hereby granted compensation for permanent total disability effective January 26, 1977.

WCB CASE NO. 76-3859 AUGUST 15, 1977

ROCKNE C. ROWDEN, CLAIMANT
Gary G. Jones, Claimant's Atty.
Charles Paulson, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and Moore.

Claimant requests review by the Board of the Referee's order which ordered that claimant's motion for an Order to Show Cause be denied.

Claimant, who was a 32-year-old grinder operator, sustained an injury while getting out of his car in the parking lot on December 1, 1975. Claimant's claim was denied on December 17, 1975. Claimant began working as an automobile salesman on March 15, 1976 and on August 6, 1976 the parties stipulated that claimant's claim was accepted as a compensable injury and claimant was entitled to compensation for temporary total disability from December 1, 1975 to March 15, 1976.

Events leading to the controversy in this case are that claimant, during the time he was employed as an automobile salesman, accumulated approximately 9,000 miles on his demonstrator and his employer withdrew the use of the car. In retaliation, claimant turned in his keys and notified the employer he was going back to rocking chair money. Claimant immediately contacted his naturopath and chiropractor who verified that claimant must indeed quit working because he was now required to use his knees instead of his back and his knees were sore and inflamed. This report is in conflict with a prior report which indicated claimant was employed as a car salesman which was the doctor's recommendation.

Claimant called the defendant and told them he could not work due to his injury and the defendant paid claimant an additional six weeks of compensation for temporary total disability.

Dr. Becker reported that claimant should not return to his former heavy work but could return to sales work and should commence looking for such. Based on his report, the defendant ceased payment.

The Referee found, based on claimant's appearance, attitude and demeanor as a witness, that he could not believe any

of claimant's testimony. He did not believe that claimant's knees were sore and inflamed because of excessive use as a result of his inability to bend his back; he did not believe the arm and upper back symptoms are related to the injury of December 1, 1976 and did not believe claimant was unable to work as a car salesman at any time after May 1, 1976 because of any symptoms relating to the compensable injury.

The Referee further found that claimant terminated his employment because he had been deprived of his demonstrator and immediately enlisted the aid of his doctors to justify his actions.

The Referee concluded claimant was physically able to continue his employment as an automobile salesman at all times after May 1, 1976. Claimant is not entitled to any further compensation for temporary total disability and this issue is moot. Claimant testified that he received compensation for temporary total disability to July 2, 1976 and, therefore, it appears claimant has received all of the benefits to which he was entitled by the Stipulated Order and claimant's contention at the hearing is without merit.

The Board, on de novo review, finds that claimant was never released to return to his regular work by any of the medical evidence and therefore, claimant is entitled to compensation for temporary total disability from July 2, 1976 until closure is authorized pursuant to ORS 656.268 and further that the employer-defendant shall pay a penalty to claimant in the sum of 25% of the compensation for temporary total disability due and owing claimant from July 2, 1976 until closure is authorized for its unreasonable resistance for payment of compensation.

ORDER

The order of the Referee, dated January 11, 1977, is reversed.

Claimant's claim is remanded to the employer for payment of compensation for temporary total disability commencing July 2, 1976 and until closure is authorized pursuant to ORS 656.268.

Claimant is further granted a sum of 25% of the temporary total disability compensation due and owing to claimant commencing on July 2, 1976 and until closure is authorized as a penalty for the employer's unreasonable resistance to the payment of compensation to be paid by the employer.

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

WCB CASE NO. 75-4066 AUGUST 15, 1977

LESTER WOLFE, CLAIMANT
Rolf T. Olson, Claimant's Atty.
Gary G. Jones, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests review by the Board of the Referee's order which granted claimant an award for permanent total disability commencing on the date of his order, May 27, 1976.

Claimant,a 57 year old farm laborer at that time, sustained a twisting injury to his right knee on August 29, 1973. Dr. Young diagnosed probable tear of the left lateral ligament of the right knee. Subsequently, Dr. Spady performed a meniscectomy.

In February 1974, Dr. Spady found claimant's condition medically stationary. In May 1974, Dr. Poulson examined claimant and noted softening of the articular cartilage of the medial condyle of the femur and opined that claimant's traumatic arthritis will probably become quite disabling to claimant as he continues to use that leg. Further surgery may be necessary in the future. Dr. Poulson recommended claimant be given trials of work over a six-month period to find out if claimant could get back to his regular employment.

Claimant continued under the care of Dr. Poulson due to continuing pain and Dr. Poulson felt it likely was due to retropatellar chondromalacia and traumatic arthritis.

On January 15, 1975, he found claimant medically stationary with disability due to pain but no impairment or loss of motion; the knee was stable with no swelling.

A Determination Order of February 12, 1976 granted claimant an award of 15 degrees for 10% loss of the right leg.

Claimant's education was to the second grade and his working life has been limited to heavy labor, cannery work and as a creamery employee. Claimant has made several attempts to return to work. Claimant testified to a constant dull ache in the knee extending into his hip; this pain is exacerbated with sitting for an hour or standing for a half hour.

The medical evidence is inadequate to support a causal relationship of claimant's back complaints to his injury sustained to his leg.

Dr. Paltrow, a psychiatrist, evaluated claimant on December 11 and December 31, 1975 and indicated claimant had been involved in a couple of car accidents, and was struck across the back

of the neck by a piece of wood at work. Claimant denied any personal injuries as a result of these accidents.

The Referee found claimant's testimony to be open, frank and persuasive as to credibility. Dr. Paltrow testified that claimant suffers from a traumatic depressive neurosis caused by a psychic injury related to the injury to his right knee.

Mr. Maddox, a vocational rehabilitation counselor, testified that in May 1975 he had concluded that there was no reasonable anticipation for claimant to be retrained and he closed claimant's file. Claimant continued to come in and see him. Claimant was becoming more and more depressed so Mr. Maddox reopened claimant's file. Later, he again closed the file as there was nothing feasible in the way of a reasonable training program for claimant. He found claimant unemployable as he is now 62 years of age.

Dr. Maltby, a psychiatrist, opined that claimant did not have a clinically significant or disabling depression at that time. However, there was the possibility of a subconscious neurosis for financial gain. Dr. Maltby felt that if claimant were able and motivated to work such depression would not prevent him from working.

On April 13, 1976 Dr. Paltrow disagreed to some extent with Dr. Maltby indicating that both agree that claimant was functioning until this injury and coping in a way consistent with his lifestyle. But he disagrees with Dr. Maltby on the amount and degree of depression.

The Referee found that the weight of the evidence demonstrates an injury-precipitated disabling traumatic neurosis with a minimal probability of effective vocational rehabilitation absent an alleviation of the neurosis. The Referee concluded that claimant is presently permanently incapacitated from regularly performing any gainful employment.

He further found that Dr. Paltrow felt claimant might respond to group psychotherapy with a possibility of a positive response then to vocational rehabilitation and if the defendant were to offer such psychiatric treatment then claimant would be obliged to accept such treatment to reduce his psychological difficulties.

He granted claimant an award of permanent total disability.

The Board, on de novo review, finds that, based on the medical reports in evidence, claimant has been adequately compensated for his disability by the award granted by the Determination Order of 10% loss of the right leg. Claimant is not entitled to psychological disability as indicated by the Referee.

ORDER

The order of the Referee, dated May 27, 1976, is reversed.

The Determination Order of February 14, 1975 is hereby affirmed and reinstated.

WCB CASE NO. 76-6276 AUGUST 16, 1977

FREDA J. CASTLES, CLAIMANT
Brian L. Welch, Claimant's Atty.
Marshall Cheney, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which remanded the claim to it for acceptance and payment of compensation until termination is authorized.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 10, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, payable by the carrier.

WCB CASE NO. 76-4343 AUGUST 16, 1977

RUBEN CLARK, CLAIMANT
Ronald L. Marek, Claimant's Atty.
Jeffrey M. Kilmer, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks Board review of the Referee's order which affirmed the carrier's denial of claimant's claim for workmen's compensation benefits.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 2, 1977, is affirmed.

WCB CASE NO. 76-5293 AUGUST 16, 1977

CHARLES J. DANFORD, JR., CLAIMANT
D. Richard Hammersley, Claimant's Atty.
Marshall C. Cheney, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks Board review of the Referee's order which affirmed the carrier's denial of claimant's claim for aggravation benefits.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

WCB CASE NO. 76-2357 AUGUST 16, 1977

HENRY DEATON, CLAIMANT
Keith E. Tichenor, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of claimant's claim for aggravation benefits.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

In the Matter of the
Complying Status of
FLYWAYS, INC., EMPLOYER
Order on Review

The employer requests Board review of the Referee's Order which held Flyways, Inc., an Oregon corporation, to be a noncomplying employer from June 25, 1976 to September 14, 1976. The Board affirms the Order of the Referee.

The issue is whether or not this corporation is a subject employer, i.e., has subject employees.

ORS 656.027 states "All workmen are subject to ORS 656.001 to 656.794 except those nonsubject workmen described in the following sections: . . . (7) Sole proprietors, partners and officers of corporations." (Emphasis Supplied)

Flyways, Inc. is an Oregon corporation incorporated in 1964 or 1965 and operated for nine or ten years with three corporate officers and as a complying employer with workers' compensation insurance in force for its employees. The premium, especially for flying personnel, was substantial. An insurance agent advised the President of the corporation that he could provide better insurance coverage at a much less cost but to do this, it would be necessary to "circumvent the . . . letter of the law, as far as Workmen's Compensation went." To implement this scheme and by Board of Directors minutes of December 24, 1975, all employees were appointed "non-voting" "vice-presidents" of the corporation. Thus, under literal reading of ORS 656.027(7) since all employees were "corporate officers" this corporation had no subject employees. Therefore, the corporation was not a subject employer and did not need workers' compensation insurance.

The evidence in the record is uncontradicted that the approximately sixteen employees who were given the title of "vice-president" had substantially the same duties and authority before and after they were given the title of "vice-president."

The Board finds that merely designating employees as vice-presidents in the corporate minutes does not make such employees corporate officers within the meaning of ORS 656.027(7). Carson v. SIAC, 152 Or. 455, 54 P2d. 109 (1936).

The Board finds that bona fide corporate officers of this corporation during the period involved were: Jack D. Casper, William J. Mills and Robert S. Langmack. As such, the bona fide corporate officers are not subject workmen and would not receive workers' compensation benefits if injured in the scope and course of their employment unless that corporate officer had elected coverage as provided in ORS 656.039. Allen v. SIAC, 200 Or. 521, 265 P2d. 1086 (1954).

Merely appointing every log truck driver as a "second vice-president" (see Order on Review - In the Matter of the Compensation of Julian Webb, Claimant, and In the Matter of the Complying Status of C & H Contractors, Inc., Employer, WCB Case No. 74-3934-E and 74-3863, also, Jackson County Circuit Court Order - In the Matter of the Compensation of Julian Webb, Claimant, No. 76-512-L-3) or appointing mechanics, secretaries, etc., as "vice-presidents" as in this case, does not make such employees bona fide corporate officers within the meaning of ORS 656.027(7). Such procedure not only would deprive employees the protection of workers' compensation benefits, but also, could impose personal liabilities of such nominal corporate officers for claims costs and civil penalties arising out of injuries to fellow workmen. ORS 656.735(4).

Defining bona fide and non-bona fide corporate officers within the meaning of ORS 656.027(7) depends on the facts in each case. Generally speaking, small closely held corporations traditionally have three corporate officers. More than three corporate officers in small corporations could well be a red flag to investigate whether or not there are employees named as non-bona fide corporate officers. Substantial stock ownership or financial interest in the corporation is usually found in small corporations for a corporate officer. Merely naming an individual as a corporate officer in a corporate minutes is not conclusive as to his corporate officer status. Carson v. SIAC, 152 Or. 455, 54 P2d. 109 (1936). True corporate officer management duties as opposed to foremen or supervisory duties and responsibilities is an incident of bona fide officer status. In other words, if the facts of the particular case preponderate that the individual is a bona fide corporate officer, then such corporate officer is not a subject workman within the meaning of ORS 656.027(7) and will not obtain workers' compensation insurance benefits unless the corporation has elected coverage for that individual. On the other hand, if the facts of a particular case preponderate that such individual is a subject workman, then the corporate employer must have workers' compensation insurance in force and the subject workman will receive workers' compensation benefits in the event of an industrial injury. The substantial personal liabilities to corporate officers pursuant to ORS 656.735(4) should encourage corporations who are subject employers and their bona fide corporate officers, who are personally liable, if the corporation is a noncomplying employer, to not "circumvent the . . . letter of the Workers' Compensation Law" or attempt to manufacture facts trying to make a non-bona fide corporate officer into a bona fide corporate officer. The Board and the law ultimately look to the substance of the matter rather than the form.

The Board finds that Flyways, Inc., an Oregon corporation, was a noncomplying employer from June 25, 1976 to September 14, 1976.

ORDER

The Order of the Referee dated January 31, 1977 is affirmed.

WCB CASE NO. 75-5052 AUGUST 16, 1977

JOHN W. HALL, CLAIMANT
McGill & Clarke, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Referee's order which vacated the Determination Order of October 14,1975 and ordered the SAIF to pay claimant temporary total disability from and after September 22, 1975, subject to credit and/or offset for temporary total disability and permanent partial disability already paid claimant for this period of time.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 25, 1977, is affirmed.

Because no briefs were filed in respect to this Board review, there will be no attorneys fees granted.

CLAIM NO. D53-124426 AUGUST 16, 1977

JACK HUNTER, CLAIMANT
Peter Hansen, Claimant's Atty.
Own Motion Order

On January 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 suffered in 1968. Claimant's request was supported by medical reports.

The Board found, after a response from the carrier with more medical reports, that it did not have sufficient evidence to enable it to make a determination and the matter was referred to the Hearings Division to hold a hearing and take evidence on this issue.

A hearing was held on July 7, 1977 before Referee James P. Leahy. Referee Leahy, in his order of August 3, 1977, found that the medical evidence substantiated that claimant's present symptoms were related to his industrial injury of June 14, 1968; however, these symptoms do not represent a worsening of claimant's condition since the last award or arrangement of compensation and claimant's claim should not be reopened.

The Board, after full de novo review of the evidence and the Referee's recommendation, hereby adopts the Referee's order as its own which is, by this reference made a part of this order.

ORDER

Claimant's request for the Board to exercise its own motion jurisdiction and reopen his claim is hereby denied.

WCB CASE NO. 75-5404 AUGUST 16, 1977

JAMES HUTSON, CLAIMANT
Dye & Olson, Claimant's Atty.
SAIF, Legal Division, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which granted claimant an award of permanent total disability, effective as of the date of the order.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the SAIF.

WCB CASE NO. 76-5556 AUGUST 16, 1977

PETER W. JOHNSON, CLAIMANT
Jan Thomas Baisch, Claimant's Atty.
Frank A. Moscato, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which granted claimant 60 degrees for 40% permanent partial disability of his left forearm. Claimant contends that he is entitled to a separate award of permanent partial disability for loss of use of the left hand.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 31, 1977, is affirmed.

SAIF CLAIM NO. ZC 65073 AUGUST 16, 1977

WALTER D. JOHNSON, CLAIMANT
Own Motion Determination

Claimant, who was self-employed as North Santiam Cutting Company, was injured on March 14, 1967 while reaching for a power saw. His claim was first closed as a medical only. On July 12, 1968, Dr. Holm stated that claimant had a "chronic lumbosacral sprain in association with degenerative disk disease. He has a mild degree of impairment". On July 26, 1968, the claim was closed with no time loss and 5% loss of an arm by separation for unscheduled disability.

An interbody fusion of L4-5 and an exploration of L5-S1 was performed on January 9, 1976. On April 19, 1977, Dr. Poulson indicated that claimant had no impairment but some disability as a result of pain which is recurrent but not constant.

On June 2, 1977, the State Accident Insurance Fund requested a determination. The Evaluation Division of the Board recommended that claimant be granted an additional award of 28.8 degrees for 15% unscheduled disability and temporary total disa-

bility from January 5, 1976 through September 9, 1976 and from September 10, 1976 through April 19, 1977.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 5, 1976 through September 9, 1976 and also from September 10, 1976 through April 19, 1977 and an additional award of 28.8 degrees for 15% unscheduled disability.

CLAIM NO. WC66247 AUGUST 16, 1977

RUSSELL F. LEWIS, CLAIMANT
Galton & Popick, Claimant's Atty.
Dennis VavRosky, Defense Atty.
Own Motion Determination

Claimant, a 47-year-old truck driver for Trans Western Express, suffered a compensable leg injury when a 1400 pound steel frame fell on his left foot. After receiving medical treatment by Dr. Patton, he returned to his regular work on August 5, 1968. A Determination Order followed on April 15, 1969 which allowed temporary total disability and awarded claimant 20% loss of the left foot for permanent residuals in his left foot and ankle. The initial report of the injury mentioned a contusion and swelling of the left knee and Dr. McKillop's closing examination noted a 1958 left knee injury with some problems continuing from it. Despite this, it was not until December 1969 that claimant sought medical treatment for bilateral knee problems. At this time, Dr. Patton diagnosed osteoarthritis of both knees which he felt was exacerbated by claimant's injury on April 12, 1968. The Determination Order was appealed and, after a hearing, an Opinion and Order dated May 28, 1970 granted claimant 40% loss of the left leg and 20% loss of the right leg in lieu of the award he received from the first Determination Order.

Claimant was required to quit work on December 15, 1972 as a result of an aggravation he suffered to his right knee approximately a year earlier. On January 5, 1973, Dr. McKillop performed an upper tibial osteotomy of the right knee, however, this surgery apparently led to a thrombosis in the left leg by April 1973. Two surgeries followed at several months interval, but improvement was not as was expected. On May 28, 1974, claimant was referred to the Disability Prevention Division where his condition was found to not be medically stationary. After minor surgery, Dr. McKillop found claimant to be medically stationary and a Second Determination Order dated October 24, 1974 granted additional 40% loss of the left leg with 30% loss of the right leg, making a total of 80% and 50%, respectively. Claimant appealed this order, and after a hearing, an Opinion and Order of September 30,

1975 awarded 100% loss of function of the left leg and 65% loss of function of the right leg. On March 19, 1976, the Board affirmed the order of the Referee and on May 24, 1976 the same was affirmed by the circuit court.

On January 17, 1977, Dr. Langston performed a total left knee replacement and the claim was reopened by an Own Motion Order of the Board dated June 2, 1977. The closing report of Dr. Langston dated July 11, 1977 stated that the claimant has a loss of function equal to 65% of the left leg at the most.

On July 28, 1977, the employer requested a determination. The Evaluation Division of the Board recommends no change in the award for the left leg as it has already been granted the maximum allowed by statute and, further, there is no evidence that his right leg condition has worsened since September 30, 1975. However, the Evaluation Division felt that claimant was entitled to additional compensation for temporary total disability inclusively from January 17, 1977 (per Own Motion Order dated June 2, 1977) through the medically stationary date, June 1, 1977.

ORDER

Claimant is hereby awarded additional compensation for temporary total disability inclusively from January 17, 1977 through June 1, 1977.

WCB CASE NO. 75-3588 AUGUST 16, 1977

OLIVER MAST, CLAIMANT
Don Wilson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which granted claimant an award of permanent total disability and affirmed the Determination Order of August 20, 1975.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

WCB CASE NO. 76-3857 AUGUST 16, 1977
WCB CASE NO. 76-4165

CLAIR OWEN, CLAIMANT
Noreen K. Saltveit, Claimant's Atty.
Scott Kelley, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an award of permanent total disability for his injury sustained on July 13, 1972, commencing the date of his order, December 30, 1976, and affirmed the Determination Order of February 3, 1976 for claimant's injury of July 24, 1974.

Claimant, then 54 years old, sustained a compensable injury on July 13, 1972 to his low back while employed by J & J Construction Company. Claimant sought treatment from Dr. Patton who diagnosed acute lumbosacral strain and probable disruption of degenerative articular facets between L5 and S1. Claimant was treated conservatively. Claimant returned to work on July 31, 1972 but due to repeated exacerbations by his work activity he was not able to work continuously.

Dr. Patton referred claimant to Dr. Ho who examined claimant on January 3, 1973 and diagnosed lumbar spondylarthritis and degenerated L3 disc.

On January 24, 1973 Dr. Patton stated that claimant should not continue to perform heavy lifting or overhead work which only aggravates his back condition.

On March 7, 1973, a Determination Order granted claimant 48 degrees for 15% unscheduled disability.

Claimant continued to work for J & J Construction until January, 1974 when he became employed as a superintendent of a construction department for Casey Brothers, Inc. On July 24, 1974, claimant suffered a compensable injury to his left leg. Claimant again saw Dr. Patton who diagnosed a muscle belly tear at the plantaris fascia insertion to the gastrocnemius muscle. Claimant was placed on crutches. Dr. Patton on August 9, 1974 reported that claimant had been able to oversee his job part of the time although he was not released for work and was constantly on crutches.

Dr. Patton again referred claimant to Dr. Ho who diagnosed post-traumatic myofascitis medial head, left gastrocnemius muscle, post rupture. Dr. Ho indicated that claimant's job was such as to recurrently irritate the calf and, in addition, that

this sort of injury to a person of claimant's age and activity level is apt to follow with a long period of residual symptoms which may never disappear.

On May 20, 1975 Dr. Patton indicated claimant was unable to work as of May 13, 1975 due to his back which has been exacerbated from the injury of July 13, 1972. With regard to claimant's leg, Dr. Patton stated that claimant continued to be symptomatic and had sustained a permanent partial disability as a result of that injury.

On June 1975, the Fund reopened claimant's low back injury claim. Dr. Patton felt claimant could not return to his regular work. On December 23, 1975 Dr. Patton reported that claimant's employer had asked claimant to return to his regular job of carpenter, and that while attempting to do so claimant stepped up on a saw horse and felt a painful crunch in his low back and could not work thereafter.

On October 30, 1975 Dr. Patton stated that claimant's leg condition was medically stationary. At that time Dr. Patton indicated claimant was working as a carpenter field supervisor and would continue to do so for as long as was possible for him to do so.

On January 6, 1976 Dr. Heusch diagnosed chronic instability with chronic right sacroiliac strain. He felt claimant's condition was stationary but that claimant could not return to work as a finish carpenter.

A Determination Order of February 3, 1976 granted claimant 22.5 degrees for 15% loss of the left leg.

On February 21, 1976 Dr. Patton felt that claimant had sustained greater permanent disability to his back than that granted by the Determination Order.

On June 4, 1976 the physicians at the Orthopaedic Consultants diagnosed osteoarthritis of the lumbar spine with chronic and intermittent acute lumbosacral strain. They found claimant's condition medically stationary and felt he could be returned to some form of carpentry with limitations. Loss of function at that time was mild.

On June 29, 1976 Dr. Heusch stated he did not concur with the report of the Orthopaedic Consultants that claimant could return to carpentry with limitations. He further stated that claimant's loss of function due to the injury was greater than 20%.

Claimant is 58 years of age and has not completed high school. Claimant is a journeyman carpenter and has done this all of his working life.

In April 1976, Mr. Elwood, a service coordinator indicated he was closing claimant's file as neither placement nor referral to the Vocational Rehabilitation Division appeared feasible. He found no interest or eligibility for vocational rehabilitation and lack of interest in a center call-in. Claimant indicated he was returning to supervisor work in carpentry when work was available.

Dr. Patton testified at the hearing that, in his opinion, claimant was permanently and totally disabled. With respect to claimant's back condition Dr. Patton indicated that claimant's leg injury was a factor in speeding up claimant's back complaints but that there were other exacerbations of the back condition at that time. Concerning the leg, Dr. Patton indicated there was a damaging of a portion of the gastrocnemius muscle which continues to cause spasms. This condition is stable but disabling.

The Referee found, in regard to the leg injury, that claimant does have swelling, pain and spasms in the left leg but that claimant has been adequately compensated by the Determination Order for this loss of function of this member.

The Referee found, with regard to the back injury claim, that claimant has proved he is motivated to return to work. The Referee felt that the evidence establishes prima facie that claimant is an odd-lot employee and the burden shifts to the Fund to show some form of suitable and regular employment in which claimant could perform. The Fund has failed to make such a showing. He granted claimant an award of permanent total disability.

The Board, on de novo review, finds that the medical evidence indicates that the award granted to claimant for his leg disability is adequate. The medical evidence further establishes, except for the opinion of Dr. Patton, that claimant has sustained a substantial disability and loss of wage earning capacity, but does not substantiate an award of permanent total disability. Therefore, the Board finds claimant is entitled to an award of 160 degrees for 50% unscheduled low back disability.

ORDER

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

Claimant is hereby granted an award of 160 degrees for 50% unscheduled low back disability.

In all other respects the Referee's order is affirmed in its entirety.

WCB CASE NO. 76-4133 AUGUST 16, 1977

LINDA J. SCOTT, CLAIMANT
Del Parks, Claimant's Atty.
James D. Huegli, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the Referee's order which directed it to pay for medical services provided claimant by Dr. Garrison during the summer of 1976 along with a penalty equal to 25% of that amount payable to claimant. They were also directed to pay a penalty because of their failure to reinstate temporary total disability compensation in a timely manner in the amount of 25% of the time loss benefits due from September 3 to September 30, 1976.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 28, 1977, is affirmed.

WCB CASE NO. 76-4642 AUGUST 16, 1977

LESLIE SWALLING, CLAIMANT
Frank Moscato, Claimant's Atty.
Roger Luedtke, Defense Atty.
Order

On June 29, 1977, the Board received from the employer, by and through its attorney, Roger A. Luedtke, a request for reconsideration of the above entitled matter.

On July 25, 1977, the Board denied this motion.

On August 4, 1977, the Board received from the employer, a renewed request for reconsideration of the Board's Order on Review in the above referenced matter. The renewed letter for reconsideration indicated that the 30 days appeal period would run from the letter of July 5, 1977.

It is the Board's position that for reconsideration to effectively stay the appeal time, the Board must affirmatively before the appeal notice is filed, or if none is filed before an appeal period expires, set aside the Order on Review and

advise the parties that they are reconsidering the Order.

The Board did not do that in this case.

ORS 656.295(8):

"An order of the board is final unless within 30 days after the date of mailing of copies of such order to the parties, one of the parties appeals to the circuit court for judicial review pursuant to ORS 656.298. The order shall contain a statement explaining the rights of the parties under this subsection and ORS 656.298."

ORDER

The employer's renewed motion for reconsideration is denied.

SAIF CLAIM NO. BC 210163 AUGUST 17, 1977

LOY KNUTZEN, CLAIMANT
David Kryger, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On July 25, 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 23, 1969. Claimant's claim was initially closed by Determination Order of April 20, 1970 and his aggravation rights have now expired. Claimant furnished the Board with two reports from Dr. Sirounian in support of his own motion petition.

On July 27, 1977, the Board furnished the Fund with a copy of claimant's request along with medical attachments and advised it to respond within 20 days stating its position with respect to the request for own motion relief.

On August 9, 1977, the Fund responded, stating that, in its opinion, it was recognized from the beginning that claimant would probably have flareups from the low back when he was granted a total of 60% unscheduled permanent partial disability benefits and that any treatment needed could be made under ORS 656.245. They felt that most of the treatment described in the medicals at the present time was in connection with the cervical area and the injury of September 1969 was to the low back.

The Board, after thorough consideration of the medical reports furnished by the claimant and the response made by the Fund, concludes that claimant's condition, based on the med-

ical reports submitted, does not indicate a worsening of claimant's condition which, in fact, was found to be medically stationary.

ORDER

Claimant's petition for own motion jurisdiction pursuant to ORS 656.278 is hereby denied.

WCB CASE NO. 76-3614 AUGUST 18, 1977
WCB CASE NO. 76-4269

JAMES I. MILLER, CLAIMANT
Carlotta H. Sorensen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

Two cases were consolidated for hearing before the Referee. WCB Case No. 76-3614 involved a request for additional permanent partial disability on claimant's left middle finger. A Determination Order issued May 5, 1976 awarded 6.6 degrees for 30% loss of the finger. WCB Case No. 76-4269 is an appeal of SAIF's denial for a psychological problem, allegedly aggravated by the industrial injury to claimant's finger.

Claimant was operating a table saw during the course of his employment and on November 28, 1975 cut his left middle finger. Claimant contends he developed psychiatric problems as a result of this injury.

Based upon the testimony of Dr. Peter H.D. Winters, a psychiatrist, the Referee found claimant's psychiatric condition was part of the industrial injury and referred the matter back to the SAIF for acceptance of the psychological condition and payment of temporary total disability from February 1, 1976. He also found, except for the psychological condition, the rating on the finger given by the Evaluation Division was fair.

The Board, on de novo review, is more persuaded by the report of Dr. Marens Maltby who stated:

> ". . . but I disagree that his illness is the result of injury to his finger or that it was significantly aggravated by the injury. A Schizoid Personality is a disorder of many years standing, probably beginning in the preschool years. The finger injury is a relatively minor one which healed with a good result--it was not severe enough to produce a significant aggravation of his preexisting disorder in my opinion."

Even though Dr. Winters felt claimant was severely and temporarily handicapped by a psychiatric illness, apparently he did not feel it severe enough to preclude the claimant from working. Dr. Winters further indicated that the claimant should have had psychiatric help even at the age of 14.

The Board, on de novo review, finds claimant's psychiatric condition has not been caused by,nor aggravated by,his industrial injury.

The Board concludes that the opinion of the Referee should be reversed and the denial of the SAIF as to claimant's psychiatric condition be reinstated - WCB Case No. 76-4269.

The Board further concludes that the Determination Order issued on May 5, 1976 adequately compensates claimant for loss of the finger - WCB Case No. 76-3614.

ORDER

The order of the Referee, dated January 20, 1977, is reversed.

The denial of the State Accident Insurance Fund as to claimant's psychiatric condition is reinstated and affirmed - WCB Case No. 76-4269.

The Determination Order issued by the Evaluation Division of the Board is affirmed - WCB Case No. 76-3614.

CLAIM NO. 87CM-1111 N AUGUST 18, 1977

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

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 28, 1967.

Because of conflicting evidence offered by both claimant and the defendant in this case, the Board found it necessary to refer the matter to the Hearings Division to hold a hearing and determine the issue of whether claimant's present condition was the result of his 1967 industrial injury and represented a worsening of that condition since his last award or arrangement of compensation. The Board referred this matter on April 13, 1977.

On July 12, 1977 a hearing was held before Referee James P. Leahy. In his order of August 5, 1977 Referee Leahy recommended that claimant's request for the Board to exercise its own motion jurisdiction should be denied because the unresolved conflicts leave the trier of fact in the position of attempting to guess, and therefore, it was felt that claimant had not borne his burden of proof.

The Board, after de novo review of the evidence in this case and the Referee's recommendation, hereby adopts the Referee's recommendation as its own.

ORDER

Claimant's request for the Board to exercise its own motion jurisdiction and reopen his claim is hereby denied.

WCB CASE NO. 76-3131 AUGUST 19, 1977

MELVIN R. BONNER, CLAIMANT
Bailey, Doblie & Bruun, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and the payment of compensation to which claimant is entitled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, payable by the carrier.

SAIF CLAIM NO. B 143406 AUGUST 19, 1977

JESSE L. BRENCHLEY, CLAIMANT
David M. Jaqua, Claimant's Atty.
Lawrence J. Hall, Defense Atty.
Settlement Stipulation

It is hereby stipulated and agreed by and between Jesse L. Brenchley, hereinafter called claimant acting by and through his attorney David M. Jaqua, and the State Accident Insurance Fund acting by and through its attorney Lawrence J. Hall, as follows:

1. Claimant suffered a compensable industrial injury to his back on April 14, 1965 which claim bears State Accident Insurance Fund number B 143406.

2. Said claim was first closed by an Order of the State Compensation Department dated April 12, 1967.

3. Claimant has subsequently presented a petition requesting workmen's compensation benefits pursuant to the Board's own motion under ORS 656.278.

4. The Workmen's Compensation Board by Order dated July 15, 1976, denied claimant's petition for an Order for benefits to be paid in the exercise of its own motion jurisdiction.

5. Subsequent thereto, claimant has presented SAIF with an additional medical report from Dr. John Caroll dated September 17, 1976 and is again requesting SAIF to grant him workmen's compensation benefits under the authority of the provisions of ORS 656.278

6. There is a bona fide dispute between SAIF and the claimant, the Fund contending the new medical report from Dr. Caroll is insufficient and the claimant contending that it is sufficient and that his claim should be reopened under ORS 656.278.

7. In compromise and settlement of all claims for any benefits accruing prior and up to the date hereof for claimant's back condition, the parties agree that claimant has suffered no additional accident since the accident of April 14, 1965 in his subsequent or current employment and that therefore payments by SAIF should be made on this claim, number B 143406; and further that SAIF shall pay and claimant shall accept $500 payable to himself and his attorney in full settlement for any and all claims for his back conditions arising heretofore, said sum to include legal expenses and attorney's fees and any and all claims raised and raisable at the present time.

It is so stipulated.

The foregoing stipulation on a bona fide dispute appearing just and equitable, is hereby approved.

WCB CASE NO. 76-314 AUGUST 19, 1977

WILLIS HODGE, CLAIMANT
James A. Wickre, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the Determination Order of January 13, 1976 which awarded claimant 25% permanent partial disability for loss of the right forearm. Claimant contends that he is entitled to a greater award of permanent partial disability or, in the alternative, an award of permanent total disability. Claimant also felt that penalties and attorney's fees should have been assessed the carrier for failure to furnish medical reports in a timely manner.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

WCB CASE NO. 76-5641 AUGUST 19, 1977
WCB CASE NO. 76-4970

MARTIN HOERLING, CLAIMANT
Sid Brockley, Claimant's Atty.
R. Kenney Roberts, Employer's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Referee's order which ordered it to accept responsibility for claimant's claim.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 4, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $100, payable by the carrier.

WCB CASE NO. 76-475 AUGUST 19, 1977

JIM SEWELL, CLAIMANT
Benton Flaxel, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which denied claimant any workmen's compensation benefits for his right knee condition and refused to assess penalties on the Fund for their refusal to furnish medical information. The Referee ordered the Fund to pay Dr. Matteri's fee for the taking of his deposition testimony.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

WCB CASE NO. 76-3904 AUGUST 19, 1977

MICHAEL T. SUMINSKI, CLAIMANT
Robert L. Burns, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which approved that Determination Order of June 28, 1976 which granted claimant temporary total disability from February 18, 1976 through March 8, 1976, and dismissed the matter.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 25, 1977, is affirmed.

WCB CASE NO. 76-4368 AUGUST 19, 1977

DANIEL TALMADGE, CLAIMANT
Sanford Kowitt, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which modified the award of the Determination Order to 15% unscheduled disability to the low back and set aside the award of psychiatric disability. Claimant contends that the psychiatric disability award should be reinstated and that he should be awarded permanent total disability or, in the alternative, additional permanent partial disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

WCB CASE NO. 75-2157 AUGUST 19, 1977

JANET M. WHITEHURST, CLAIMANT
Jon L. Woodside, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which approved the Determination Order of April 28, 1975 which granted, in addition to temporary total disability, 10% unscheduled disability of the low back and 5% disability of the

right leg. Claimant contends that she is entitled to a greater award of permanent partial disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 31, 1977, is affirmed.

WCB CASE NO. 76-4651 AUGUST 22, 1977

ROBERT A. EARL, II, CLAIMANT
John J. Herbrand, Claimant's Atty.
SAIF, Legal Services, 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 State Accident Insurance Fund's denial of his claim.

This 21-year-old claimant was employed as a laborer by a landscape and construction company. During the latter part of May, 1976 claimant was using a sledge hammer in laying pipe and developed right shoulder, arm and back pain. Claimant did not work over Memorial Day weekend. The employer stated claimant did not work June 1 and upon returning on June 2, stated he had hurt his back the day before moving a refrigerator.

Claimant was unable to work, sought medical attention and a lumbosacral strain was diagnosed by Dr. Eckhardt.

The Referee at the hearing was unable to sift through the evidence to determine if claimant had, in fact, sustained an injury on the job or had injured himself in the lifting incident at home. Two witnesses testified they had observed claimant was in pain while working but could not define the time frame or what event had caused the onset.

The Board, on de novo review, has received no briefs from either party which might have clarified the record. The burden of establishing a compensable claim by a preponderance of evidence is upon the claimant and in this matter, the Board concludes he has not done so.

ORDER

The State Accident Insurance Fund's denial of the claimant's claim for compensation is affirmed.

WCB CASE NO. 76-2293 AUGUST 22, 1977

DOROTHY M. HARGENS, CLAIMANT
Roger Gould, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests Board review of the Referee's order which granted claimant an award of 30% unscheduled permanent partial disability, being an increase of 10%.

Claimant sustained a compensable injury March 10, 1975 when she was employed as a motel laundry room worker. By a Determination Order of May 3, 1976 she was awarded 10%.

Since the injury claimant complains of disabling pain in the low back and left leg and feels she is precluded from returning to her former work. Examining physicians have found little, if any, physical basis for her low back disability. Dr. Curtis Adams opined that claimant suffered mechanical low back pain due to obesity, poor abdominal muscle tone and lumbar lordotic posture.

Claimant was examined by Dr. Marens Maltby, psychiatrist, on July 29, 1976, who diagnosed Conversion (Compensation) Neurosis and stated the injuries she described were not the cause of this neurosis, but rather they offer her an opportunity to become physically disabled as a means of solving some of life's problems.

Faced with this report, the Referee found that although the psychiatrist stated that the injuries were not the cause of the neurosis, it seemed obvious from the sequence of events, that but for the accident claimant would have continued working.

The State Accident Insurance Fund contends that the unrebutted psychiatric opinion in this case indicates claimant's psychological condition is not related to her industrial injury and does not feel the Referee has sufficient expertise to disregard this opinion. If it was felt the psychiatric opinion was wrong, claimant could have obtained an examination by another psychiatrist or at least could have cross-examined Dr. Maltby.

The Board, on de novo review, accepts Dr. Maltby's opinion and finds claimant is entitled to an award of 10% unscheduled low back disability as found by the Evaluation Division.

ORDER

The order of the Referee, dated March 7, 1977, is reversed.

The Determination Order, mailed May 3, 1976, is affirmed.

WCB CASE NO. 76-5507 AUGUST 22, 1977

CECIL C. JOHNSON, CLAIMANT
David W. Hittle, Claimant's Atty.
SAIF, Legal Division, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

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

Claimant, a carpenter and insulator for many years, started working for this employer on June 2, 1976 applying insulation on a ceiling. He was required to move a heavy scaffolding which held tools and materials.

On or about June 10,1976 he noticed a burning and itching sensation in the right groin. There was no specific incident. He kept on working until the job terminated on June 25, 1976. After quitting work, the symptoms worsened and a friend suggested he might have a hernia. On September 3, 1976, Dr. George Miller diagnosed a right inguinal hernia and claimant has since had a hernia repair for which the Fund has denied responsibility.

The Referee found this to be a complicated medical situation requiring expert medical testimony to find a causal relationship between the employment and the hernia. There was no such testimony in this matter. The Referee further stated the distinguishing features holding medical evidence unnecessary to make a prima facie case of causation are an uncomplicated situation, the immediate appearance of symptoms, the prompt reporting of the occurrence by the workman to a superior and consultation with a physician, coupled with the fact that claimant was theretofore in good health and free from any disability of the kind involved. The Referee found the evidence in this case would not fit this test, stating while claimant had no prior hernia or abdominal pain of the type he experienced and was in good health and free from any disability of the kinds involved before he began working for his employer, there was no immediate appearance of symptoms and no prompt reporting. He thereupon found the claimant had not established a compensable injury as alleged.

The Board, on de novo review, does not concur with the findings made by the Referee.

The Board finds uncontradicted evidence that claimant's work activities required repeated lifting, by him alone, of metal scaffolding weighing approximately 200 pounds; that he experienced burning and itching in his right groin within a few days after the first day he commenced lifting the scaffolding; that he had never had a prior hernia and didn't recognize the symptoms until they worsened and he talked with a friend, at which time he promptly

notified his employer and sought medical consultation. Prior to beginning work for this employer claimant had never had groin pain and was in good health and free from disability of any kind. There was no expert medical testimony offered by the employer in opposition to the diagnosis of the hernia claim or the causal relationship between the lifting activity and the hernia.

The Board concludes this matter is not a complicated medical situation and the undisputed facts support a finding of causal relationship between claimant's work-related activities and the hernia.

As to the issue of timeliness, the Board finds that the claimant did notify the employer a reasonable time after he had reason to recognize the nature of his injury and has established good cause for failure to give the notice within 30 days.

ORDER

The order of the Referee, dated March 10, 1977, is reversed.

This claim is remanded to the State Accident Insurance Fund for acceptance and payment of benefits required by law.

The claimant's attorney is awarded a reasonable attorney's fee in the amount of $900 for his services in connection with the hearing and the Board review, payable by the State Accident Insurance Fund.

WCB CASE NO. 76-3649 AUGUST 22, 1977

ARCHIE KEPHART, CLAIMANT
David Vinson, 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 ordered claimant's claim for medical services be accepted and paid by it.

Claimant sustained a compensable injury on December 5, 1969 which was subsequently closed by a Determination Order of July 10, 1970 with an award of 32 degrees for 10% unscheduled disability. Claimant continued to have difficulties and filed a claim for aggravation which, after a hearing, was ordered accepted. On June 21, 1974 a Second Determination Order granted claimant an additional 5% unscheduled disability. Claimant, thereafter, appeal-

ed this Determination Order and, after a hearing, was granted an additional 15% on July 9, 1975.

On June 2, 1976 claimant quit working due to increasing back problems; on June 10, 1976 claimant underwent a laminectomy and Dr. Golden indicated that the need for this surgery arose from claimant's December 5, 1969 industrial injury.

Claimant's aggravation rights expired on July 9, 1975.

The employer contends that the right to treatment under ORS 656.245 expired with claimant's aggravation rights. The evidence indicates no intervening injury or accident and no challenge to the causal relationship between the surgery performed and the industrial injury.

The Referee found that under the provisions of ORS 656.245 medical coverage is limited only to the extent that the treated condition must have resulted from the compensable injury.

The Referee found that the employer's denial to pay such medical benefits was not unreasonable, although the question is a close one.

The Referee concluded that the employer must pay the medical services provided to claimant.

The Board, on de novo review, finds that the provisions of ORS 656.245 are clear and unambiguous and provide for medical services for a compensable injury for such period as the nature of the injury or process of recovery is required and in no way places a limitation on the duration of such. Furthermore, the Board finds that the employer's refusal to pay for such medical services is in violation of this statute and constitutes unreasonable refusal to pay compensation and a penalty will be assessed for this conduct.

ORDER

The order of the Referee, dated January 20, 1977, is modified.

The employer is hereby assessed a penalty payable to claimant in the amount of 25% of the cost of the medical services due and owing to claimant.

Claimant's attorney is hereby granted, as a reasonable attorney's fee for his services at Board review, the sum of $300, payable by the employer.

The order of the Referee dated January 20, 1977 in all other respects is affirmed.

WCB CASE NO. 76-3199 AUGUST 22, 1977

WALTER KREISKOTT, CLAIMANT
Hugh K. Cole, Jr., Claimant's Atty.
Frank H. Lagesen, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The issue is extent of permanent disability. The Determination Order awarded claimant 35% (112 degrees) unscheduled disability for injury to the neck and left shoulder. The Referee increased the award to a total of 75% (240 degrees) unscheduled disability. Claimant requests Board review contending he is permanently and totally disabled.

Claimant, a 64-year-old painter filed a claim for injury to his left shoulder and neck caused by carrying an extension ladder with the date of injury, July 19, 1974. Claimant had a laminectomy in 1974 and returned to work in 1975 earning $31,000 in that year. Claimant had some help from a fellow workman to accomplish his work in 1975.

The medical evidence does not support an award of permanent total disability. The Board concurs with the finding of the Referee that claimant is not permanently and totally disabled and that 75% (240 degrees) unscheduled disability is adequate.

ORDER

The order of the Referee, dated January 10, 1977, is affirmed.

WCB CASE NO. 76-4797 AUGUST 22, 1977

DOMINGO LETE, CLAIMANT
Brian L. Welch, Claimant's Atty.
Marshall C. Cheney, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Two issues were presented at the time of the hearing: (1) Whether or not medical treatment must be provided pursuant to ORS 656.245 beyond the five-year aggravation period; and (2) Whether the treatment received by Mr. Lete in 1976 was related to his industrial injury of February 22, 1971.

The Referee's Opinion and Order dealt only with Issue (2), wherein he found the medical evidence would not support a finding

of compensability and affirmed the employer's denial of claimant's claim of aggravation.

Both issues are now before the Board on request by the claimant for Board review.

As to Issue (1), the right to medical care and treatment under ORS 656.245 is not limited by the five-year limitation on the commencement of an aggravation claim. See Patsy Carpenter, WCB Case No. 75-1989, Board Order on Review dated April 20, 1976.

Issue (2) is whether or not the claimant has established by a preponderance of the evidence that the medical treatment received in 1976 was related to his industrial injury of February 22, 1971. The Referee did not find a causal relationship and sustained the employer's denial.

The Board, on de novo review, finds the conclusion reached by the Referee is contrary to Dr. Weare's 827 report dated July 20, 1976, Dr. Weare's report dated September 15, 1976, and Dr. Weare's testimony at the time of the hearing.

Although it appeared that Dr. Weare had never thought about or considered the difference between "probability" and "possibility" in the context that it is relevant in a legal proceeding such as a workmen's compensation claim, after questioning by claimant's counsel and contemplating his answer, the doctor did testify that he felt the treatment he provided in 1976 was related to the industrial injury.

The Board concludes claimant has established his claim for benefits under ORS 656.245.

ORDER

The order of the Referee, dated February 9, 1977, is reversed.

Claimant's claim is remanded to the employer for payment of benefits as provided by law.

The claimant's attorney is awarded a reasonable attorney's fee in the amount of $600 for his services in connection with the hearing and Board review, payable by the employer.

WCB CASE NO. 76-5069 AUGUST 22, 1977

ORVAL OLIVER, CLAIMANT
Burton J. Fallgren Claimant's Atty.
SAIF, Legal Services, 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 partial denial of claimant's claim.

Claimant sustained a face injury on March 1, 1976 when he was hit in the face with a 45 pound steel chain. Claimant was immediately hospitalized but not immediately sent to surgery because the anesthesiologist suspected a heart problem. Surgery was eventually performed. Dr. Bishop at that time found no heart disease but advised claimant to quit drinking coffee and smoking cigarettes. Claimant did. Claimant's claim for the face injury was accepted.

Within a day of claimant's release from the hospital he felt chest pains. The suspected problem was diagnosed as premature ventricular beats. On September 10, 1976 the Fund denied claimant's heart condition.

On October 20, 1976, Dr. Loosli examined claimant and indicated it was difficult to evaluate a heart condition in relationship to claimant's head injury but that cardiac irregularities do happen in relationship to shock, emotion and physical trauma.

On June 15, 1976 Dr. Rogers examined claimant and opined that claimant's chest pain was not from angina but rather of chest wall origin.

On December 6, 1976 Dr. Rogers wrote claimant's attorney that claimant's chief complaint had been precordial ache since March 1, 1976 and which subsided by September 16, 1976. He also found no evidence of heart disease. Dr. Rogers opined claimant had a number of PVC's following his injury which might have been precipitated by the circumstances of the injury.

Dr. Rogers testified at the hearing that trauma did not cause the PVC's but it was possible trauma aggravated it. He further testified that severe head injuries could cause a continuation of PVC's, however, Dr. Rogers himself believed that the PVC's continuing long after the trauma (six months) indicated claimant had them prior to injury, but there is no proof of this.

Dr. Rogers testified further that if he assumed claimant entered this accident free of all evidence of heart disease or PVC's and that he developed them after the accident and has had

them ever since, and then if asked if the accident caused them, aggravated them or perpetuated them, then his answer was "yes, of course".

The Referee found that medical causation was not established and only speculation could attribute the heart condition to the trauma. He affirmed the denial of claimant's claim.

The Board, on de novo review, finds that the evidence does not prove that claimant's PVC's were present before the industrial injury and therefore one must find, as did Dr. Loosli and Dr. Rogers on cross examination, that trauma either caused or aggravated the PVC's and therefore are compensable.

The Board further finds that the Fund's motion to dismiss this case should be denied.

ORDER

The order of the Referee, dated January 18, 1977, is reversed.

Claimant's claim is hereby remanded to the Fund for acceptance and payment of compensation as provided by law until claim closure is authorized.

Claimant's attorney is granted $1100 payable by the Fund for his services in connection with the hearing and this Board review.

WCB CASE NO. 75-5456 AUGUST 22, 1977

KENNEDY RAGSDALE, CLAIMANT
Gary L. Case, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order dated January 7, 1977 which affirmed the Determination Orders issued in his claim and dismissed his request for hearing. Claimant contends that his present disability is causally related to his previous compensable injury and aggravation of that injury, both of which he has already been compensated for.

On July 3, 1970, claimant sustained a low back injury when he slipped on a concrete floor and landed on his tailbone. By a Determination Order of February 23, 1972, claimant was awarded 128 degrees for unscheduled low back disability. Subsequently, claimant's claim was reopened for additional treatment and he was

awarded additional temporary total disability. On November 20, 1975, a Determination Order was entered which closed the claim and granted claimant no permanent partial disability.

The initial diagnosis, three days after claimant's industrial injury, was lumbosacral strain. On October 6, 1970, Dr. McKillop opined that claimant's disability was due to a chronic lumbosacral strain syndrome. He noted from claimant's history, that he has had back problems in the past and the industrial injury was an aggravation of those problems, with claimant suffering from continuous symptoms rather than intermittent as before. The doctor indicated that claimant should avoid heavy work requiring a lot of bending and lifting; he did not recommend surgery at that time. On June 18, 1971, Dr. McKillop noted that claimant had had to quit work due to his symptomatology becoming progressively worse. He referred him to the Good Samaritan Hospital for physical therapy treatments for his lower back. He felt that if claimant's difficulties continued, he would need to be trained for lighter work and possibly would require surgery. Basically, these same findings were noted in his report of July 29, 1971.

The claimant was seen by Dr. Toon, a medical examiner for the Physical Rehabilitation Center, in October of 1971. He diagnosed a low back strain with probable functional overlay and recommended claimant be placed on a program of evaluation and testing with a referral to the Vocational Rehabilitation Division for an interview. The claimant was then seen by Dr. Hickman, a clinical psychologist, who felt that at the time claimant was showing moderately severe anxiety tension reactions with depression and rather extreme preoccupation with physical and emotional complaints. He felt that claimant was a fair to good candidate for vocational rehabilitation, although the prognosis for such a program would have to be guarded because of claimant's limitations and psychological problems. The doctor recommended that claimant obtain his GED certificate, that he be referred to VRD, and that he probably would not need psychotherapy unless he had problems in his vocational rehabilitation.

Claimant was again seen by Dr. McKillop and in his report of November 8, 1971, the doctor noted that there was some improvement from physical therapy and that claimant's claim should be closed.

In December 1971, the Back Evaluation Clinic diagnosed claimant's condition as "chronic low back strain with some paravertebral muscle spasm and lack of the lumbar lordosis" with minimally narrowed L4-5 disc space. They recommended job retraining with no further medical or surgical treatment and that claimant's claim should be closed. Dr. McKillop's February 8, 1972 report indicated basically the same recommendations as suggested by the Back Evaluation Clinic in December 1971.

Claimant entered an authorized program of vocational rehabilitation in 1972 which did not seem to be successful and the

VRD opined that claimant's claim should be closed.

The claim was closed by Determination Order of February 23, 1972. On November 21, 1974, Dr. McKillop opined that claimant's condition had worsened sufficiently to require further treatment and x-rays. He felt that claimant's claim should be reopened on the basis of aggravation.

In Dr. Pasquesi's February 24, 1975 report to the State Accident Insurance Fund, a possible reason for claimant's worsened condition was noted which was not mentioned in Dr. McKillop's report. In October of 1974, while claimant was leaving his home to go to work at a machine shop, at which time he was carrying a lunch bucket, he turned around to talk to his mother and felt a sudden severe pain between his shoulder blades, a pain which also affected his ribs. He remained in bed for most of the next day. Dr. Pasquesi's diagnosis was "chronic lumbosacral strain with manifestations of a neurological character in the form of numbness, probably in the overlapping course of the 4th and 5th lumbar nerve roots. There is also some narrowing between L4 and L5; chronic discomfort in upper back; transient numbness right upper extremity". He felt that claimant was in need of medical care and probably vocational rehabilitation and also that claimant's claim should be reopened. SAIF did this on March 6, 1975.

On April 9, 1975, Dr. McKillop noted that claimant had been under his care since the reopening of his claim in March. He indicated that claimant is disabled and unable to work at the present time and will continue this way until he can be placed in a sedentary or light work activity or be retrained. DVR felt that claimant was unable to profit from any type of authorized program they could provide for him. In the September 17, 1975 report of the Orthopaedic Consultants, it was noted that in their opinion claimant had only a mild total loss of low back function at that time and only minimal loss of function due to his July 1970 injury. They felt his condition was stationary, that claimant seemed to be unmotivated to return to his usual occupation, and that his claim should be closed. Dr. McKillop stated his agreement with the conclusions of the Orthopaedic Consultants. By Determination Order of November 20, 1975 claimant's claim was again closed with no permanent partial disability "in excess of that granted by the Determination Order of February 23, 1972."

On June 15, 1976, Dr. Zivin examined claimant and found "chronic multiple myofascial strains" and "cervical spondylosis, C5-6, C6-7 disc degeneration with no evidence of nerve root or spinal cord involvement". Also noted was a severe anxiety tension state with depression and it was felt that claimant had an inadequate personality. The doctor felt that claimant was able to perform light work and that the award granted him in 1972 was more than adequate. He opined that claimant was crippled by his psychological inadequacies and that even psychiatric counseling would not be of much help.

Claimant and his wife testified, at that hearing, that he fell backwards on his back and hit his head on July 3, 1970. This testimony was only seen once in the medical reports. The rest of the doctors had heard and observed nothing to support claimant's contention that a head injury was involved. The Referee had serious doubts about claimant's credibility and concluded that the neck and thoracic spine problems were not in any way related to the compensable injury in 1970 nor to the aggravation of that injury. As a result, the Referee affirmed the prior Determination Orders which granted claimant 128 degrees for permanent partial disability on February 23, 1972 and no additional permanent partial disability on November 20, 1975.

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

ORDER

The order of the Referee, dated January 7, 1977, is affirmed.

WCB CASE NO. 76-5072 AUGUST 22, 1977

DONALD L. RISNER, CLAIMANT
Rolf T. Olson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which granted claimant permanent partial disability for loss of use of the right arm equal to 96 degrees (50%) and 160 degrees permanent partial disability to the neck, shoulder and head.

Claimant suffered a compensable injury on October 15, 1975 when he pulled a rod board while working in concrete. He had worked as a cement finisher for 35 years prior to the injury. In August of 1975, claimant began to notice an increase in discomfort of his right elbow. He received conservative treatment for several months from Dr. Burr who diagnosed medial epicondylitis. He was advised that he should not work as hard as normal and the doctor gave him a tennis elbow strap. Dr. Burr continued to treat claimant for his elbow and neck and shoulder pain during the next year. He felt that if the pain continued, claimant should begin looking for another job, as the cement finishing work was only aggravating the problem. He found claimant to be medically stationary in August 1976 and suggested that his claim be closed.

On April 12, 1976, a Stipulation and Order was signed dismissing claimant's request for a hearing on the issue of SAIF's

failure to pay time loss beneifts. On September 13, 1976, a Determination Order was issued granting claimant temporary total disability from October 15, 1975 through August 6, 1976 together with 19.2 degrees for 10% permanent partial disability for loss of the right arm.

On November 30, 1976, Dr. Burr noted that claimant would continue to have limitations with regard to his occupation. He felt that the claimant's problem was centered around his neck and right upper extremity, but he would be able to do no heavy lifting or overhead work.

The Referee found claimant severely disabled in the use of his right arm and, basically, his whole body as a result of his limitations in the neck, shoulder and head. The possibility of obtaining work was remote because claimant lacked training in anything other than cement finishing. The Disability Prevention Division didn't offer claimant much help and neither did the Vocational Rehabilitation Division. The Referee felt that the Determination Order's award of 10% permanent partial disability was inadequate. He granted claimant an award equal to 50% loss of his right arm.

The claimant, since May 1976, has been involved in a partnership, operating and owning a tavern in Independence. He works approximately eight to sixteen hours per week supervising tavern employees. In addition, claimant also orders supplies and spends approximately two hours per day doing this.

The Board, on de novo review, concludes that claimant has not suffered loss of wages to the extent granted by the Referee and concludes that 30% of unscheduled permanent partial disability would be proper.

The Board also concludes that claimant's loss of function does not exceed 30% of the scheduled member.

ORDER

The order of the Referee, dated January 27, 1977, is modified. Claimant is granted 30% for unscheduled disability. This is in lieu of, and not in addition to, that previously granted.

Claimant is also granted 30% permanent partial disability of the right arm for his scheduled disability. This is in lieu of, and not in addition to, that previously granted.

WCB CASE NO. 76-3150 AUGUST 22, 1977

NORMAN W. ROSE, CLAIMANT
Malagon, Starr & Vinson, Claimant's Atty.
SAIF, Legal Division, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The issue is the State Accident Insurance Fund's partial denial denying responsibility for psychological treatment. The Referee reversed the denial of psychiatric (psychological) treatment.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 14, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $400, payable by the carrier.

WCB CASE NO. 76-4133 AUGUST 22, 1977

LINDA J. SCOTT, CLAIMANT
Del Parks, Claimant's Atty.
James D. Huegli, Defense Atty.
Amended Order Allowing Attorney Fee

The Board's order on Review entered August 16, 1977 in the above-entitled matter failed to include an award of a reasonable attorney's fee.

ORDER

IT IS HEREBY ORDERED that claimant's counsel receive a reasonable attorney's fee in the amount of $350, payable by the employer, for services in connection with Board review.

WCB CASE NO. 76-4173 AUGUST 22, 1977

CURLEY SUELL, CLAIMANT
Richard T. Kropp, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Phillips.

This is a denied aggravation claim. The Referee held that claimant's condition had become aggravated. SAIF's request for Board review contends that claimant had not proved his condition had worsened since the last award or arrangement of compensation.

Claimant, a then 47 year old warehouse man, fell ten or twelve feet from a semi-truck while loading grain on April 27, 1972. After a hearing in March 1974, claimant was awarded permanent total disability by the Referee which was affirmed by the Board but modified by the circuit court to 50% permanent partial disability which was upheld by the Court of Appeals. Claimant filed a subsequent aggravation claim which was settled by stipulation with an additional 15% unscheduled disability and 15% right leg disability. Claimant now files a claim for aggravation which was denied by SAIF.

Claimant has a fourth grade education and has followed farm work most of his life.

Although there are contradictions in the record and the evidence is not too strong that claimant is as bad as he says he is, based on medical evidence the Board concurs with the findings of the Referee that claimant has proved that his condition has worsened since March 29, 1976 which was the date of the last arrangement of compensation. The Board also concurs in the finding of the Referee that claimant is permanently and totally disabled now.

ORDER

The order of the Referee, dated January 10, 1977, is affirmed.

The claimant's attorney is awarded $500.00 as and for a reasonable attorney's fee to be paid by the State Accident Insurance Fund and not to be paid out of claimant's compensation for his services at Board review.

WCB CASE NO. 76-3158 AUGUST 23, 1977

WALTER BENNETT, CLAIMANT
Larry K. Bruun, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which remanded the claim to it for acceptance and payment of compensation. Also penalties were assessed in the amount of 2% of any time loss benefits due and owing to claimant from the date of the filing of the claim to the date of the denial.

Claimant, a 62-year-old edge glue operator, alleges he received a compensable injury to his low back on March 26, 1976 when he slipped and twisted his back while setting up his machine. The injury was diagnosed as lumbosacral sprain with upper and lower thoracic sprain along with radiculitis and parathesia of the left and right lower extremities. Dr. Lynch felt that claimant's condition was causally related to his work-connected activities of March 26, 1976. After chiropractic adjustments from March 31 to June 11, 1976, claimant was considered medically stationary on June 30, 1976.

Claimant did not report his injury until March 31 which was well within the time limit of the Workers' Compensation Board. He officially retired the next day and attributed this action to his alleged injury.

Some facts of consequence noted by the Referee are as follows: Claimant did not show up for an appointment with Dr. Anderson requested by the carrier and no reasonable explanation was given for this; after "retiring" from his job, claimant filed for unemployment benefits, which were denied; and, claimant was not available for a medical examination on June 30, 1976 as he was out of the state at the time.

The Referee felt that claimant did prove, by a preponderance of the evidence, that his condition was compensable. He found claimant and his wife's testimony was suspect, but considered it credible. The reports of Dr. Lynch seem to substantiate the fact of claimant's injury and the resulting symptomatology. The question raised concerning the medically stationary date of June 30, 1976 as being in error because claimant was out of the state at that time was of little concern to the Referee, as medical reports often have typographical errors in them.

The Referee also found that claimant was entitled to penalties and attorney's fees because of the carrier's failure to deny the claim in a timely manner in accordance with ORS 656.262(5). He did not feel the denial was inappropriate in light

of the circumstances surrounding claimant's alleged injury such as his retirement, attempt to draw unemployment benefits and his failure to show up for an examination at the request of the carrier. He ordered that the carrier accept the claimant's claim and pay compensation as provided by law.

The Board, on de novo review, concurs with the Referee that the claimant has proven by the preponderance of the evidence that his claim is compensable.

The Board disagrees with the Referee that the conduct of the employer justifies a penalty.

ORDER

The order of the Referee, dated January 24, 1977, is modified to the extent that the penalty is set aside. The Opinion and Order is affirmed in all other respects.

There were no briefs submitted by the parties, therefore no attorney fee is justified.

WCB CASE NO. 76-2678 AUGUST 23, 1977
WCB CASE NO. 76-2679

MICHAEL GILROY, CLAIMANT
Sidney Galton, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests review and Employee Benefits Insurance Company cross-requests review by the Board of the Referee's order which remanded the claimant's two claims to both carriers for acceptance and payment of compensation until closure is authorized at which time they may apportion the disability now existent, if any, between the two carriers; assessed a penalty against the Fund in the amount of 25% of compensation for temporary total disability due and owing to claimant under the terms of this order of the Referee and that the Fund shall reimburse the EBI Company for time loss benefits it has paid to claimant; and assessed an attorney fee in the amount of $600 against both carriers.

Claimant sustained the first compensable injury on March 18, 1974 dislocating claimant's right shoulder. This claim was closed on August 20, 1974 without any award for permanent partial disability. SAIF was the workmen's compensation carrier at that time.

The second injury occurred on April 21, 1976 when the claimant slipped and fell on the stairs of the employer's premises again dislocating the shoulder. At this time the carrier for the employer was EBI which issued a denial of this injury on June 14, 1976. On May 27, 1976, EBI commenced payments of compensation for temporary total disability from May 25, 1976 to June 11, 1976. EBI had received the Form 801 between May 25, 1976 and June 2, 1976.

On June 10, 1976, the Fund received a report from Dr. Berselli concerning the recurrent dislocation of claimant's shoulder and how it became progressively easier to dislocate and that surgery was necessary. On June 10, the Fund received a report of the surgery. These two reports received by the Fund constituted a claim for aggravation. There appears to have been some confusion in the Fund's office and on June 17, 1976 an adjuster for the Fund advised claimant's attorney that she had received no medical for claimant's claim of aggravation. There was considerable testimony at the hearing as to this confusion and an apparent breakdown of interoffice communication which the Referee found to be credible, however, he found this does not release the Fund from properly performing their duty in the administration of handling claims. Therefore, this conduct constitutes unreasonable delay in the payment of compensation.

Dr. Berselli testified in his deposition that claimant's fall, causing the second injury, "crystalized claimant's problem" and added additional permanent damage.

The Referee found that the claimant had sustained both a new injury and an aggravation of the old injury and he ordered that which appears in the first paragraph of this order.

The Board, on de novo review, finds that the medical evidence supports that conclusion that there was a distinct and identifiable new trauma which did cause some additional permanent damage.

Following the Massachusetts-Michigan rules the liability must be assigned to the last injurious exposure, the trip and fall on April 21, 1976, and therefore is the responsibility of Employee Benefits Insurance Company.

The Board concludes that the claimant suffered a new compensable injury.

ORDER

The order of the Referee, dated January 4, 1977, is reversed.

The denial of the State Accident Insurance Fund of the aggravation claim is affirmed.

Claimant's claim for a new injury of April 21, 1976 is

remanded to the employer and its carrier, Employee Benefits Insurance, to be accepted for the payment of compensation as provided by law and until the claim is closed pursuant to ORS 656.268.

The attorney's fee granted by the Referee, payable by Employee Benefits Insurance, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by Employee Benefits Insurance.

WCB CASE NO. 76-5172 AUGUST 23, 1977

M. GREG HAZLE, CLAIMANT
Peter O. Hansen, Claimant's Atty.
Michael D. Hoffman, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer has requested Board review of the Referee's order which remanded claimant's claim to the employer-carrier with the instructions to reopen the claim effective August 10, 1976 for temporary total disability from that date and to continue until termination is authorized under the provision of ORS 656.268.

In issuing his order, the Referee relied upon the opinion of Dr. Hickman that with regard to claimant's emotional condition it was unlikely claimant was in a stationary status at the time of claim closure.

Claimant received a compensable injury on January 6, 1976 which was diagnosed as an acute lumbar sprain by Dr. Ferrante who treated claimant by chiropractic manipulation.

On May 5, 1976, claimant was examined by Dr. Pasquesi who found the claimant to be medically stationary and recommended claim closure. He opined that claimant's impairment was 10% based on his chronic lower lumbar pain. Both Dr. Pasquesi and Dr. Ferrante recommended retraining.

On June 23, 1976, claimant was enrolled in the Disability Prevention Division and was examined by Dr. Van Osdel who noted the presence of a moderately severe depressive reaction, but concluded that claimant's vocational handicap was "mild" and that claimant was medically stationary. The DPD Psychology Team report dated July 29, 1976 noted that although claimant had been employed as an industrial maintenance mechanic for 13 years, that he had varied employment experience as credit manager, truck dispatcher and relief driver, reservation supervisor and travel agent for a car rental company. His performance IQ was in the very superior range and

claimant also qualified for 61 of the 62 occupational aptitude patterns on the GATB.

Dr. Hickman, who examined claimant in November 1976, noted that claimant had remarkable strong aptitudes and constructive personality resources but had no special training and was not qualified for light work. He felt claimant was suffering from moderately severe depressive reactions because he was unable to work and recommended reopening the claim for psychological treatment, psychotherapy, educational and vocational counseling.

Dr. Arlen Quan, psychiatrist, examined claimant on December 20, 1976 and stated he found claimant's intellectual ability appeared to be high-average or better and there was no significant psychological disorder. He could find no psychiatric causes which would preclude claimant's returning to some type of gainful work.

The Referee ordered the claim to be remanded to the employer-carrier and reopened as of August 10, 1976 until termination authorized by ORS 656.268. This decision was based on the finding that claimant needed psychological counseling and still required weekly chiropractic treatments.

The Board, on de novo review, does not concur with the findings of the Referee.

Regarding the chiropractic treatments administered by Dr. Ferrante after August 10, 1976, the Board notes that such medical services are palliative and do not preclude claim closure upon the finding of a medically stationary condition.

In his finding that this claim should remain open for psychological counseling, the Referee relied exclusively on the report of Dr. Hickman. This report is countered by the medical reports of the DPD staff, Dr. Pasquesi and Dr. Quan. The Board finds that claimant did not meet his burden of proving by a preponderance of the evidence that his medical condition was not medically stationary.

By incorrectly reopening, the Referee did not consider the issue of the extent of claimant's permanent partial disability. Claimant was awarded 5% unscheduled disability by the Determination Order issued September 20, 1976. The Board concludes claimant does have some residual unscheduled disability and after consideration of Dr. Pasquesi's report and other additional medical evidence, finds claimant is entitled to an award of 15% unscheduled low back disability, an increase of 10%.

ORDER

The order of the Referee, dated January 21, 1977, is reversed.

The Determination Order dated September 20, 1976 is hereby reinstated in all respects except as to the extent of permanent partial disability.

Claimant is granted 15% for unscheduled permanent partial disability. This is in lieu of the award granted by the Determination Order.

Claimant's counsel is awarded as a reasonable attorney's fee 25% of the increased compensation awarded claimant by this order.

WCB CASE NO. 75-3957 AUGUST 23, 1977

ROBERT L. SEELYE, CLAIMANT
Allan B. deSchweinitz, Claimant's Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks Board review of the Referee's order which affirmed the Second Determination Order of September 4, 1975 which granted claimant an award of 6.75 degrees for 5% loss of the left foot. Claimant contends that he is entitled to additional disability and vocational rehabilitation benefits.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated May 6, 1976, is affirmed.

WCB CASE NO. 76-1567 AUGUST 23, 1977

EVELYN SERJEANT, CLAIMANT
William Thomas, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks Board review of the Referee's order which granted her an increase of permanent partial disability for a total award of 80% equal to 256 degrees. Claimant contends that she is permanently and totally disabled as a result of her industrial accident.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 28, 1977, is affirmed.

CLAIM NO. C604-7080 AUGUST 23, 1977

ELSIE MAE SMITH, CLAIMANT
Own Motion Determination

Claimant suffered an industrial injury on April 1, 1967 while working as a nurse's aide for Portland Adventist Hospital. The initial diagnosis was lumbosacral strain for which she was treated conservatively. Her claim was closed July 27, 1969 with an allowance for medical treatment only. After a reopening shortly thereafter, the claim was again closed on August 10, 1969 with no award.

On April 13, 1971, after her claim was again reopened, claimant underwent a laminectomy with decompression of nerve roots at L4-5 and L5-S1 levels. She suffered pain in her left lower hip and lower extremity, but returned to lighter work as a ward clerk. The claim was again closed on November 24, 1971 with an award of temporary total disability and 29 degrees (15%) unscheduled disability of the low back.

After reopening in August of 1973, claimant again had surgery which included a laminectomy and bilevel fusion from L4 to S1. Closing reports indicated that the surgery was successful and her loss of function due to the injury was moderate. She could return to her lighter job as a ward clerk.

On August 27, 1975 the claim was again closed with an additional award of 15% unscheduled disability to the low back.

Claimant's claim was reopened on November 2, 1976 when the carrier had the claimant admitted to the Pain Center. Claimant did well in this program, although it was recommended that she avoid heavy lifting. She received psycho-therapy from Dr. Stolzberg primarily for reaction to her husband's recent death.

On a follow-up check at the Pain Center in April, 1977, claimant's condition had been maintained.

On June 30, 1977, the employer requested a determination. The Evaluation Division of the Board indicated that claimant has received an adequate award of permanent partial disability in the

amount of 30%. They felt that claimant was entitled to time loss benefits from November 2, 1976 through November 18, 1976 and for one day on April 13, 1977, less time worked.

ORDER

Claimant is hereby granted time loss payments from November 2, 1976 through November 18, 1976 and also for April 13, 1977, less time worked.

WCB CASE NO. 75-5239 AUGUST 23, 1977

In the Matter of the Compensation of
MARY E. SMOTHERMAN, CLAIMANT
And in the Complying Status of
JOHN P. GLANTZ and GERALDINE DESHASIER,
dba Johnnie's Diner, Employer
Orlin Anson, Claimant's Atty.
Chester Scott, Defense Atty.
Carl M. Davis, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The issue involved is whether or not claimant sustained a compensable injury to her leg while working as a cook at the employer's restaurant on June 2, 1975. The employer was a noncomplying employer on this date. SAIF processed the claim pursuant to ORS 656.054, giving notice to the noncomplying employer of its acceptance of the claim as being compensable and the employer requested a hearing denying that claimant's claim was compensable.

Claimant, a 43 year old cook, filed a claim for injury to her left leg, alleging it was hit by a refrigerator door. The diagnosis was deep thrombophlebitis. The Referee, based primarily on lack of credibility of claimant, held that the claimant had failed to prove a compensable injury and ordered the claim be denied.

A noncomplying employer is the "insurer" since the noncomplying employer is liable for all claims costs, administrative costs and claimant's attorneys fees if claimant prevails at a hearing which was requested by the employer. ORS 656.054. Therefore, the noncomplying employer has every right to request a hearing and to deny claimant's claim.

When a claim is denied, it is the claimant's burden to establish by preponderance of the evidence to prove her claim. Matherly v. SAIF, 28 Or. App. 691 (1977) and Zehr v. SAIF, 28 Or. App. 181 (1977). The fact that the employer did not have

workers' compensation insurance in force and thus was a noncomplying employer is irrelevant as to whether or not the claimant was a subject employee or as in this case, the injury arose out of or in the course of her employment. The burden of proof on the claimant to prove her claim is by the preponderance of the evidence and does not shift to the employer merely because he was noncomplying. The fact that SAIF accepted the claim, does not shift the burden of proof from the claimant to the employer. All of the compensation benefits received by the claimant, until such time as all of the facts were determined under oath at the hearing and until the Referee's order denied the claim, are not recoverable from the claimant.

Since the claimant did not prevail at the hearing which was initiated by an employer, claimant's attorneys fee is not payable by the employer pursuant to ORS 656.382.

The Referee held that the claimant failed to prove a compensable injury primarily because of the lack of credibility of the claimant. When the issue turns upon the credibility of witnesses, the Board gives weight to the findings of the Referee who saw and heard those witnesses.

ORDER

The order of the Referee dated January 10, 1977, denying claimant's claim is affirmed.

WCB CASE NO. 76-3950 AUGUST 23, 1977

RELDA UPSHAW, CLAIMANT
Sidney A. Galton, Claimant's Atty.
Roger A. Luedtke, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which remanded the claim to it for acceptance and payment of compensation from and after July 29, 1976 and until the claim is closed. Penalties were also assessed equal to 25% of the compensation due, owing and paid from May 20, 1976 through July 30, 1976.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 25, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $400, payable by the carrier.

SAIF CLAIM NO. FC 157167 AUGUST 24, 1977

JAMES H. BELK, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, a 40-year-old truck driver, sustained a compensable injury on November 7, 1968 when he first fell landing on his outstretched arm and later lost a wrench from his grip while tightening a bolt. Both of these injuries caused a combined impairment to his neck and left arm.

On November 12, 1968, Dr. Meyers diagnosed acute lesion T3 with nerve impingement. Claimant was found to be medically stationary on March 11, 1969 by Dr. Nudelman. On March 27, 1969 a Determination Order was issued granting temporary total disability from November 11, 1968 through March 12, 1969 with no permanent partial disability.

On April 1, 1969 the claim was reopened. That same day Dr. Steele diagnosed claimant's condition as myositis left shoulder secondary to trauma. On July 15, 1969 Dr. Winslow found claimant had a left radicular neuropathy. Two days later Dr. Storino found probable herniated nucleous pulposus C7. On October 13, 1969 Dr. Davis found basically the same thing. A myelogram resulted in negative findings on January 26, 1970.

On August 2, 1971, Dr. Hickman examined claimant and indicated that claimant was suffering from anxiety tension. On September 21, Dr. Parvaresh came to the same conclusion.

After a myelogram, laminectomy and discectomy by Dr. Smith, claimant was found to be medically stationary on February 14, 1972 and an award of 5% was recommended.

Claimant was admitted to the Disability Prevention Center on April 14, 1972 where the diagnosis was "1. Post laminectomy C6-7 left; 2. Left arm radiculitis and atrophy; 3. Obesity." On September 20, 1972 a Second Determination Order was issued granting temporary total disability from April 1, 1969 through April 14, 1972 less time worked and 15% disability of the neck and 10% of the left forearm.

The claim was again reopened on December 19, 1972. After treatment and a myelogram by Dr. Smith, he noted his findings as cervical spondylosis C6-7, obesity and diabetes mellitus. He recommended a cervical fusion if the claimant would lose weight.

On February 19, 1975, the doctor noted that claimant had not lost weight and recommended that the claim be closed. A Third Determination Order was entered on May 15, 1975 which granted temporary total disability from December 19, 1972 through February 19, 1975, and no award for permanent partial disability.

An Opinion and Order issued September 17, 1975 affirmed the closure but granted claimant an additional award of 20% of the neck. The Board affirmed the Hearings Order on March 2, 1976.

The claim was again opened by the insurance carrier. On January 17, 1976 Dr. Hill noted defects at C5-6 and recommended a fusion. On August 25, 1976 an anterior decompression and fusion was performed.

On May 31, 1977, the Orthopaedic Consultants found C7 left radiculopathy, obesity and functional overlay. They found claimant to be medically stationary and recommended job placement services. They felt that the most recent award exceeded claimant's condition by 10%. On June 28, 1977 Dr. Hill concurred with these findings.

On July 13, 1977, the State Accident Insurance Fund requested a determination. The Board's Evaluation Division recommended that claimant be granted additional temporary total disability from January 8, 1976 through June 28, 1977 less time worked and that he receive no additional permanent partial disability.

ORDER

Claimant is hereby awarded temporary total disability from January 8, 1976 through June 28, 1977, less time worked.

WCB CASE NO. 76-5241 AUGUST 24, 1977

WILLIAM K. JOHNSTON, CLAIMANT
Bernard K. Smith, Claimant's Atty.
Merlin Miller, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks Board review of the Referee's order which approved the Determination Order of July 22, 1976 which granted claimant an award of 16 degrees unscheduled disability and dismissed the matter.

Claimant, age 35, slipped and fell while sorting and grading lumber on January 9, 1976. The inital diagnosis was fracture dislocation of the right shoulder. On January 16, Dr. Cook noted his findings as "normal", said claimant was medically stationary and further treatment would be needed only if symptoms persisted. On January 21, the same doctor found claimant was mak-

ing reasonably good progress from a mild soft tissue injury. On May 12, 1976, Dr. Cook noted that claimant would probably have some limitation of motion but would continue to improve. On July 8 of that year the doctor suggested claim closure.

The Determination Order of July 22, 1976 was then issued granting claimant temporary total disability from January 9, 1976 through February 17, 1976 and 16 degrees for injury to his right shoulder.

Claimant contends that he cannot do the same job he was doing at the time of his injury, which apparently was a two-man job. He feels like his arm is going to disengage from his shoulder. He is limited on jobs requiring him to work overhead and needs needs help clearing the lumber chain at times.

The Referee found that the injury was mild and claimant's condition is improving. He noted that claimant's loss of earning capacity is not impaired presently and that the award granted in the Determination Order should not be modified.

The Board, on de novo review, finds that claimant's loss of earning capacity is greater than that awarded by the Determination Order and grants him 48° for 15% unscheduled disability. The Board further finds that the temporary total disability granted claimant should have been awarded through April 8, 1976 instead of February 17, 1976.

ORDER

The order of the Referee, dated January 24, 1977, is modified.

Claimant is granted an increase of 10% for his unscheduled disability; this is in addition to that awarded by the Determination Order. The Determination Order of July 22, 1976 is modified and claimant is granted temporary total disability inclusively from January 9, 1976 through April 8, 1976 and in addition, an award of 10% giving claimant a total award of 48° for 15% unscheduled disability.

Claimant's attorney is hereby granted a reasonable attorney's fee in the sum of 25% of the increased compensation granted by this order, not to exceed $2,300.

WCB CASE NO. 76-3422 AUGUST 24, 1977

GEORGE LAWRENCE, CLAIMANT
J. W. McCracken, Claimant's Atty.
Daryll E. Klein, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests Board review of the Referee's order which awarded claimant an additional 40% for unscheduled disability, bringing claimant's total award for the 1974 industrial injury to 60% unscheduled partial disability. The employer also contends the Referee failed to take into consideration claimant's prior awards of compensation for unscheduled disability.

Claimant sustained a compensable injury to his neck, shoulder area and upper back on September 3, 1974 while pulling on the green chain. His injury has been diagnosed as a thoracic and cervical strain.

Claimant was treated initially by Dr. Erpelding for a muscle sprain. Thereafter Dr. Golden diagnosed the condition as the result of a cervical strain of mild to moderate degree. Dr. Donald J. Schroeder then saw claimant and reported that claimant's physical examination demonstrated essentially a full range of motion of the cervical, thoracic and lumbar spine. It was Dr. Schroeder's opinion that claimant had sustained little, if any, permanent residual disability as the result of the injury. On May 11, 1976 Dr. Schroeder again examined claimant, found claimant's condition was stationary and recommended claim closure. He further reported that claimant would experience "some mild, continued permanent residual disability."

Under the Division of Vocational Rehabilitation, claimant was authorized to be enrolled in six terms of college courses to receive training in food service management; however, claimant attended classes for only approximately one month, then, without notice, discontinued attendance.

His claim was closed by a Determination Order awarding 20% unscheduled disability.

At the time of the hearing claimant complained of limitation of motion of his neck and right arm and neck pain which radiates throughout the shoulder area and the arm. The Referee awarded claimant a total of 60% unscheduled disability.

Based on the medical reports, the Board, on de novo review, considers the award granted by the Referee to be excessive and concludes claimant is entitled to an award of 40% unscheduled disability, particularly in view of the fact that claimant has not demonstrated any aggressive attempts to become gainfully employed or to become retrained. Claimant received two prior industrial

injuries in 1964 and 1969 for which he had received awards of permanent partial disability equaling 60%. ORS 656.222 requires, in determining a disability award for a subsequent injury, that the combined effects of the prior injuries and the claimant's past receipt of benefits for such disabilities be considered. In this unscheduled disability case, we have done so, as did the Referee, in the manner directed.

Green v. SIAC, 197 Or 160, 251 P2d. 437, 252 P2d. 545 (1953). The fact that we have concluded that claimant should receive an award of 40% unscheduled disability for this injury is coincidental and should not be construed as a ruling that successive unscheduled injury awards may not exceed 100% under ORS 656.222. Green, supra, is to the contrary.

ORDER

The order of the Referee, dated January 31, 1977, is hereby hereby modified to grant claimant an award of 40% unscheduled permanent partial disability.

NO NUMBER AUGUST 24, 1977

In the Matter of the Reimbursement of
SCOTT WETZEL SERVICES INCORPORATED
for Temporary Total Disability Paid to
WILLIAM LILLEY
for the period of February 12, 1976 through
July 16, 1976
Order

On August 11, 1977, Scott Wetzel Services Incorporated, (hereinafter referred to as Scott Wetzel), filed a letter petition pursuant to OAR 436-61-055(6), seeking Board consideration of the Compliance Division's refusal to reimburse certain time loss benefits paid to William Lilley after he had become medically stationary.

Official notice of the files of the Workers' Compensation Board reveals that William Lilley, a then 27 year old stock clerk employed by Richey's Market in Corvallis, Oregon, injured his low back on June 5, 1974, while lifting heavy bales of flour.

It was eventually concluded that vocational rehabilitation services would be necessary to return Mr. Lilley to an employable status and he was referred to the Vocational Rehabilitation Division on May 1, 1975 for implementation of a program.

On May 13, 1975, the Board's Evaluation Division issued a WCB Form 1255, advising Scott Wetzel that Mr. Lilley's condition was considered medically stationary as of December 16, 1974, but

that his claim would not be determined since he was in a vocational rehabilitation program.

The Board files reveal that thereafter, Mr. Lilley was not faithful in attending classes which were a part of his vocational rehabilitation plan. As a result, his authorized program was suspended on February 20, 1976.

Scott Wetzel received its copy of the letter of suspension on March 2, 1976.

The Vocational Rehabilitation rules then in effect provided in OAR 436-61-050(1):

> "Temporary disability compensation must continue to be paid a worker who has not returned to his regular employment and whose treating physician has not authorized his return to regular employment until termination thereof is authorized by the Board or during a period of suspension under OAR 436-61-030(2)(b), or following termination under OAR 436-61-030(2)(b)."

Instead of suspending Mr. Lilley's temporary total disability payments, Scott Wetzel continued paying them regularly, even after the Disability Prevention Division terminated his program on March 29, 1976.

The claim should have been immediately submitted for evaluation but Scott Wetzel did nothing but continue to pay time loss.

After termination of his Board authorized program, Mr. Lilley apparently arranged with the Vocational Rehabilitation Division to begin again; under the auspices of the Vocational Rehabilitation Division, in a different vocational rehabilitation program to become a "wholesaler". In case notes dated April 21, 1976, his caseworker indicated an intent to petition the Workers' Compensation Board for reinstatement of his time loss payments but that was never accomplished.

Apparently in early July, however, the Vocational Rehabilitation Division did notify the Board's Disability Prevention Division that Mr. Lilley's wholesaler program was being terminated in view of his plans to go to work as a truck driver as of July 19, 1976. The Disability Prevention Division personnel failed to notice the previous termination letters and therefore, on July 14, advised the worker that his "authorized program" would be terminated 10 days hence.

On July 19, the Vocational Rehabilitation Division terminated their rehabilitation efforts and on July 27, the Disability Prevention Division notified Mr. Lilley his program was terminated.

Copies of both Disability Prevention Division letters to Mr. Lilley were routinely sent to Scott Wetzel.

Also on July 19, 1976, Scott Wetzel prepared a WCB Form 802, reporting that time loss had been paid continuously through July 16, 1976. On August 9, 1976, by means of a phone call, that 802 was converted to a request for determination.

On August 12, 1976, a Determination Order issued declaring the worker's condition medically stationary on December 16, 1974 and awarding time loss through July 26, 1976, less time worked. It was thereafter brought to the Evaluation Division's attention that Mr. Lilley's program had actually been suspended on February 20, 1976 then terminated on March 29, 1976 rather than in July. As a result, on August 27, 1976 an amendment modifying the August 12, Determination Order was issued terminating time loss as of February 20, 1976, less time worked.

On February 23, 1977, the Compliance Division refused to reimburse any time loss paid after February 20, 1976.

Based on the facts we have at hand and the applicable rules, the denial of reimbursement was correct.

As previously noted, OAR 436-61-050(1) provided that time loss was to be suspended when the program was suspended. Scott Wetzel failed to do so in spite of receiving a copy of:

(1) The February 20, 1977 Notice of Suspension letter,

(2) The March 29, 1976 Notice of Termination letter.

The fact that the Disability Prevention Division erroneously sent out another set of termination letters in July after the Vocational Rehabilitation Division contacted the agency is irrelevant. The proximate cause of the overpayment of time loss was Scott Wetzel's failure to process the claim properly in February and March of 1976.

Under these circumstances, they are not entitled to reimbursement.

ORDER

The petition of Scott Wetzel Services Incorporated for reimbursement, dated August 8, 1977, is hereby denied.

WCB CASE NO. 76-3711 AUGUST 24, 1977

MARY LOU MUNYON (SMITH), CLAIMANT
Pozzi, Wilson & Atchison, Claimant's Atty.
Paul Roess, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which ordered that claimant's claim be reopened and that she be paid temporary total disability from May 7, 1976 until claim closure. As a result, the Determination Order of July 6, 1976 was set aside as premature and claimant's aggravation rights would commence to run when the matter was again closed.

Claimant suffered an industrial injury on February 22, 1973 while swinging an 8-pound sledge hammer. The initial diagnosis by Dr. Bunnell was sterno-clavicular strain or separation. She was instructed to do no heavy work for a period of three weeks. On April 9, 1973, Dr. Bunnell released claimant for work.

Dr. Bunnell saw claimant on September 25, 1975 for rather vague arm and neck trouble which she attributed to an industrial injury suffered in 1972. At that time she developed a scratch on her right arm which became infected and drained a purulent material for some three weeks. Since that injury she has had intermittent recurrent pain in her right arm and neck. The doctor's impression at that time was muscular strain syndrome of the right arm which he felt was most likely related to the heavy work claimant does. He recommended a period of rest and a follow-up visit in two weeks.

After continuous treatment by Dr. Bert, he found claimant to be medically stationary on April 8, 1976. On May 7, 1976, Dr. Bert noted that the results from the extensor erasure of her right elbow were satisfactory and that claimant's claim could be closed. Subsequently, the July 2, 1976 Determination Order was entered awarding temporary total disability and no permanent partial disability.

After the entry of the Determination Order, claimant continued to see Dr. Bert complaining of recurrent pain in her elbow. He gave her medication for her condition and indicated he would check on her periodically.

Claimant has worked for defendant-employer as a utility worker since 1972. She pulls substandard logs from the mill pond along with clean-up duties and other rather hard labor.

The Referee found that, despite the confusion of whether claimant's injury occurred in 1972 or 1973, there is no doubt that she did suffer a compensable industrial injury which has been accepted by the employer. She feels that her problem is related to

the 1972 injury and that her condition relating to the 1973 injury is cleared up. Dr. Bert feels that her condition is related to the heavy work that she does. The date is really of little importance; the question before the Referee was whether claimant has ever become medically stationary.

The Referee relied entirely upon claimant's testimony as the employer did not present any testimony to support their position. She stated that the doctor released her to light work only and that she was never released for full time employment. At this time she is back under the treatment of Dr. Bert and the Referee felt that the claim closure and subsequent Determination Order were premature. He ordered the claim be reopened and the defendant-employer pay claimant temporary total disability from May 7, 1976 until claim closure pursuant to ORS 656.268.

The Board, on de novo review, finds that the claimant's treating physician found the claimant to be medically stationary as of April 8, 1976. The treating physician, on May 7, 1976, after examination, again found the claimant to be medically stationary, the date so found by evaluation. The Board concurs with the Determination Order.

The Board finds, however, that the claimant does have some some permanent impairment and finds this to be 15% of an arm.

ORDER

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

The Determination Order mailed July 2, 1976 is reinstated and modified by granting an award of 15% loss of an arm.

The employer is authorized to offset payments of temporary total disability as ordered by the Referee from the award granted by this order.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in the amount of 25% of the increase in compensation, not to exceed $2,000. Any attorney fee payments received by claimant's attorney under the order of the Referee shall be considered as part payment of the attorney fee allowed hereby.

WCB CASE NO. 76-1756 AUGUST 26, 1977

FRANCIS CABAL, CLAIMANT
Flaxel & Todd, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which awarded the claimant 80° for 25% unscheduled permanent partial disability for an industrial injury to the low back. SAIF contends that this award should be reversed.

Claimant, at the time a 46-year-old sawmill edgerman, injured his low back on November 8, 1973 while lifting a cant. The injury was diagnosed as a low back strain with sprain of the lumbar and lumbosacral articulations. Treatment was conservative.

The attending orthopedist's impression on closing examination is that claimant probably has a herniated disc at L5 on the right and that he will probably have recurrent episodes.

Claimant wears a back brace but still has back pain radiating to both legs. In spite of this, he has returned to his former employment.

The Determination Order of March 23, 1976 granted claimant temporary total disability from November 9, 1973 through April 30, 1974 and an unscheduled disability award of 32 degrees for 10% disability as a result of his low back injury.

Although the Referee recognized claimant had successfully returned to his former employment with his former employer, he believed claimant would probably have trouble finding employment if he had to change employers in the future. Based on that consideration plus the claimant's age, education, work experience together with his return to regular employment with chronic pain, the Referee found claimant was entitled to an award of unscheduled permanent disability equal to 25% of the maximum.

The Fund contends the Referee erred in considering possible future job change difficulties in evaluating claimant's loss of wage earning capacity.

While it is proper to take into account those future wage earning capacity consequences which are reasonably certain to occur, the Board believes the Referee's award is excessive in light of claimant's particular skills and his current success in meeting the physical demands of the job.

The Board, on de novo review, concludes claimant is entitled to 20% unscheduled disability.

Mr. Todd, claimant's attorney, points out that the attorney fee agreement signed by the claimant and Mr. Todd provided that the fee should "not exceed 20% of the additional compensation secured . . .". The Referee inadvertently awarded the usual 25% as an attorney's fee. The Referee's order should be modified in that respect also.

IT IS HEREBY ORDERED that the Referee's order entered December 21, 1976 is hereby set aside and in lieu thereof claimant is

granted an award of 64° or 20% of the maximum allowable for unscheduled disability, being an increase of 32°.

IT IS HEREBY FURTHER ORDERED that claimant's attorney receive 20% of the increased compensation awarded hereby as a reasonable attorney's fee.

WCB CASE NO. 76-1654 AUGUST 26, 1977

LILI FOLK, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of that portion of a Referee's order which granted claimant 160° for 50% unscheduled disability, contending she is permanently and totally disabled.

On June 23, 1973, claimant, then a 57-year-old LPN, suffered a compensable injury to her low back. In March 1974 claimant returned to work and a Determination Order dated July 15, 1974 granted her time loss only. Thereafter she terminated her employment, was hospitalized and eventually underwent a laminectomy in November 1974. On October 2, 1975 a Second Determination Order granted claimant 96° for 30% unscheduled disability.

On January 19, 1976 claimant was again hospitalized for another myelogram which proved negative.

On August 25, 1976, Dr. Nash examined claimant and indicated that in May 1975 claimant had been provided with a stimulator which had lessened her pain symptoms. Dr. Nash diagnosed intractable pain, which he felt was permanent and that claimant is unable to be gainfully employed with her present complaints and objective complaints and he inferred that she is permanently and totally disabled.

The Referee found a considerable disparity between her subjective complaints and the objective findings. He found claimant was not permanently and totally disabled and granted claimant an award of 160° for 50% unscheduled disability.

The Board, on de novo review, agrees that claimant is not permanently and totally disabled and that the Referee's order should be affirmed.

ORDER

The order of the Referee, dated February 10, 1977, is affirmed.

WCB CASE NO. 76-4345 AUGUST 30,1977

In the Matter of the Compensation of
MARK BIERMAN, CLAIMANT
and The Complying Status of
JERRY K. FLETCHER, Employer
Lyman Johnson, Claimant's Atty.
William P. Colton, Defense Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which made the Proposed and Final Order, executed by Thomas K. Bowman,of the Board's Compliance Division, on August 9, 1976, a final order.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 4, 1977, is affirmed.

Claimant's attorney is allowed a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, to be paid by the State Accident Insurance Fund and reimbursed by the Workers' Compensation Board from the employer pursuant to ORS 656.054.

WCB CASE NO. 76-4754 AUGUST 30, 1977

GERALD B. BLOORE, CLAIMANT
Ben T. Gray, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of a Referee's order which affirmed SAIF's denial of his request for further medical treatment and vocational rehabilitation.

On July 11, 1974 claimant, who is presently 60 years of age, injured his right eye in an industrial injury. On November 19, 1974 claimant was granted an award of 100% loss of an eye. He returned to work for the City of Portland in December, 1974. The employer allowed him to work a six-hour day during the winter months when the days were short because of his having to drive to work with one eye. Claimant testified that thereafter he felt he had been harrassed at work and when his social security benefits arrived he quit working and has not worked since. On December 4, 1974 claimant requested a lump sum payment on that award and received it.

On November 24, 1976 Dr. Wesche, a psychiatrist, examined claimant and found him doing poorly psychologically. In his opinion, the loss of his eye had triggered the problems which occurred when he returned to work and for the problems which he has had since quitting work. Dr. Wesche felt claimant could work with special accommodations made for his physical limitations.

On December 16, 1976 Dr. Hickman evaluated claimant. Dr. Hickman diagnosed a moderately severe anxiety tension reaction with depression and rather extreme preoccupation with physical and emotional complaints. He found this psychopathology significantly related to the injury with a grave danger that claimant would suffer significant permanent psychological disability as a result of this injury. He strongly recommended psychotherapy and vocational help or claimant could become permanently and totally disabled.

Claimant testified that after he quit working he didn't go to the employment office because while on social security he was not employable. Claimant further testified he would forego social security for a good employment position.

The Referee found, based on the evidence and observation of claimant, that he would go to work if the job was of his own choosing. He concluded that claimant is not entitled to counseling or retraining and affirmed the denial.

The Board, on de novo review, finds that claimant is medically stationary and therefore his claim should not be reopened. We conclude, however, claimant is entitled to the recommended psychotherapy under the provisions of ORS 656.245 in order to aid his adjustment to his condition as a partially disabled worker. The Board also strongly urges claimant to contact a service coordinator to explore job placement possibilities.

ORDER

The order of the Referee, dated March 17, 1977, is reversed.

The State Accident Insurance Fund is hereby ordered to provide psychotherapy to the claimant under the provisions of ORS 656.245.

Claimant's attorney is hereby awarded an attorney's fee of $600 payable by the State Accident Insurance Fund for his services at the hearing and on this review.

WCB CASE NO. 76-3604 AUGUST 30, 1977

CHARLES CHILSON, CLAIMANT
A. W. Metzger, Claimant's Atty.
SAIF, Legal Services, Defense Atty
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded the claim to it for acceptance and payment of compensation to claimant.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 10, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $150, payable by the State Accident Insurance Fund.

WCB CASE NO. 76-6166 AUGUST 30, 1977

LORA DAVIS, CLAIMANT
Peter S. Rudie, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the employer's denial of September 24, 1976.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof. An error in the Opinion and Order should be amended as follows: on page 1, paragraph 2 of the Findings portion of the order, line 1, the year mentioned there should be 1975 rather than 1966. The order should be corrected to reflect this change.

ORDER

The order of the Referee, dated January 12, 1977, is affirmed.

WCB CASE NO. 77-2078 AUGUST 30, 1977

ROSALIE FASSETT, CLAIMANT
Keith D. Skelton, Claimant's Atty.
G. Howard Cliff, Defense Atty.
Order of Dismissal

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

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

WCB CASE NO. 76-5852 AUGUST 30, 1977

ROY B. FRENCH, CLAIMANT
Richardson, Murphy & Nelson, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith, Defense Atty.
Request for Review by Claimant
Cross-request by Employer

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which granted claimant 60% unscheduled disability, an increase of 30% over the award granted by the October 11, 1976 Determination Order. Claimant contends that he is permanently and totally disabled. The employer issued a cross-request of the Referee's order contending that the award granted was too high and should be reduced to 40% unscheduled disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 25, 1977, is affirmed.

WCB CASE NO. 76-3103 AUGUST 30, 1977

DeLARIS A. HARMON, CLAIMANT
Gary D. Rossi, Claimant's Atty.
Malagan, Starr & Vinson, Claimant's Atty.
SAIF, Legal Services, Defense Attyl
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which awarded claimant 60% unscheduled permanent partial disability. SAIF's contention is that this award is much too high.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 28, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the State Accident Insurance Fund.

WCB CASE NO. 75-5418 AUGUST 30, 1977

WALTER HILL, CLAIMANT
Larry Dawson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which awarded claimant permanent total disability. The SAIF contends that the 35% unscheduled disability award of the December 31, 1974 Determination Order was adequate.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 1, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, payable by the State Accident Insurance Fund.

WCB CASE NO. 76-1965 AUGUST 30, 1977

EDWARD KEECH, CLAIMANT
James H. Lewelling, Claimant's Atty.
Roger A. Luedtke, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which affirmed the carrier's denial of April 7, 1976.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

WCB CASE NO. 76-1864 AUGUST 30, 1977

MARION KIZER, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded the claimant's aggravation claim to it for acceptance and payment of compensation.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

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

WCB CASE NO. 76-5074 AUGUST 30, 1977

NAOMI SCHROEDER, CLAIMANT
Bailey Doblie & Bruun, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which granted claimant an award of permanent partial disability equal to 80°, an increase of 48° over the Determination Order of August 19, 1976. Claimant contends that the award is still inadequate.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 10, 1977, is affirmed.

WCB CASE NO. 75-180-E AUGUST 30, 1977

WILBERT SERLES, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which modified the Determination Order of October 30, 1974 and

granted him 60% (192°) unscheduled permanent partial disability. Claimant contends that he is permanently and totally disabled and that the Determination Order should be reinstated.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

WCB CASE NO. 76-3463 AUGUST 30, 1977

JIM D. SMALLEY, CLAIMANT
Flaxel & Todd, Claimant's Atty.
SAIF,Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The issues for Board review are the extent of scheduled permanent partial disability and attorney's fees and penalties for failure by SAIF to pay temporary disability from January 27, 1976 to April 5, 1976 as ordered by the Determination Order.

Claimant, an 18-year-old laborer at a seafood processing plant fractured his right arm when he was caught in a roller on August 16, 1975. Open reduction with a plate and screws on the bone was performed immediately. X-rays taken January 7, 1976 still showed the fracture site and that the plate could not be removed at that time. In fact, by examination of April 5, 1976 and x-rays taken at that time, the attending orthopedist recommended that the plate and screws not be removed for another six months or so. Claimant desired to go to work full time and asked the attending doctor for a regular duty slip so that the claim could be closed as of April 5, 1976.

The Determination Order issued June 8, 1976 ordered SAIF to pay temporary total disability from August 17, 1975 through January 7, 1976 and temporary partial disability from January 8, 1976 through April 5, 1976 and awarded the claimant 10% (15°) loss of the right forearm.

The Referee, in her Opinion and Order, again ordered SAIF to pay temporary disability from January 8, 1976 through April 5, 1976 less time actually worked and affirmed the 10% (15°) award for permanent partial scheduled disability.

The record clearly shows that as of the date of the hearing, December 8, 1976, SAIF had paid no temporary total disability

to the claimant for the period of January 8, 1976 to April 5, 1976 and further that SAIF had a certification from the claimant dated June 19, 1976 that he had had no earnings during the period in question and further had completely ignored the Determination Order of June 8, 1976 regarding payment of temporary disability for the period in question.

The Referee's Opinion and Order merely ordered SAIF again to do that which the Determination Order had ordered as to temporary disability for the period of January 8, 1976 through April 5, 1976 and which SAIF had ignored, but also by the amended order took from the claimant by ordering claimant's attorney's fees to be paid from claimant's compensation. The amended order also denied penalties and attorney's fees payable by SAIF apparently under the theory that this issue was not raised at the hearing.

The request for a hearing clearly shows that the issues were the extent of permanent disability, temporary total disability, and temporary partial disability. The opening remarks at the hearing when the Referee was defining the issues specifically reflects that temporary disability from January 8 to April 5 was an issue in that SAIF had not paid this temporary disability even though the Determination Order had previously ordered SAIF to so pay.

The Board finds that SAIF's refusal to pay temporary disability from January 8 to April 5, 1976 as ordered by the Determination Order is unreasonable resistance to the payment of compensation. SAIF must pay a penalty and claimant's attorney's fees.

The Board finds that claimant is entitled to 10% of the temporary total disability which SAIF refused to pay from January 8 to April 5, 1976. Claimant's attorney's fees are to be paid by SAIF and not deducted from claimant's compensation.

The Board affirms the Determination Order that claimant is entitled to 10% (15°) scheduled right arm disability.

ORDER

The order of the Referee, dated January 5, 1977, and the amended order of the Referee, dated January 19, 1977, is modified.

The Determination Order dated June 8, 1976 awarding claimant 10% (15°) scheduled loss of the right forearm and temporary disability from August 17, 1975 through April 5, 1976 less time worked is affirmed.

Claimant is entitled to and SAIF will pay claimant 10% of the temporary disability payments due the claimant from the period of January 8, 1976 through April 5, 1976.

Claimant's attorney's fees, in the amount of $500 payable by SAIF and not payable out of the compensation of the claimant for services at the hearing and at Board review, are ordered.

WCB CASE NO. 76-3721 AUGUST 30, 1977

CHARLES E. STEVIE, CLAIMANT
Willner, Bennett, Riggs & Skarstad, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which affirmed the carrier's denial of his claim and dismissed the matter.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated March 1, 1977, is affirmed.

WCB CASE NO. 76-3011 AUGUST 30, 1977
WCB CASE NO. 76-4316

JESSE STILTNER, CLAIMANT
Jackson & Coughlin, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which remanded the claim to it for acceptance of claimant's aggravation claim and for payment of compensation.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 28, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the carrier.

WCB CASE NO. 76-732 AUGUST 30, 1977
WCB CASE NO. 76-733

TERRY WALLACE, CLAIMANT
Coons & Anderson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of that portion of the Referee's order which affirmed the denial of the Fund and suspended claimant's compensation until such time as he submits to such medical or surgical treatment as is felt to be necessary to promote his recovery.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated March 8, 1977, is affirmed.

WCB CASE NO. 76-4690 AUGUST 30, 1977

JAMES B. WILSON, CLAIMANT
Elden M. Rosenthal, Claimant's Atty.
SAIF, Legal Division, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the State Accident Insurance Fund's denial of July 30, 1976.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated May 4, 1977, is affirmed.

WCB CASE NO. 77-1062 SEPTEMBER 7, 1977

MARGARET CRAIG, CLAIMANT
Larry Dawson, Claimant's Atty.
Gearin, Cheney, Landis, Aebi & Kelley, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which granted her 30° permanent disability, being an increase of 15° over the Determination Order of January 18, 1977. Claimant contends that she is entitled to a greater award of disability.

Claimant, age 53, twisted her left ankle while working as a nurse's aide on January 7, 1975. Dr. Waldram noted on March 11, 1975 that claimant suffered an ankle sprain which may have irritated her pre-existing arthritis in the knee. He did not anticipate any permanent disability as a result of her injury and felt that any problems in the future would be due to her arthritis condition.

On October 17, 1975, the Orthopaedic Consultants felt that claimant was medically stationary and that she could return to her same occupation with some limitations. The loss of function to her ankle was mild and to her knee was minimal. There was slightly more loss of function to the knee in connection with claimant's arthritis, but this was not related to the industrial injury. Dr. Waldram concurred with these findings. The Determination Order of March 10, 1976 was then issued granting claimant temporary disability and 15° for 10% loss of her left leg.

Apparently without the knowledge of the Evaluation Division, claimant entered in a program at the Disability Prevention Division. She started a course of schooling which she did not finish because walking on campus caused exacerbation to her ankle and knee. On April 30, 1976 an Interim Order was issued by the Evaluation Division setting aside the Order of March 10, 1976. This order credited any compensation paid as temporary total disability and stated that any time loss paid after February 2, 1976 was reimburseable from the rehabilitation reserve fund. On January 18, 1977 a Determination Order was issued which granted claimant temporary total disability, temporary partial disability and 15° for 10% loss of the left leg.

Two letters to the claimant from the carrier informed her that she had been overpaid and no additional benefits were due her. An obvious error was found in the Determination Order which caused an overlapping of benefits from March 17, 1975 until May 16, 1975. Since claimant was found to be medically stationary on February 2, 1976, the Referee found that any time

loss paid to her after that date was reimburseable pursuant to the Interim Order of April 30, 1976. Also, any time loss paid claimant for the period ending February 2, 1976 in excess of that granted by the Determination Order of January 18, 1977 was subject to offset as an advance payment on the permanent partial disability award.

The Referee found claimant to be well motivated and no significant emotional problems resulted from her injury. Her main complaints are compounded by her pre-existing arthritic condition. The Referee felt that she was entitled to 64° for 20% loss of function of the left leg being an increase of 15% over the Determination Order of January 18,1977.

The Board, after de novo review, concurs with the conclusions of the Referee. However, an error in the January 18, 1977 Determination Order must be corrected to show claimant's medically stationary date as February 2, 1976 as is indicated in the Interim Order of April 30, 1976.

ORDER

The order of the Referee, dated April 29, 1977, is affirmed.

WCB CASE NO. 76-4357 SEPTEMBER 7, 1977

CHARLES MUMPER, CLAIMANT
Robert J. Morgan, Claimant's Atty.
Scott M. Kelley, Employer's Atty.
Stipulated Order

Claimant received a compensable injury on September 23, 1972, consisting of an injury to the low back. He received workmen's compensation benefits. By determination order of March 29, 1974, claimant was granted 35 per cent unscheduled permanent partial disability and by stipulated order of September 12, 1975, was granted an additional 25 per cent unscheduled, for a total of 60 per cent unscheduled permanent partial disability.

Thereafter claimant contended that his condition had become aggravated and that he is permanently and totally disabled and made a request for hearing. A hearing was held and the referee did not find that claimant's condition had become worse since September 12, 1975. The claimant thereupon requested a review by the Workmen's Compensation Board.

The parties have agreed to resolve the present dispute as to the compensability of the claim of aggravation on a disputed claim basis as follows:

It is agreed by the claimant individually and by Robert J. Morgan, his attorney, and by the subject employer,

Hudson House, and Industrial Indemnity Company, its workmen's compensation carrier, by and through Scott M. Kelley of its attorneys, that the carrier shall pay to the claimant the sum of SIX THOUSAND DOLLARS ($6,000) in a lump sum, as a full and final settlement between the parties, under the provisions of ORS 656.289 (4), as to the present claim of aggravation, and the payment of such sum shall put an end to the claimant's present claim of aggravation, but reserving to the claimant his rights of aggravation for the low back injury of September 23, 1972, which rights of aggravation expire on March 29, 1979.

It is further agreed that out of the said sum of $6,000 there shall be paid to Robert J. Morgan the sum of $1,500 for his attorney's fee.

Wherefore, the parties hereby agree to and join in this petition to the board to approve the foregoing settlement and to issue an order approving this compromise, concluding this claim, and dismissing the claimant's request for review.

I have read the foregoing agreement, and my attorney, Robert J. Morgan, has advised me as to its meaning. I understand it and agree to it freely and voluntarily, and this settlement is entirely satisfactory.

WCB CASE NO. 76-5309 SEPTEMBER 7, 1977

SUSIE NORRIS, CLAIMANT
Bailey, Doblie & Bruun, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The issue is the reasonableness of attorney's fees for claimant's attorney in the amount of $700 which the Referee ordered SAIF to pay.

SAIF, admittedly in error, stopped payment of temporary total disability payments. This was the second time this particular claimant's compensation had been stopped by SAIF in error. Claimant obtained an attorney and there were substantial discussions between claimant's attorney and SAIF's claims personnel regarding penalties and attorney's fees. The Referee found, based on claimant's time records, that a reasonable attorney's fee in the amount of $700 payable by SAIF was a reasonable attorney's fee for the attorney's services in securing compensation for the claimant and at the hearing.

SAIF's contention on Board review is that claimant had a similar problem previously and all she had to do was call SAIF

who would have immediately corrected it, but instead she went to an attorney. SAIF forgets that it has a duty to process the claim correctly without stopping temporary total disability twice improperly. SAIF's contention is that claimant should not have obtained an attorney and that, since claimant's attorney would not accept SAIF's judgment as to the appropriate attorney's fees, claimant's attorney's time spent is unreasonable. These contentions and inferences are not well taken.

SAIF started this problem by twice improperly interrupting the claimant's compensation and continued the problem through hearing and Board review as to reasonableness of attorney's fees. Claimant's attorney's fees are verified by time records which appear accurate and reasonable under the facts of this case.

Since SAIF requested Board review, claimant's attorney is entitled to fees payable by SAIF. Unfortunately, claimant's brief was not timely filed and therefore will not be considered in this case as to reasonable attorney's fees payable by SAIF to claimant's attorney for his services at Board review.

ORDER

The order of the Referee, dated March 3, 1977, is affirmed.

Claimant's attorney is allowed a reasonable attorney's fee in the amount of $100 payable by SAIF for his services on Board review.

WCB CASE NO. 76-5991 SEPTEMBER 7, 1977

RAYMOND A. PEARSON, CLAIMANT
John G. Cox, Claimant's Atty.
Edward V. O'Reilly, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The issue is whether or not the industrial injury accelerated claimant's amyotorphic lateral sclerosis condition.

The Board adopts the well written and well reasoned opinion of the Referee which is attached hereto and by this reference incorporated herein.

The Board finds that the temporary total disability awarded by the Determination Order which was affirmed by the Referee from December 12, 1974 to December 22, 1974 to be inadequate. The Board finds that time loss to the claimant is to be paid from December 12, 1974 to November 30, 1975, less time worked.

ORDER

The order of the Referee, dated January 20, 1977, is modified to the extent that temporary disability is payable to the claimant to November 30, 1975, less time worked. In all other respects, the order of the Referee is affirmed.

WCB CASE NO. 76-2611 SEPTEMBER 7, 1977

PRISCILLA YOST, CLAIMANT
Flaxel & Todd, Claimant's Atty.
Collins, Velure & Heysell, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the employer's denial of January 10, 1975. The Board finds that, in reality, the issue before the Referee was the Determination Order of March 26, 1976 which granted claimant temporary total disability and no permanent disability. The appeal of the denial was settled by an Opinion and Order of Referee Fitzgerald previously. All evidence found in the instant Opinion and Order indicate that the Referee actually did mean to affirm the Determination Order of March 1976 rather than the denial of January 1975. In any event, the claimant is contending that her condition necessitates an award of permanent partial disability.

In November 1974, claimant filed a claim for compensation stating that her female organ and intestinal tract problems were a result of stress on her job as a bank teller. After the employer's denial of January 10, 1975 was issued claimant withdrew her claim that a hysterectomy and any female problems were due to her job. Referee Fitzgerald found that claimant's condition of spastic colitis was related to the stress of her job and remanded the claim to the Fund for acceptance and payment of compensation by law.

Claimant continued under the care of Dr. Potter for quite some time. He found that claimant was having intermittent constipation and diarrhea and a moderate problem with abdominal gas pains. In January 1976 he found claimant moderately improved but indicated that she had been severely disabled in the past. He stated that apparently physical and emotional stress do exacerbate claimant's condition and felt that she could not tolerate employment in the near future.

In February 1976, Dr. Long felt that claimant's problem was that of an irritable colon, but that her main problem was that of nerves. He felt that she could return to work as far as her physical condition was concerned and that her tension was

playing a far greater part in her disability than any physical problems.

Dr. Potter continued to feel that claimant was having too much difficulty physically to return to work and firmly disagreed with Dr. Long's philosophy. However, he did feel that claimant's condition was medically stationary and that any disability claimant had now was due to the "basic severity of her disease" and not to any "lingering trauma from her employment". After this statement from Dr. Potter on March 12, the Determination Order was entered on March 26, 1976 granting claimant no award for permanent partial disability.

Claimant testified at the hearing that her condition has not changed since her claim was closed in March 1976. She states that her "gas" problems are present constantly and causes bloating and water retention together with a lot a pain. She says that she has diarrhea most of the time with intermittent periods of constipation which causes her to become really sick. She feels that she could hold down a job mentally, but that no employer would want to hire her with her need to go to the restroom every ten minutes and the fact that she would probably have to take one day a week off because of her problem.

The Referee found that claimant's claim should not be reopened as all the evidence indicates that claimant is medically stationary. Dr. Potter states that he can do no more for her in the way of treatment, aside from prescribing medication which he is presently doing. There is no medical report subsequent to the March 1976 Determination Order stating that claimant has experienced any change in her condition.

The Referee relies on Dr. Potter's report of March 12, 1976 in respect to the extent of claimant's permanent disability. The doctor stated that any problem claimant was experiencing now should not be the responsibility of the carrier as her current condition is not an exacerbation of her problems caused by her job, but is a result of her underlying disease. The Referee, therefore, found that claimant is not entitled to any award of permanent disability and affirmed the Determination Order of March 26, 1976 (mistakenly shown on the Opinion and Order as the denial of January 10, 1975).

The Board, after de novo review, concurs with the conclusion of the Referee and affirms the Determination Order of March 26, 1976.

ORDER

The order of the Referee, dated February 4, 1977, is affirmed.

WCB CASE NO. 77-7 SEPTEMBER 9, 1977
WCB CASE NO. 77-2421

JAMES R. BARR, CLAIMANT
James F. Larson, Claimant's Atty.
Allen W. Lyons, Defense Atty.
Stipulation and Order

James R. Barr sustained a compensable low back injury April 12, 1976. This claim was accepted by the State Accident Insurance Fund and assigned SAIF Claim No. YD 189958. The claimant continued working and initially sustained no time loss. The claimant was hospitalized October 4, 1976. The State Accident Insurance Fund subsequently denied any responsibility for treatment or for time loss from October 5, 1976. A hearing was held on this question and on June 7, 1977 Referee issued an opinion and order finding that certain conditions were compensable and that other conditions were not compensable. The Referee also found that the claimant was entitled to temporary total disability benefits from October 4, 1976 through November 12, 1976. This portion of the opinion and order was appealed by the claimant by a request for board review. That opinion and order in that workmen's compensation board review were docketed as WCB Case No. 77-7.

On April 11, 1977, subsequent to the partial denial, but prior to the opinion and order finding certain conditions compensable, a determination order was issued which awarded no compensation for temporary total disability and no permanent disability. The determination order specifically stated that it did not cover any conditions denied by the insurer on January 5, 1977. A timely request for hearing was filed by the claimant on that determination order.

The claimant and the State Accident Insurance Fund now agree and stipulate as follows:

1. The determination order of April 11, 1977 was prematurely issued in view of the referee's decision that certain conditions previously denied were and are compensable.

2. A hearing on the determination order issued April 11, 1977 was premature and the matter should be remanded to the insurer and the closing and evaluation division to be closed pursuant to the provisions of ORS 656.268 and the subsequent determination order should be considered the first determination order for purposes of any future aggravation claims.

3. The issue of temporary total disability and when it should be terminated was not fully presented to the referee and should be determined by the closing and evaluation division. Insofaras the opinion and order of the referee of June 7, 1977 purports to determine the period of temporary total disability it should be set aside. In all other respects the opinion and order of June 7, 1977 should remain in full force and effect and is res adjudicata.

4. The request for hearing docketed as WCB Case No. 77-2421 should be dismissed with prejudice.

5. The request for board review docketed as WCB Case No. 77-7 should be dismissed with prejudice.

6. The claimant's attorney, James F. Larson, should be allowed as reasonable attorney's fees an amount equal to twenty-five per cent (25%) of the increased disability made payable by this order and the subsequent referral to the closing and evaluation division, to be paid from said increase, not to exceed the sum of $500.00 payable from any additional temporary total disability or temporary partial disability and not to exceed an aggregate award of $2,000.00 from any additional temporary total disability, temporary partial disability and permanent partial disability or permanent total disability awarded by subsequent determination order.

It is stipulated this 29th day of August, 1977.

ORDER

Stipulation is approved and it is so ordered.

WCB CASE NO. 76-5378 SEPTEMBER 9, 1977

RONALD CURL, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Atty.
Jones, Lang, Klein, Wolf &
Smith, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the employer's denial of October 20, 1976.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 13, 1977, is affirmed.

SAIF CLAIM NO. GC 20123 SEPTEMBER 9, 1977

NORMAN FOUNTAIN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on May 20, 1966 when he fell while lifting. The first Determination Order was issued on October 3, 1966. Claimant was granted awards from this first order and later orders equal to 50% unscheduled disability. Claimant's aggravation rights expired on October 3, 1971.

The carrier reopened the claim to provide for an aggravation of claimant's condition which required hospitalization on January 25, 1977. He was released by his treating doctor and returned to work on February 15, 1977. His condition is unchanged.

The State Accident Insurance Fund requested a determination on May 6, 1977. The Evaluation Division of the Board recommended that claimant be granted temporary total disability from January 25, 1977 through February 14, 1977 with no increase in permanent partial disability.

ORDER

Claimant is hereby granted temporary total disability from January 25, 1977 through February 14, 1977.

WCB CASE NO. 76-1589 SEPTEMBER 9, 1977

ARNOLD JUVE, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which ordered it to pay claimant permanent total disability as of December 16, 1975, in lieu of the previous award.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated Janaury 4, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $200, payable by the carrier.

WCB CASE NO. 76-3768 SEPTEMBER 9, 1977

ROY C. LUSCH, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
&O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded the claim to it for acceptance and payment of compensation to which claimant is entitled.

Claimant, 25, filed a claim for low back strain after the pain kept him in bed one morning after shoveling pea gravel all day from a truck onto a roof on January 26, 1976. Claimant had no history of back pain until late 1975 when he noticed his back would be sore after a day of heavy work, but he didn't give this too much thought as many of his co-workers had the same problem. On February 2, 1976, claimant went to the doctor who advised symptomatic care and told claimant there was nothing else he could do for him.

Claimant saw Dr. Wells on May 26, 1976 who felt that claimant's condition probably pre-existed his present employment but that the condition was undoubtedly aggravated by his present job. The doctor indicated that claimant could no longer continue doing heavy labor.

The Referee found that there was no doubt that claimant's back condition probably pre-existed his employment, but that the heavy labor he was performing probably caused an aggravation of this problem. He concluded that claimant's injury was a compensable aggravation of a condition that pre-existed his employment.

The Board, after de novo review, concurs with the conclusion of the Referee.

ORDER

The order of the Referee, dated February 10, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the carrier.

WCB CASE NO. 75-3588 SEPTEMBER 9, 1977

OLIVER MAST, CLAIMANT
Don Wilson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Supplemental Order Awarding Attorney Fee

The Board's Order on Review issued August 16, 1977 in the above-entitled matter failed to include an award of a reasonable attorney's fee.

ORDER

IT IS HEREBY ORDERED that claimant's counsel receive a reasonable attorney's fee in the amount of $650, payable by the State Accident Insurance Fund, for services in connection with Board review.

WCB CASE NO. 76-4944 SEPTEMBER 9, 1977

KATHY A. McGINNIS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

This matter involves a claim for aggravation. The Determination Order issued July 9, 1975 awarded claimant temporary total disability from July 3, 1974 through June 9, 1975 and 15% (48°) unscheduled upper back disability. The claimant, in her letter of March 14, 1976 to SAIF, advised SAIF that she was continuing to have troubles. SAIF, in their letter to the claimant of March 23, 1976, in essence warned that to perfect the claim for aggravation she must submit a medical report but that they wanted to make it perfectly clear that if her present complaints are not related to this injury the examination will be at claimant's expense.

Claimant's attending physician, an orthopedist, in his letter to SAIF of May 25, 1976, requested the claim be reopened for treatment of her back condition. Again on June 16, 1976, claimant's attending orthopedist requested SAIF to reopen the claim. SAIF neither accepted nor denied the claimant's claim for aggravation.

ORS 656.273(3) clearly states: "A physician's report indicating a need for further medical services or additional compensation is a claim for aggravation."

The Referee held that medical treatment under ORS 656.245 was adequate and that claimant's hospitalization of July 1976 "is not convincingly a result of the industrial accident". The Board disagrees with both the findings of the Referee. The preponderance of the medical evidence is that claimant's condition had worsened since the Determination Order was issued. The memo from SAIF's in-house consulting doctor does not convince the Board that claimant's hospitalization in July 1976 is not related to the industrial injury.

Claimant's claim for aggravation is referred to SAIF for acceptance. Since SAIF neither accepted or denied the claim after they received a physician's report indicating a need for further medical services which is a claim for aggravation, SAIF must pay claimant's attorney's fees both at the hearing and Board review, not to be deducted from claimant's compensation.

ORDER

The order of the Referee, dated January 26, 1977, is reversed.

SAIF will accept claimant's claim for aggravation as of May 25, 1976.

SAIF is ordered to pay claimant's attorney's fees in the amount of $1,000, payable by SAIF and not to be taken out of claimant's compensation for services at the hearing and in Board review.

WCB CASE NO. 76-6056 SEPTEMBER 9, 1977

REVA McLAIN, CLAIMANT
William M. Horner, Claimant's Atty.
SAIF, Legal Division, Defense Atty.
Supplemental Order

On August 4, 1977, the Board issued an Order of Dismissal in the above entitled case which failed to deal with the issue of attorney fees. Claimant's claim has now been reopened for a program of vocational rehabilitation rendering the issue of permanent disability moot.

It appears that although claimant's attorney dealt primarily with the permanent disability issue at the hearing, that he was instrumental in securing the reopening of the claimant's claim for rehabilitation and that he therefore should receive 25% of claimant's temporary total disability to a maximum of $350 as a reasonable fee for his services in this regard.

IT IS SO ORDERED.

WCB CASE NO. 76-5666-SI SEPTEMBER 9, 1977

In the Matter of Second Injury
Fund Relief of
A. E. Melton, Employer
William M. Collver, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Final Order

This is a request for additional second injury relief. The issue is the employer's challenge of the July 20, 1976 Determination Order which allowed him a payment of 75% of the increased Workmen's Compensation costs, but no relief for other related costs. Claimant filed with the Workers' Compensation Board an objection to the Referee's Recommended Order which was responded to by the Agency on April 26, 1977.

The Board, after considering the abstract of record and the recommendations made by Referee Mulder, adopts as its own the recommendation dated March 25, 1977, which is attached hereto and, by this reference, made a part of this order.

ORDER

IT IS HEREBY ORDERED that the Determination Order of July 20, 1976 is affirmed.

SAIF CLAIM NO. RC 227129 SEPTEMBER 9, 1977

AVIS RUSZKOWSKI, CLAIMANT
Lyle Velure, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 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 January 23, 1970. Claimant's claim was initially closed by Determination Order of December 10, 1970 and her aggravation rights have now expired. Claimant furnished the Board with one report from Dr. Dunn in support of her position.

On August 9, 1977, the Board furnished the Fund with a copy of the claimant's request along with the medical attachment and advised it to respond within 20 days stating its position with respect to the request for own motion relief.

On August 18, 1977, the Fund responded, stating that, in its opinion, any treatment, other than surgery, could be carried out under ORS 656.245. They indicated that if it were necessary for the claimant to have further surgery with respect to

her injury, her claim could be reopened for additional temporary total disability at that time.

The Board, after thorough consideration of the medical report furnished by the claimant and the response made by the Fund, concludes that claimant can obtain further treatment, if necessary, under ORS 656.245 and that in the event of further surgery, her claim shall be reopened for additional temporary total disability compensation.

ORDER

Claimant's petition for own motion relief, pursuant to ORS 656.278, is hereby denied.

WCB CASE NO. 76-5035 SEPTEMBER 9, 1977

NANCY SCHUETTE, CLAIMANT
Galton & Popick, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests Board review of that portion of the Referee's order which awarded claimant temporary total disability from May 20, 1976 to July 1, 1976 together with a 25% penalty of said amount, and modified the July 16, 1976 Determination Order to show an issuance date of October 25, 1976, requiring the Fund to pay temporary total disability up to the new date. The Fund contends that penalties should not be assessed, that the Determination Order was not prematurely closed as claimant was medically stationary, and that, in any event, it should be reimbursed for subsistence paid claimant during the period claimant was involved at the Disability Prevention Division.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 20, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the Fund.

WCB CASE NO. 76-1690 SEPTEMBER 9, 1977

WILLIAM SULLIVAN, CLAIMANT
Emmons, Kyle, Kropp, & Kryger,
Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the Referee's order which granted claimant an additional 25% unscheduled disability, resulting in a total award of 30%. The employer contends that the award of 5% granted by the Determination Order of March 25, 1976 was adequate.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated April 5, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the carrier.

WCB CASE NO. 76-4927 SEPTEMBER 13, 1977

KIRK CHURCH, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an award of 128° for 40% unscheduled disability.

Claimant, a 47-year-old logger most of his life, sustained a compensable injury on May 12, 1975 diagnosed as a probable angina pectoris. Dr. Kloster diagnosed symptomatic coro-

nary heart disease with major narrowing of the right coronary artery. Dr. Griswold felt that claimant's problem on May 12, 1975 was acute coronary insufficiency probably without any infarction.

On July 31, 1975 claimant's claim was denied. After a hearing, the claim was ordered accepted. A Determination Order of September 10, 1976 granted claimant 48° for 15% unscheduled disability. Dr. Kloster diagnosed heart disease, hypertension and obesity. It was his opinion that claimant was capable of working at a job requiring moderate physical activity but that he could not return to logging. Claimant cannot find a job because of the history of heart disease.

The Referee found claimant had a serious coronary artery disease which pre-existed his industrial injury but that as a result of the compensable event of May 12, 1975, claimant had suffered a greater loss of wage earning capacity than that recognized by the Determination Order. He granted claimant an award of 128° for 40% unscheduled heart disability and the Board, on de novo review, affirms the conclusions reached by the Referee.

ORDER

The order of the Referee, dated January 13, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, payable by the State Accident Insurance Fund.

WCB CASE NO. 76-2975 SEPTEMBER 13, 1977

MYRA HERMANN, CLAIMANT
David R. Vandenberg, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of April 1, 1976.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, made a part hereof. In any event, the Board finds that on the merits the claimant has failed to prove the compensability.

ORDER

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

WCB CASE NO. 75-4881 SEPTEMBER 13, 1977

ARDIS HOLSTEIN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appealed by Claimant

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of that portion of the Referee's order which assessed penalties and attorney's fees against it and awarded additional unscheduled disability for a condition which it contends is a scheduled disability. Claimant cross-appeals that portion of the order which found claimant's claim had been properly closed and which granted claimant an additional 20% unscheduled disability. He contends that his temporary total disability payments should have continued until his vocational status was determined. In the alternative, he contends that his unscheduled disability award is inadequate and should be increased.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

Claimant, in his brief on review, complained of the Disability Prevention Division's refusal, for procedural reasons, to consider his request for vocational rehabilitation. From the record it appears that claimant did attempt to raise the issue of vocational rehabilitation at the hearing and the Disability Prevention Division should have considered claimant's request for vocational rehabilitation consideration on the merits.

ORDER

The order of the Referee, dated January 26, 1977, is affirmed.

The Disability Prevention Division shall forthwith determine whether claimant is entitled to an authorized program of vocational rehabilitation.

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

WCB CASE NO. 75-5137 SEPTEMBER 13, 1977
WCB CASE NO. 75-5138

GERALD HOWARD, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appeal by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant, a 39-year-old logger, received an injury on August 18, 1970 when a rolling rock got loose and rolled down the hill, striking him in the back and on December 8, 1970 when struck by a log which rolled over him injuring his upper chest, neck and back. Both injuries were received while working for the same employer, insured by the State Accident Insurance Fund in both cases. The request for a hearing by the claimant contesting both the Determination Orders were consolidated at hearing and at Board review.

Claimant, at hearing, and on cross-appeal at Board review, contends he is permanently totally disabled. The Determination Order for the August 18, 1970 injury awarded claimant 40% (128°) unscheduled disability and the Determination Order for the injury of December 8, 1970 awarded claimant 10% (32°) unscheduled disability. The Referee increased the total award for both injuries to 100% (320°) unscheduled disability apportioning it as 25% neck and shoulder area, 65% back area and 10% psychopathology for an accumulative total of 100%. SAIF requests Board review contending that the total of 50% unscheduled disability awarded by the Determination Orders adequately compensated the claimant and that award made by the Referee should be reduced to a total of 50%. Claimant cross-appeals contending that claimant is permanently totally disabled.

Claimant has had four surgeries on his neck and back and numerous examinations. Claimant's credibility at the hearing and in the record is questionable. Claimant has had substantial personal problems.

The Board finds, as did the Referee, that claimant is not permanently totally disabled. Claimant has substantial unscheduled disability resulting from both of these injuries but the medical evidence in the record and the evidence of the claimant's activities since the surgery preponderate with a result that the Board finds claimant is not permanently totally disabled.

The Board finds that claimant's total unscheduled disability resulting from both injuries is 85% (272°).

ORDER

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

The Determination Order for the August 18, 1970 injury of 40% (128°) is affirmed.

The Determination Order for the December 8, 1970 injury, which allowed 10% unscheduled disability (32°) is increased to a total of 45% (144°).

Claimant's attorney is to receive as a reasonable attorney's fee 25% of and out of the increased compensation from that awarded in the Determination Order, not to exceed $2,000.

WCB CASE NO. 76-4267 SEPTEMBER 13, 1977
WCB CASE NO. 76-4268

KEN HUMPHREY, CLAIMANT
Gerald D. Wygant, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The issue involved is whether or not claimant's claims are an aggravation of an old industrial injury or a new injury.

Claimant received a back injury March 3, 1971 while working for Monte's Union Station who was insured by the State Accident Insurance Fund. A laminectomy was performed March 11, 1971 and a one-level lumbosacral spine fusion on July 13, 1973. A subsequent medical report by the attending orthopedist and surgeon reflected that the claimant had motion in his back fusion.

After doing heavy work while working for FMC Marine and Rail Equipment, Inc., insured by Liberty Mutual, claimant had substantial back problems. SAIF denied claimant's claim of aggravation on the basis that it was a new injury and Liberty Mutual denied all responsibility for a subsequent spinal fusion of May 19, 1976. The Referee found that claimant's claim was an aggravation of the 1971 injury insured by SAIF and not a new injury.

The Board concurs in the result and order of the Referee. The attending orthopedic surgeon, in his reports of February 23, 1972 and October 30, 1975, reports among other things that the underlying symptom complex of the 1971 injury and subsequent surgeries are, in his opinion, caused by the 1971 injury and the probability of his condition being related to any industrial injury in November of 1974 is exceedingly small.

The Board affirms the result of the Referee that this was an aggravation of the 1971 injury and not a new injury in November of 1974.

ORDER

The order of the Referee, dated January 12, 1977, is affirmed.

WCB CASE NO. 76-2858 SEPTEMBER 13, 1977

THOMAS JAMES, CLAIMANT
Dye & Olson, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which affirmed the Second Determination Order of June 2, 1976, as corrected on June 18, 1976, which awarded claimant 60% unscheduled disability. Claimant contends that he is permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 23, 1977, is affirmed.

WCB CASE NO. 76-4705 SEPTEMBER 13, 1977

JAMES E. LAST, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The issue is whether or not claimant's work constituted a material causative factor in the worsening of claimant's underlying ankylosing spondylitis (inflammatory arthritis).

The employer denied the claim. The Referee ordered the employer/carrier to accept the claim.

The claimant and the employer each had eminently qualified medical experts as witnesses. The Board, as did the Referee, finds that the attending doctor's opinion is persuasive that claimant's work activity aggravated to a material degree the pre-existing condition under the facts of this case.

ORDER

The order of the Referee, dated April 15, 1977, is affirmed.

Claimant's attorney is to receive as a reasonable attorney's fee for services at Board review the amount of $400, payable by the employer and not deductible from claimant's compensation.

WCB CASE NO. 76-4709 SEPTEMBER 13, 1977

RICHARD L. SHERMAN, CLAIMANT
Gary L. Marlette, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which affirmed SAIF's denial of August 20, 1976.

Claimant, age 36, allegedly suffered a low back injury on July 1, 1976 while engaged in heavy lifting. He mentioned the back pain to a co-worker at that time, but did not report the incident to his supervisor as he didn't think it was serious enough. The following day, which was claimant's day off, he and his family went to Sumpter on a picnic. At that time, the pain was so severe that they ate their lunch and returned home. On Saturday, July 3, claimant went with his family to downtown Baker to watch a parade. It was on this day that the pain hit him hard in the middle of the back. He testified that he could hardly breathe and leaned up against a building and kind of slid down to his knees. When he was able to walk, he had his wife take him to the emergency room at the hospital.

The Referee finds several inconsistencies in the record that persuade him the claimant's injury is not compensable. Dr. Mosley did not indicate in his emergency room report that claimant had told him about the industrial incident on the 1st of July, although claimant states in his testimony that he did tell the doctor about the incident. Two of the three co-workers with

claimant at the time of the incident did not remember claimant complaining of any back pain at any time during the day in question. Also the Referee finds that claimant did not report the incident as he didn't feel it was serious, but yet, in his testimony, stated that the pain was "almost unlivable". The Referee felt that if the pain was actually as terrible as claimant claimed, then the witnesses should have heard an outcry or some other manifestation that claimant was experiencing extreme pain. Because of these inconsistencies, the Referee felt that claimant did not carry his burden of proving that his claim should be compensable and that the denial of the Fund should be affirmed.

The Board, after de novo review, concludes that the Referee's decision should be reversed. The fact that Dr. Mosley did not indicate claimant's July 1 industrial incident in his report does not seem inconsistent. It is conceivable that on the 4th of July weekend, getting a full medical history in a busy hospital emergency room was not the doctor's primary concern. The claimant testified that he did, in fact, tell Dr. Mosley about the incident at work on July 1. Both Dr. Ward and Dr. Rosenbaum stated that they felt claimant's problem was due to a work-related incident. It also seems logical that the three witnesses might not remember hearing claimant complain of pain when it struck his back. At the time, it didn't seem bad enough for claimant to report and therefore, it probably wasn't bad enough for claimant to let out an outcry or fall down to the ground in pain. One witness testified claimant did complain that he hurt his back moving the cabinet. The Referee noted that claimant first said the pain was not bad and later stated that the pain was "almost unlivable". The testimony at the hearing makes it clear that claimant was referring to the episode in Baker on July 3 when he stated that the pain was unlivable. Claimant stated:

> "A. This was -- when I hurt my back it was -- it was almost unlivable with. It was terrible. And the -- I have aches and pains in my knees and stuff and it doesn't even compare.
>
> "Q. So when you hurt your back on July 1st, it really hurt you, it was almost unbearable, is that what you're saying?
>
> "A. No, I said when I -- when I first hurt my back, it hurt. But when I had the attack uptown, that's when it become unbearable and it was terrible" (Transcript, p.28).

Based upon these findings, the Board finds that the denial of the State Accident Insurance Fund should be reversed.

ORDER

The order of the Referee, dated February 10, 1977, is reversed.

Claimant's claim is hereby remanded to the Fund for acceptance and payment of compensation as provided by law until closure is authorized.

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

WCB CASE NO. 76-3728 SEPTEMBER 14, 1977

LEE BARNETT, CLAIMANT
William G. Whitney, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which granted claimant an additional 15% award making his total award equal to 80° for 25% unscheduled disability. Claimant contends that he is permanently and totally disabled.

Claimant, 54 years old, slipped and fell on January 4, 1975 suffering contusions to the upper dorsal area. Claimant had a history of back problems as far back as 10 years ago when he suffered an industrial injury which necessitated him being off work for one year. In 1974 he slipped and fell on his back, but lost no time from work.

Claimant underwent surgery in early 1975 for a right carpal tunnel syndrome and later for a left carpal tunnel syndrome. On June 28, 1975 Dr. Miller reported that he felt claimant was medically stationary and that further treatment was not necessary. He felt he could return to work with limitations involving no heavy lifting or bending.

On January 2, 1976 Dr. Carroll reported seeing claimant twice for shoulder problems which seemed to be related to his neck condition which resulted from his 1975 injury. Dr. Carroll considered claimant stationary on January 14, 1976.

On April 19, 1976, Dr. Miller told claimant that he would have to learn to live with his symptoms as best he could. He didn't see that any further treatment or neurosurgical evaluation was indicated.

On May 12, 1976 Dr. Carroll again saw claimant and felt that he was suffering from chronic tenosynovitis involving the shoulders and that this was possibly related to his chronic neck problems. He didn't feel that claimant was a good surgical candidate and that his condition would not be permanently disabling. He agreed with Dr. Miller that claimant would have to learn to live with his condition, which should be easy as long as he wasn't working.

Dr. Cowan found claimant to have chronic tenosynovitis and felt that he would never be able to return to his former employment as it requires too much heavy lifting. In fact, the doctor felt that claimant was totally disabled from doing any kind of work.

Dr. Gripekoven, on November 16, 1976 found claimant's objective findings were of limited decreased range of motion in the cervical spine and painful subjective discomfort in multiple areas. He considered claimant to be medically stationary but felt that heavy work would not be possible because of claimant's complaints.

The Referee found that claimant's lack of motivation to return to work or to become vocationally rehabilitated, together with the nature of his subjective complaints, indicated that an award of permanent total disability would not be appropriate here. The Referee felt that he would give claimant some benefit of the doubt and granted him a total of 25% unscheduled disability.

The Board, after de novo review, finds that claimant is entitled to a larger award based on a substantial loss of earning capacity. The Board feels that claimant should be granted an increased award of 15% unscheduled disability.

ORDER

The order of the Referee, dated January 31, 1977, is modified.

Claimant is hereby granted an additional award of 15% unscheduled disability for a total of 128° for 40% unscheduled disability to the neck and shoulder.

Claimant's attorney is hereby granted 25% of the increased compensation allowed by this order as a reasonable attorney's fee. In no event, however, shall the fee granted hereby when added to the fee granted by the Referee, exceed $2,000.

WCB CASE NO. 76-5436 SEPTEMBER 14, 1977

CONNIE BARTLEY, CLAIMANT
Haley, Haley & Odman, Claimant's Atty.
Dennis R. VavRosky, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which ordered that claimant's claim be reopened for medical care and treatment as of December 20, 1976. Claimant contends that she is entitled to temporary total disability benefits between August 23, 1976 (the date of claim closure) and December 20, 1976.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 28, 1977, is affirmed.

WCB CASE NO. 76-5439 SEPTEMBER 14, 1977

DANIEL L. BECKLEY, CLAIMANT
Kenneth W. Stodd, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the Determination Order of October 5, 1976 which granted temporary total disability and no permanent partial disability. Claimant contends that he is entitled to an award of permanent disability.

Claimant, 44 years of age, suffered an injury on December 15, 1975 when a nightstand fell from a stack of six onto his back and knocked him to his knees. Dr. Thornton diagnosed a contusion to the back and right shoulder. He was found to be totally disabled on December 20, 1975 by Dr. Hansel. It was felt that he could return to work by February 1, 1976 but claimant was not responding to treatment as well as he should have and he was referred to Dr. Dresher. Dr. Dresher felt that claimant's problem should be healed very soon and that he needed conservative treatment and encouragement to return to work.

On July 1, 1976, Dr. Bell found claimant to be having a considerable amount of discomfort and suggested he not return to work for at least six more weeks. On August 17, 1976, Dr. Wilson felt that claimant's actual back pain was hard to evaluate and that it was possible claimant's main problem was emotional. His neurological examination was entirely within normal limits.

The Referee found that there was no medical evidence in the record to substantiate claimant's complaints. The suggestion was given by Dr. Wilson that claimant's problems could possibly be emotional in nature and no causal connection was shown between this possibility and the industrial injury.

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

ORDER

The order of the Referee, dated January 28, 1977, is affirmed.

WCB CASE NO. 77-1283 SEPTEMBER 14, 1977

JOHN BURKE, CLAIMANT
Carney, Probst, Levak & Cornelius,
Claimant's Atty.
Roger R. Warren, Defense Atty.
Order of Dismissal

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

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

WCB CASE NO. 74-2987 SEPTEMBER 14, 1977
WCB CASE NO. 74-4435

RICHARD COMBS, CLAIMANT
Charles H. Seagraves, Jr., Claimant's Atty.
William G. Purdy, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the Determination Orders of July 30, 1974 and January 20, 1975 together with the employers' denials of July 16, 1974 and December 4, 1974. Claimant contends he is entitled to an award of permanent partial unscheduled disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated May 20, 1976, is affirmed.

WCB CASE NO. 76-4883 SEPTEMBER 14, 1977

EGON GORECKI, CLAIMANT
Kitson & Bond, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, 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 low back injury.

Claimant, a 54-year-old inspector repairman, alleges he sustained an industrial injury on July 1, 1976 while lifting a 9-drawer dresser. That evening of July 1, 1976, there was a union arbitration meeting to which claimant went. Witnesses at this meeting testified that claimant squirmed in his chair and appeared uncomfortable and several overheard him state he had hurt his back at work lifting a dresser.

Mr. Angelos, the man who assisted claimant in lifting the drawer, did not remember the incident. One witness, Mr. Edel, testified that while claimant and he were eating lunch claimant told him he hurt his back at home. Claimant testified this conversation never took place and he never ate lunch with Mr. Edel.

On July 3, 1976 claimant was examined at the emergency room of the hospital where a diagnosis was made of sciatica. Claimant was examined by Dr. Kayser on July 6, 1976 and gave a history of increasing low back pain,left buttock and left leg pain for the past month.

Claimant first made his claim for an industrial injury when he was hospitalized on July 20, 1976. It wasn't until Sep-

tember 1, 1976 when Dr. Kayser again examined him that he gave a history of the industrial injury.

The Referee found that doctors do not fabricate histories given to them but claimants sometimes do. He found that the evidence indicates claimant did not sustain a compensable injury and affirmed the denial.

The Board, on de novo review, finds that four witnesses testified to observing claimant's obvious discomfort the evening of the injury and furthermore, testified that claimant told the personnel manager and themselves that he had hurt his back lifting the dresser. On cross-examination, Mr. Angelos, the man who assisted claimant with the drawer, indicated that the incident could have occurred but he just did not remember.

The Board further finds no inconsistencies in the testimony of the witnesses even though the Referee did. We conclude that claimant did suffer a compensable injury as he alleged.

The Board would suggest, based on the Referee's statement in paragraph two on page two of his order, that a Referee should request a partial transcript of the proceedings before him if he has serious doubts about the testimony presented.

ORDER

The Referee's order, dated January 28, 1977, is hereby reversed and claimant's claim is remanded to the employer for acceptance and payment of benefits as provided by law.

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

WCB CASE NO. 76-3350 SEPTEMBER 14, 1977

WARREN GRAHAM, CLAIMANT
Evohl Malagon, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Stipulation

It is hereby stipulated by and between Warren Graham through his attorney, Evohl Malagon, and Truitt Brothers through their insurer, Employee Benefits Insurance Company, by and through R. Kenney Roberts of their attorneys, that claimant experienced an industrial injury on October 25, 1974. During the course of his treatment there arose some question whether claimant had a psychiatric disorder and whether or not this condition was re-

lated to his industrial injury and whether or not he needed additional psychiatric treatment. A determination order was issued awarding fifteen percent unscheduled disability. Claimant contends that the psychiatric and/or personality disorder has been materially aggravated by his industrial injury and needs treatment. The insurance carrier has denied responsibility for this condition and for any treatment rendered therefore. Claimant further contends that he is permanently and totally disabled or in the alternative is entitled to greater permanent partial disability than that previously awarded. There being a bonafide dispute existing between the parties and the parties wishing to resolve their request for review before the Workmen's Compensation Board;

It is hereby stipulated and agreed that this matter be compromised and settled subject to the approval of the Workmen's Compensation Board or by Employee Benefits Insurance Company paying and claimant accepting the sum of $600.00 and in consideration for this payment claimant agrees that Employee Benefits Insurance Company shall not be responsible for any psychiatric or personality disorder whether allegedly caused by or aggravated by the industrial injury. It is agreed that this condition, and responsibility therefore, is denied and shall remain denied and that Employee Benefits Insurance Company shall not be responsible for any payments for medical expenses on account of treatment for psychiatric or psychological treatment or disability. It is further agreed that the Opinion and Order shall in all other respects stand and be a final determination of this case and the extent of claimant's disability.

It is further agreed that claimant shall hold Employee Benefits Insurance Company harmless from any and all medical expenses incurred as a result of treatment for the alleged psychiatric or psychological problem.

It is further agreed that there shall be no attorney fees awarded as a result of this stipulation.

Stipulation approved and claimant's request for board review is dismissed with prejudice.

WCB CASE NO. 76-2630 SEPTEMBER 14, 1977

JACK HEMPLE, CLAIMANT
McInturff, Thom & Collver, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the employer's denial of May 3, 1976.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

WCB CASE NO. 76-3384 SEPTEMBER 14, 1977

DEBORAH E. MORGAN, CLAIMANT
Kissling & Keys, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of that portion of the Referee's order which approved the Fund's denial.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee dated March 31, 1977, and as amended on April 27, 1977, is affirmed.

WCB CASE NO. 76-688 SEPTEMBER 14, 1977

ROBERT MORRIS, JR., CLAIMANT
Doblie, Bischoff & Murray, Claimant's Atty.
Roger Warren, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the Referee's order which awarded claimant a penalty in the amount of 25% of the temporary total disability benefits paid to claimant. The employer contends that these penalties should not have been assessed and the Referee's order should be modified to show that claimant is not entitled to vocational rehabilitation.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated March 16, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the carrier.

WCB CASE NO. 76-4221 SEPTEMBER 14, 1977

CHARLES NORTON, CLAIMANT
David Vandenberg, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The issue is whether or not claimant received an industrial injury to a pre-existing disordered psyche at work when he was reprimanded by a foreman.

The employer denied the claim and the Referee ordered the employer to accept the claim.

Claimant, a 27-year-old mill worker, has a long history of instability in his personal life and his vocational life. He has filed some nine claims for industrial injuries. On his new job at the employer's mill he had tension headaches. When the foreman reprimanded him for not stacking the boards correctly he went to pieces and was sent home.

Upon de novo review of the entire record, the Board concludes that the order of the Referee must be reversed. The condition which the Referee found to be caused by the alleged injury at work had long pre-existed the work incident. The history given to Dr. Koutsky by the claimant was inaccurate and incomplete and when asked a hypothetical question which, in the Board's opinion, more accurately describes the true situation (Tr. pp 35-36), Dr. Koutsky renders an opinion that the work incident and experience at Weyerhaeuser was probably not a causative factor.

There is no question that claimant has and has had for many years a character disorder, but the Board concludes from a review of the entire record that the evidence, both lay and medical, heavily preponderates against a finding that the work exper-

ience for this employer generally and specifically the reprimand by the foreman did not aggravate or precipitate the claimant's condition.

ORDER

The order of the Referee, dated March 4, 1977, is reversed and the denial by the employer is affirmed.

CLAIM NO. 05X005297 SEPTEMBER 14, 1977

RICHARD L. RICE, CLAIMANT
Own Motion Determination

Claimant, a then 25-year-old ranch hand, suffered a compensable fracture of the left femoral neck when thrown from a horse on December 27, 1967. Dr. Guyer pinned the fracture after providing medical treatment and on October 24, 1968 he removed the pin. Shortly thereafter, the doctor found minimal objective findings and a Determination Order dated January 14, 1969 was entered allowing temporary total disability and an award of 15% loss of the left leg.

On December 15, 1970, claimant requested his claim be reopened for aggravation of his condition and on June 23, 1971, Dr. Davis diagnosed an avascular necrosis of the femoral head along with both moderate subjective and objective findings. The Second Determination Order granted claimant an additional 38° for loss of the left leg, giving him slightly more than 40% total left leg disability.

Claimant's condition continued to worsen and a total hip (joint) replacement was scheduled to be done on January 4, 1977 by Dr. Collis. The insurance carrier would not reopen the claim for disability benefits but would accept responsibility for all medical expenses related to this surgery. A Board's Own Motion Order dated December 28, 1976 ordered the carrier to pay compensation to which claimant was entitled. (Claimant's aggravation rights had expired on January 14, 1974.)

The surgery was performed on January 4, 1977 as scheduled and Dr. Collis reported on June 22, 1977 that claimant is doing well and his condition can be considered medically stationary. The doctor also found some mild improvement in the left leg disability since the June 9, 1971 examination by Dr. Davis.

On July 28, 1977, the carrier requested a determination from the Board. The Evaluation Division of the Board recommended that claimant be granted permanent partial disability equal to 75° for 50% loss of the left leg, in lieu of and not in addition to the awards granted by the two Determination Orders dated Jan-

uary 14, 1969 and July 8, 1971 and claimant should be awarded temporary total disability from January 4, 1977 through June 22, 1977, per Own Motion Order dated December 28, 1976. The Board concurs with this recommendation.

ORDER

Claimant is hereby granted permanent partial disability equal to 75° for 50% loss of the left leg, in lieu of and not in addition to the awards granted by the two Determination Orders dated January 14, 1969 and July 8, 1971. Claimant is also awarded temporary total disability from January 4, 1977 through June 22, 1977, per Own Motion Order dated December 28, 1976.

WCB CASE NO. 76-6724 SEPTEMBER 14, 1977

In the Matter of the Distribution
of The Proceeds of
SEYMOUR v. WHITE
(Coos County Circuit Court
Case No. 35710)
Keith E. Tichenor, Claimant's Atty.
Legal Division, Defense Atty.
Order

On September 1, 1977, Richard Seymour, through his attorney, Keith E. Tichenor, petitioned the Workers' Compensation Board to resolve, pursuant to ORS 656.593(3), a conflict between him and the State Accident Insurance Fund over what is a "just and proper distribution" of the proceeds of the action referenced above.

Mr. Seymour contends "that all or nearly all of the money collected from the judgment in question is for injuries from a separate and independent accident totally unrelated to the industrial injuries which are the subject of the State Accident Insurance Fund's claim No. RC 451820.

A hearing must be convened to secure evidence regarding the validity of that contention before the Board can resolve the conflict.

IT IS THEREFORE ACCORDINGLY ORDERED that this matter be remanded to a Referee of the Hearings Division to convene a hearing for receipt of evidence concerning the issue in dispute.

IT IS FURTHER ORDERED that the Referee prepare an abstract of the proceedings for presentation to the Board along with a recommended Finding of Fact.

CLAIM NO. FB 121801 SEPTEMBER 14, 1977

PAUL J. SIMMONS, CLAIMANT
James F. Larson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, at the time a 44-year-old truck driver, lost the use of his legs on April 4, 1965 while operating a truck for his Oregon employer in Bakersfield, California. At a Bakersfield hospital his condition was diagnosed as an aorto-iliac occlusion and subsequent surgeries for removal of blood clots were performed. The surgeries were successful in the left leg but the right leg became gangrenous resulting in an above-the-knee amputation on April 9, 1965. On April 21 of that year, claimant filed a claim against the employer's insurance company, the then State Industrial Accident Commission.

SIAC denied claimant's claim on the basis of claimant's prior bilateral thrombophlebitis in both 1959 and 1962, but on December 13, 1967 the Circuit Court ordered SIAC to accept the claim. The claim was closed on March 25, 1970 with claimant receiving 100% loss of the right leg and by a stipulation of July 17, 1970, claimant was granted 25% loss of the left leg.

The SAIF continued to pay medical bills relating to the claimant's right leg condition including temporary total disability from July 26, 1976 through November 24, 1976 for a period of hospitalization. Since claim closure, treatment has been confined to the right leg, for which claimant has received 100% disability.

On August 25, 1977, the SAIF requested a determination on the claim from the Evaluation Division of the Board. They recommended that temporary total disability should be paid to claimant from July 26, 1976 through November 24, 1976 and that no additional compensation for permanent partial disability should be awarded. The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability from July 26, 1976 through November 24, 1976, if it has not already been paid by the Fund.

WCB CASE NO. 76-5838 SEPTEMBER 14, 1977

ILEEN B. SOULAGNET, CLAIMANT
Fulop & Gross, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the employer's denial.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 16, 1977, is affirmed.

WCB CASE NO. 76-5515 SEPTEMBER 14, 1977

GEORGE W. SULLIVAN, CLAIMANT
Bailey, Doblie & Bruun, Claimant's Atty.
Gearin, Cheney, Landis, Aebi & Kelley, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the Referee's order which remanded the claim to it for acceptance and payment of compensation from January 12, 1976 until termination is authorized pursuant to ORS 656.268.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 22, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $400, payable by the carrier.

WCB CASE NO. 76-5400 SEPTEMBER 14, 1977
WCB CASE NO. 76-5401

RICHARD TEED, CLAIMANT
Malagan, Starr & Vinson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which denied claimant's claim for aggravation of his July 8, 1974 industrial injury and his claim for a new injury which allegedly occurred on August 22, 1975.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 23, 1977, is affirmed.

WCB CASE NO. 75-5499 SEPTEMBER 14, 1977
WCB CASE NO. 75-5483

RONALD WAGGONER, CLAIMANT
Richardson, Murphy & Nelson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the denials of both employers. Claimant contends that the last carrier, the "carrier covering the risk at the time of the most recent injury that bears a causal relationship to the liability", should be ordered to accept the claim and pay to claimant compensation to which he is entitled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

WCB CASE NO. 76-5634 SEPTEMBER 16, 1977

BRUCE J. DAWLEY, CLAIMANT
Diment, Jagger & Billings, Claimant's Atty.
Jaqua & Wheatley, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which granted him 32° unscheduled neck disability which, in addition to the Determination Order of September 23, 1976, equaled a total award of 64° for 20% unscheduled disability. Claimant contends that he is entitled to more permanent partial disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 27, 1977, is affirmed.

WCB CASE NO. 76-507 SEPTEMBER 16, 1977

LOUISE FULLAGER, CLAIMANT
Ackerman & DeWenter, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the denial of the Fund which stated that claimant's condition in respect to her feet, ankles, legs and low back is not compensable.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 20, 1977, is affirmed.

WCB CASE NO. 76-623 SEPTEMBER 16, 1977

GERALD W. MAYES, CLAIMANT
Grant, Ferguson & Carter, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which found claimant's cervical problem was related to the industrial injury of December 1972 and remanded the claim to it for acceptance and payment of compensation.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the carrier.

WCB CASE NO. 76-1385 SEPTEMBER 16, 1977

RACHEL RHINE, CLAIMANT
Hayter, Shetterly, Noble & Weiser,
Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer has requested Board review of that part of the Referee's order which found claimant's time loss should not have been terminated on July 29, 1975 and awarded instead, time loss through January 1, 1976.

The claimant, without filing a cross-request for review, seeks in her brief on review, to appeal for an award of permanent partial disability.

On December 4, 1974, claimant, a then 25 year old waitress employed at Sambo's Restaurant, suffered a low back and

shoulder strain when a co-employee clutched her by the shoulder and then fell during an epileptic seizure.

Her original treating physician, Dr. Winkler, eventually referred her to Orthopedist Stephen Teal for further care.

Dr. Real concluded she did not have significant orthopedic pathology but that she was continuing to suffer emotional distress from the incident. Claimant has reported to him that she had no intention of returning to work at Sambo's.

In a July 30, 1975 letter to the insurance carrier, Dr. Teal stated:

> "I would not state that she is totally disabled, but I would state that she will have some temporary, partial disability related to severe muscle spasm and pain in the entire spine region.
>
> "I have currently elected to continue treating her with physical therapy with symptomatic care twice weekly, and I will see her in a month. At that time, if she is medically stationary, I will so advise you."

On August 5, 1975, Dr. Teal wrote to clarify his earlier remark about claimant not being totally disabled by reporting that ". . . she is physically able to return to work at the present time."

Upon closure of her claim the Evaluation Division terminated claimant's time loss as of July 29, 1975. The Referee apparently did not consider Dr. Teal's report of August 5, 1975 a release to return to "regular" work and therefore, because claimant had not in fact returned to work, continued claimant's time loss until she was considered medically stationary on January 1, 1976.

On review, we are persuaded that Dr. Teal's August 5, 1975 letter constitutes a clear release to return to regular employment. Dr. Teal was fully aware of her employment and injury history at Sambo's and undoubtedly was referring to waitress work at Sambo's when he stated on August 5, 1975 that she was then able to work.

For this reason the Referee's order should be modified to allow additional time loss until August 5, 1975 rather than January 1, 1976

The claimant's attempted appeal of the Referee's refusal to grant permanent partial disability will not be considered because no cross-request for review was filed as required by ORS 656.289(3).

ORDER

The Referee's order dated January 18, 1977 is hereby modified to grant claimant temporary total disability from July 30, 1975 through August 5, 1975 only.

WCB CASE NO. 76-3463 SEPTEMBER 16, 1977

JIM D. SMALLEY, CLAIMANT
Flaxel & Todd, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On August 30, 1977, the Board issued their Order on Review which modified the Referee by affirming the Determination Order of June 8, 1976 and awarded claimant penalties equal to 10% of temporary disability payments due him from January 8, 1976 through April 5, 1976. In addition, an attorney's fee of $500 was awarded claimant's attorney. By letter of September 2, 1977, the Fund submitted to the Board a motion for reconsideration of its Order on Review on the grounds that it failed to correct errors that were made originally in the appealed Opinion and Order and the attorney's fee awarded claimant's attorney at the Board level was excessive.

The Board, after due consideration, finds its evaluation of this case to be proper and the Fund's request on motion for reconsideration is hereby denied.

IT IS SO ORDERED.

SAIF CLAIM NO. A 441689 SEPTEMBER 19, 1977

DAVID H. BARNETT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On March 11, 1954, claimant, then 42, slipped and fell in the snow while carrying a barrel of garbage down a steep bank injuring his right leg. On March 26 of that year, he had an arthrotomy with removal of loose bodies.

On April 5, 1955, after previous claim closure, claimant's knee was arthrodesed. On February 10, 1956 the claim was closed with an award of 50% for the right leg. The claim was reopened on May 9, 1957 and on September 24, 1957 the permanent partial disability was reinstated. Dr. Harris, on May 9, 1958, recommended that claimant be granted 65% of a leg, which was done

on June 13, 1958 by Commission Order on remand from the circuit court.

On January 4, 1977, claimant went to see Dr. Scheinburg with pain in the right hip area. The doctor described severe degenerative changes in the lumbar and lumbosacral spine, degenerative arthritis in the right hip, and a fusion of the right knee. Claimant received conservative treatment together with pain medications and a cane. On January 25, 1977 the doctor performed a total hip arthroplasty with a Charnley-Miller prosthesis.

On February 22, 1977, the report from Dr. Scheinburg indicated that claimant was again performing normal activities and the Fund "activated" his claim on May 19, 1977, declaring it officially reopened on May 4, 1977.

On August 26, 1977, the Fund requested a determination of this claim. The Evaluation Division of the Board concluded that the 65% permanent partial disability award was adequate. It was felt, however, that claimant should receive temporary total disability from January 4, 1977 through February 22, 1977.

The Board, after thorough consideration, concurs with the recommendation of the Evaluation Division.

ORDER

Claimant is hereby granted temporary total disability compensation from January 4, 1977 through February 22, 1977.

WCB CASE NO. 76-6863 SEPTEMBER 19, 1977

HARRY CLEMONS, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the employer's denial.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated April 7, 1977, is affirmed.

WCB CASE NO. 75-3059 SEPTEMBER 19, 1977

LOY E. CONRAD, CLAIMANT
Emmons, Kyle, Kryger & Kropp, Claimant's Atty.
Lindsay, Nahstoll, Hart & Krause, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which remanded the claim to it for acceptance and payment of compensation to which claimant is entitled together with penalties.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated May 5, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, payable by the carrier.

WCB CASE NO. 76-5266 SEPTEMBER 19, 1977

ROBERT L. DURGAN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which granted claimant a total of 25% loss of the left leg as an alternative to reopening the claim. The claimant contends that, since the carrier subsequently reopened the claim and paid temporary total disability benefits retroactive to December 10, 1976, he is actually entitled to such benefits retroactive to June 11, 1976.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 26, 1977, is affirmed.

WCB CASE NO. 76-6314 SEPTEMBER 19, 1977

ISIAH JACKSON, CLAIMANT
Green & Griswold, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

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

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated March 9, 1977, is affirmed.

Because claimant's attorney failed to file a brief with the Board, he is hereby granted an attorney's fee of $50, payable by the carrier.

WCB CASE NO. 76-2109 SEPTEMBER 19, 1977

MONTAGUE R. KIRKNESS, CLAIMANT
McMenamin, Joseph & Herrell, Claimant's Atty.
McMurry & Nichols, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

This matter involves whether or not the claimant is entitled to unscheduled permanent disability as awarded by the Referee along with penalties and attorney's fees and whether or not claimant's medical expenses for diagnosis in his attempt to perfect an aggravation claim which was unsuccessful should be ordered paid by the carrier.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, dated January 25, 1977, which is attached hereto and, by this reference, incorporated herein.

As to the additional issue of whether or not the carrier is obligated to pay the medical expenses under ORS 656.245 incurred by the claim in his attempt to perfect a claim for aggravation, the Board finds, as did the Referee, that claimant's

condition had not worsened since the Determination Order was issued and therefore the medical expenses incurred by the claimant attempting to perfect his claim of aggravation are not payable by the employer/carrier.

ORDER

The order of the Referee, dated January 25, 1977, is affirmed.

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

The medical expenses incurred by the claimant for diagnostic purposes attempting to perfect claimant's claim for aggravation unsuccessfully are not payable by the employer/carrier.

WCB CASE NO. 76-5830 SEPTEMBER 19, 1977

CHRISTINE MERCK, CLAIMANT
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests Board review of the Referee's order which approved the motion of the employer/carrier for dismissal of claimant's request for a hearing on the ground that claimant did not show "good cause" for filing her request for hearing after the 60-day time period.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 23, 1977, is affirmed.

SAIF CLAIM NO. BC 95240 SEPTEMBER 19, 1977

ROY R. STOLTENBURG, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 29, 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 29, 1967. Claimant's aggravation rights have now expired. Claimant furnished the Board with two reports from Dr. Louis R. Fry in support of his position.

On September 6, 1977, the Board advised the Fund to respond within 20 days stating its position with respect to the claimant's request for own motion relief.

On September 9, 1977, the Fund responded, stating that, in its opinion, there was no medical support of claimant's contention that his claim be reopened. They consulted the Orthopaedic Consultants and Dr. Pasquesi with both reporting that no further medical treatment or surgery was needed. They also feel that Dr. Fry's reports, submitted in support of claimant's contention, do not indicate a need for surgery. They indicated that any medical treatment such as injections could be obtained under ORS 656.245.

The Board, after thorough consideration of the medical reports furnished by the claimant and the response made by the Fund, concludes that the record does not indicate that claimant is in need of further surgery or medical treatment.

ORDER

Claimant's petition for own motion relief, pursuant to ORS 656.278, is hereby denied.

SAIF CLAIM NO. KC 186886 SEPTEMBER 19, 1977

JOHN WOODS, CLAIMANT
Bailey, Welch, Bruun & Green, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 10, 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 May 29, 1969. Claimant's claim was initially closed by Determination Order of April 8, 1970 and his aggrava-

tion rights have now expired. Claimant furnished the Board with several medical reports in support of his position from Drs. Gallo, Tanabe, Miller and Eastwood, in addition to reports from the Medical Record Department of the University of Oregon Health Sciences Center.

On August 11, 1977, the Board requested the Fund to respond to claimant's request for own motion relief.

On August 18, 1977, the Fund responded, stating that, in its opinion, it was responsible for removal of the bullet near the spine which was a result of the 1969 injury and any surgery related to such removal. They concluded that it would be proper to reopen the claimant's claim from the date of surgery for removal of the gallbladder. They did not feel, however, that they were responsible for conditions such as duodenal ulcer disease, gastritis, etc.

The Board, after thorough consideration of the medical reports furnished by the claimant and the response made by the Fund, concluded that claimant's claim should be reopened for further treatment and surgery related to his 1969 injury.

ORDER

Claimant's claim is hereby reopened with compensation for temporary total disability commencing on the date of his hospitalization for surgery and until his claim is closed pursuant to ORS 656.278.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of 25% of the temporary total disability awarded claimant by this order, not to exceed $400.

WCB CASE NO. 76-4528 SEPTEMBER 21, 1977

RALPH MARTIN, CLAIMANT
Malagon, Starr & Vinson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which disapproved the Fund's denial and reopened claimant's claim as of December 13, 1976 for further medical care and treatment in addition to temporary total disability compensation until closure.

Claimant, at age 37, twisted his back when he jumped

off a platform on September 21, 1971. The major issue at the hearing was claimant's need for psychiatric treatment, which the Fund indicated was not necessary because of claimant's lack of credibility. The Referee apparently found claimant's testimony credible, especially in respect to claimant's indication that Dr. Carter's treatment was helping him, and on that basis disapproved the denial of the Fund.

The Board, after de novo review, concurs with the conclusion of the Referee, based upon the medical reports of Dr. Carter. The doctor diagnosed inadequate personality with anxiety neurosis, traumatic, chronic and acute, with secondary agitated depression, moderate to severe, with accompanying paranoid state, and psycho-physiologic musculo-skeletal disorder. Dr. Carter finds claimant's condition to be moderately related to the industrial injury of September 1971 and that it is progressing in severity. He states that claimant is not medically stationary and that he warrants treatment, although this may not be feasible. The doctor does, however, feel he can help claimant, which has already been noted from claimant's testimony at the hearing. Therefore, it is the opinion of the Board that the Referee's order should be affirmed.

ORDER

The order of the Referee dated February 3, 1977, the amended order dated February 18, 1977, and the supplemental amended order dated February 24, 1977, are affirmed.

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

WCB CASE NO. 76-5790 SEPTEMBER 21, 1977

FRANKLIN E. MONCRIEF, CLAIMANT
A. C. Roll, Claimant's Atty.
James D. Huegli, Defense Atty.
Stipulation and Order of Dismissal

This matter having come on regularly before the undersigned referee upon stipulation of the parties, the claimant acting by and through his attorney, A. C. Roll, and the employer acting by and through their counsel, James D. Huegli, and it appearing that the matter having been 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 additional compensation in the amount of

$15,000 for a scheduled disability for 100% loss of use of claimant's right leg in the amount of $10,500 and 50% loss of use of claimant's left leg in the amount of $4,500.

It is further ordered that claimant's counsel be and is hereby awarded 25% of the increase in compensation made payable by this order, not to exceed $2,000.

It is further ordered that claimant's appeal to the Workmen's Compensation Board be and is hereby dismissed.

It is so stipulated.

It is so ordered and this matter is dismissed.

WCB CASE NO. 77-1995 SEPTEMBER 21, 1977

WILLIAM E. WEST, CLAIMANT
Becker & Sipprell, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Remand

On June 20, 1977 claimant requested the Board to review the order of the Referee issued on May 25, 1977.

By stipulation of the parties the above entitled matter is hereby remanded to the Hearings Division to be heard with WCB Case No. 77-4020 on a consolidated basis and for the hearing to be expedited.

ORDER

The above entitled matter is hereby remanded to the Hearings Division to be consolidated with WCB Case No. 77-4020 and to take evidence on the issues and render a final order in both cases.

WCB CASE NO. 76-4319 SEPTEMBER 22, 1977

ALFRED M. BLAKER, CLAIMANT
Allen G. Owen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

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

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

WCB CASE NO. 76-1350 SEPTEMBER 22, 1977

EDWARD E. CLEVELAND, CLAIMANT
Myrick, Coulter, Seagraves, Nealy & Myrick, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which granted claimant compensation for permanent total disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 18, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, payable by the carrier.

WCB CASE NO. 76-3390 SEPTEMBER 22, 1977

WILLIAM PROVIENCE, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which granted him an additional 72° unscheduled low back disability equal to a total of 70% permanent partial disability. Claimant contends that he is permanently and totally disabled.

Claimant suffered a compensable injury at the age of 36 on December 12, 1969. He subsequently underwent four lami-

nectomies within a three-year period in addition to a spinal fusion in 1973 and a total of five myelograms. After each surgery, claimant returned to work temporarily, but quit after a short period because of the worsening of pain. Since December 18, 1975, he has not even tried to work.

Claimant complains of constant pain in his back, legs and feet. He cannot walk, sit or stand for any significant period of time. He takes hot baths frequently to relieve the pain and he has not slept through any one night for quite some time. He feels that he has done all he can in following doctors' orders and that there is nothing that can help him. Dr. Ackerman, on September 3, 1976, found claimant to be a "defeated and angry man" with both personality and neurotic disorders. He feels his psychological condition is stationary and that he is totally disabled.

The Referee evaluated claimant's loss of earning capacity at 224° or 70%, and supported this conclusion on two related grounds. First, she stated that claimant's former employer had a job ready for him to which claimant said he would not return and, second, that claimant has been uncooperative since August of 1975 and has demonstrated no motivation to return to gainful employment.

The Board concludes, after its de novo review, that neither of these conclusions is supported by the evidence in this case.

The so-called position as a "production inspector" (offered by the employer the day before the hearing) involved standing or sitting beside a belt for an 8-hour shift. The evidence does not support the conclusion that claimant could perform this job without taking four or five breaks in which to lie down. The Oregon Court has held many times that such jobs are not considered regular employment since they are not real indications of jobs available on the general industrial labor market. House v. SAIF, 20 Or App 150, 157.

With respect to claimant's motivation, the medical evidence in this case shows an individual who returned to work after his initial injury. Likewise, after a short period of convalescence he returned to work after his first laminectomy. In October 1971 Dr. White, claimant's treating physician, wrote that he had shown excellent motivation in losing weight. Likewise, after the second and third laminectomies claimant returned to work.

The record in this case demonstrates an individual with outstanding motivation who remained resilient after each setback until finally, after five surgeries and six years of working with severe pain, he was overcome by the physical and psychological effects of the injury.

The Board finds claimant to be permanently and totally disabled.

ORDER

The order of the Referee, dated February 28, 1977, is hereby modified to grant claimant an award of permanent total disability for his industrial injury of December 12, 1969.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of 25% of the additional compensation granted hereby. In no event however, shall it exceed, when combined with the fee allowed by the Referee, the sum of $2,300.

SAIF CLAIM NO. YC 120527 SEPTEMBER 22, 1977

LARRY ROBERTS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a back injury on April 2, 1968, for which he underwent conservative treatment. The claim was closed on October 24, 1968 granting claimant temporary total disability but no award of permanent partial disability.

The carrier reopened the claim and started paying benefits in September 1976. Claimant was released for work by his treating doctor on October 20, 1976. Claimant did not return immediately and he was examined by Dr. Harwood for the Fund. The doctor found that claimant had only minimal complaints and minimal findings and that he was under no active treatment or medication. He had lost no wage earning capacity.

On July 29, 1977, the Fund requested a determination. The Evaluation Division of the Board recommends that claimant receive time loss from September 22, 1976 (the date he was first examined by Dr. Conklin) through October 24, 1976. The Board concurs with the recommendation of the Evaluation Division.

ORDER

Claimant is hereby awarded temporary total disability compensation commencing September 22, 1976 and running through October 24, 1976.

WCB CASE NO. 75-2458-E SEPTEMBER 23, 1977

JOHN L. COMBS, CLAIMANT
Harold Adams, Claimant's Atty.
Roger A. Luedtke, Defense Atty.
Bona Fide Dispute Settlement

FACTS

The decedent worker, John Combs, sustained an industrial injury to his lower back while in the employ of the defendant employer on November 12, 1973. At that time the claimant had been working part-time for three days following a lengthy absence from work due to a stroke suffered in October of 1972. The claimant was treated for his stroke by neurosurgeon, Dr. Phillip K. Reilly. The stroke resulted in paralysis of the left arm, with weakness in the left leg and left face. Dr. Reilly diagnosed hypertensive and arteriosclerotic cerebral vascular disease and a lacunner stroke in the upper pons on the right. In December of 1972 Dr. Reilly gave the opinion that the claimant was totally and permanently disabled.

In the summer of 1973 the claimant exhibited extreme tension and anxiety due to being forced to remain around his home and accordingly Dr. Reilly authorized a return to work at West Foods on a part-time job involving the counting of tickets in a sitting position. This was a job specially arranged by the employer for the claimant at Dr. Reilly's request, for therapeutic reasons.

Following the injury the claimant received some treatment for his low back but also continued to be treated by Dr. Reilly for his stroke. Dr. Reilly on January 16, 1974 found that the claimant was totally and permanently disabled because of the severe nature of his stroke. The claimant's condition deteriorated and he was admitted to the medical school in February of 1974 where a diagnosis indicated that the claimant was functioning in a very rudimentary fashion with little spontaneous mental activity. The closing entry in the progress record there found Mr. Combs to be severely demented and confused.

The claimant was examined at the Disability Prevention Center, Dr. Hickman observing that the claimant was illiterate and had serious educational deficiency and questioning whether Mr. Combs had ever reached a place where he should have been allowed to return to work. Dr. Halferty of the Disability Prevention Center felt Mr. Combs was not employable but indicated that the relationship of his unemployability to the present injury was problematical.

The decedent's claim was closed by Determination Order of January 2, 1975 awarding him permanent total disability effective December 30, 1974. The employer appealed and hearing was held before Referee Wallace Fitzgerald on January 5, 1976. At the

hearing the employer conceded that the claimant was permanently and totally disabled but took the position that claimant was permanently and totally disabled prior to the injury herein and thus no permanent disability should be attributed to the injury of November 12, 1973. Referee Fitzgerald found that the decedent, as of November 1, 1973, had no employment capabilities which he could have marketed in any competitive labor market and therefore that he was permanently and totally disabled at the time. He, accordingly, reversed the Determination Order, recognizing that the result would be to deny compensation for permanent disability to the worker. The claimant appealed Referee Fitzgerald's decision but the decision was affirmed by the Worker's Compensation Board. The claimant appealed to the Circuit Court of Marion County and Judge Jena Schlegel ruled that the Board and Referee were without jurisdiction to rule that the claimant's injury was not compensable, and reversed and remanded the case to the Board for further proceedings.

Thus a bona fide dispute exists as to whether the claimand was permanently and totally disabled prior to his injury at West Foods in November of 1973 and whether, if he was, such facts preclude an award of permanent disability on the November, 1973 injury. Both parties had evidence and arguments sustaining their views.

PETITION

The decedent's widow in person and by one of her attorneys, Harold Adams, and respondent, West Foods, by their attorney, Roger A. Luedtke (Souther, Spaulding, Kinsey, Williamson & Schwabe), now make this joint petition to the Board and state:

1. Decedent worker's widow and West Foods, Inc. have entered into an agreement to dispose of this claim for the total sum of $12,500, said sum to include all benefits and attorney fees.

2. Both claimant and respondent state that this joint petition for settlement is being filed pursuant to ORS 656.289(4), authorizing reasonable disposition of disputed claims.

3. All parties understand that if this payment is approved by the Board and payment made thereunder, said payment is in full, final and complete settlement of the issues disputed herein and of all claims which decedent worker's widow has or may have against respondents for injuries claimed or their results, including attorney fees, and all benefits under the Worker's Compensation Law, and that he will consider this award as being final.

Wherefore, the parties hereby stipulate to and join in this petition to the Board to approve the foregoing settlement and to authorize payment in the sum set forth above pursuant to ORS 656.289(4) in full and final settlement between the parties and to issue an Order approving this compromise and withdrawing this claim.

It is so stipulated.

It is so ordered and the matter is dismissed.

WCB CASE NO. 76-279 SEPTEMBER 23, 1977

MAX E. CORBETT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the Determination Order dated December 5, 1975, which granted claimant an additional 25% unscheduled disability for a total of 40%. Claimant contends that he is permanently and totally disabled or, in the alternative, his permanent partial disability award should be increased.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 11, 1977, is affirmed.

WCB CASE NO. 76-5939 SEPTEMBER 23, 1977

PRISCILLA COX, CLAIMANT
Richardson, Murphy & Nelson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of her claim.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated March 28, 1977, is affirmed.

WCB CASE NO. 76-2492 SEPTEMBER 23, 1977

CHARLOTTE FICEK, CLAIMANT
Dye & Olson, Claimant's Atty.
James H. Gidley, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant has requested Board review of a Referee's order which required her to pay her own attorney's fee for his services in securing additional compensation, the payment of which was unreasonably delayed. Claimant seeks an order requiring the employer to pay her attorney's fee.

The Referee awarded 25% penalties pursuant to ORS 656.262(8) for three separate instances of unreasonable delay in the payment of certain disability benefits. He found the delay did not result from the deliberate intention of the employer. He refused, therefore, to order the claimant's attorney's fee paid by the employer because he interpreted ORS 656.262(8) as authorizing such action only where the unreasonable conduct consisted of deliberate resistance to the payment of compensation.

For many years Referees, and this Board, have,in reliance upon the provision of ORS 656.262(8), awarded attorney fees payable by the employer for unreasonable delay that did not amount to deliberate resistance to the payment of compensation. We believe that practice is proper in light of both the language of ORS 656.262(8) and the general intent of the Workmen's Compensation Law. We conclude that the Referee should have awarded an attorney's fee payable by the employer rather than the claimant.

ORDER

That part of the Referee's order, dated November 12, 1976 stating: "IT IS FURTHER ORDERED that claimant's agreement with her attorney be approved for the payment of attorney's fees to the extent of 25% of the increased compensation made payable by this Order, and payable out of such increased compensation" is hereby reversed and, in lieu thereof, IT IS HEREBY ORDERED that the employer pay claimant's attorney a reasonable fee of $500 in addition to and not out of claimant's compensation.

IT IS HEREBY FURTHER ORDERED that claimant's attorney refund to claimant all sums withheld from claimant's compensation and paid to him pursuant to the Referee's order.

IT IS HEREBY FINALLY ORDERED that in addition to the fee granted above, the employer shall pay claimant's attorney a reasonable fee of $300 in addition to, and not out of, claimant's compensation for his services in connection with this review.

WCB CASE NO. 76-1994 SEPTEMBER 23, 1977

BARBARA A. GARDNER, CLAIMANT
Malagon, Starr & Vinson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-appeal by the SAIF

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which granted her 48° for 15% unscheduled permanent partial disability for dermatitis. Claimant contends that the award should be greater, while the Fund contends that the Determination Order of January 23, 1976, which awarded no permanent disability, should be reinstated.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

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

WCB CASE NO. 76-5062 SEPTEMBER 23, 1977

DIANE HORAK, CLAIMANT
Bloom, Chaivoe, Ruben, Marandas & Berg,
Claimant's Atty.
Rankin, McMurry, Osburn & Gallagher,
Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of the Referee's order which granted claimant an additional 10% unscheduled disability

for a total award of 48° for 15%. The employer contends that this award is too high and the Determination Order should be reinstated with its award of 5%.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated April 6, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $200, payable by the carrier.

WCB CASE NO. 76-4221 SEPTEMBER 23, 1977

CHARLES NORTON, CLAIMANT
David Vandenberg, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson,
& Schwabe, Defense Atty.
Amended Order

The above-entitled matter was the subject of an Order on Review dated September 14, 1977.

On page 1, the next to the last paragraph contains a double negative which should be corrected.

The sole purpose of this order is to correct the record and confirm that the order should recite as follows:

> ". . . heavily preponderates against a finding that the work experience for this employer generally,and specifically the reprimand by the foreman,aggravated or precipitated the claimant's condition.

The order of September 14, 1977, should be, and it is hereby amended to reflect that correction.

WCB CASE NO. 76-2838 SEPTEMBER 23, 1977

In the Matter of the Compensation of
LOIS L. SNOW, CLAIMANT
and The Complying Status of
George O. Cushman & Ruth Cushman
dba Jova-Par & Franmar Apartments
Buss, Leichner, Barker & Nesting, Claimant's Atty.
Martin Bischoff, Templeton & Biggs, Defense Atty.
Carl Davis, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the Proposed and Final Order No. 2848-A issued by the Compliance Division of the Board, affirmed the defendant's denial of claimant's claim, and ordered that the Compliance portion of the case be remanded to the Compliance Division for further action, if necessary.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated March 29, 1977, is affirmed.

WCB CASE NO. 76-5452 SEPTEMBER 27, 1977

ANTHONY J. ALLEN, CLAIMANT
Hess & Hess, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which approved the Determination Order of September 14, 1976 which awarded only temporary total disability. Claimant contends he is entitled to more temporary total disability and an award of permanent partial disability.

Claimant sustained a compensable injury on August 12, 1975 while working as a rotoblast machine operator. With two cranes out of service, he tried to lift a casting, felt himself "go" and dropped it. He continued to work, although suffering

some pain, until one day his back went into spasms. Dr. Kravitz, on September 17, 1975, diagnosed lumbosacral sprain but found him medically stationary. On October 7, 1975, Dr. Hauge diagnosed lumbosacral sprain with some slight nerve root irritation and did not feel that claimant was medically stationary. On October 23, 1975, Dr. Storino found that claimant did likely sustain some degree of lumbar strain on the job, but that the neurological examination was within normal limits.

Claimant was released for work by Dr. Hauge on January 16, 1976 with restrictions concerning lifting, bending, twisting and pulling. On March 8, 1976, Dr. Hauge indicated that claimant was working as a janitor but was still having some problems with back pain. He noted that claimant was to see the Orthopaedic Consultants but had failed to show up twice. On April 29, 1976, the Orthopaedic Consultants found that claimant had lumbosacral strain by history and that he had a moderate functional overlay. They recommended no further treatment, found his condition to be stationary and recommended closure. They felt that claimant should be examined psychologically as they were having trouble rating his back disability because of his intense active resistance to demonstrate motion. They noted the possibility that claimant had no loss of function.

On May 28, 1976, Dr. Hauge stated that he agreed completely with the findings of the Orthopaedic Consultants and strongly urged that claimant undergo a comprehensive psychological examination. Dr. Quan, a psychiatrist, reported on July 8, 1976, that claimant seemed to have a personality disorder with some schizoid and paranoid features but that these emotional problems were not related to his industrial injury. It was quite obvious that his personality patterns were established long before going to work at ESCO.

On July 21, 1976, Dr. Goodwin noted that he had read through the work-up by Dr. Hauge and agreed with it, except for the fact that he felt that claimant could return to his previous employment without any restriction whatsoever, and that the case should be closed. Subsequently, the Determination Order of September 14, 1976 was issued granting temporary total disability from September 17, 1975 through August 3, 1976, less time worked. On October 18, 1976, claimant saw Dr. Berselli informing him that he was suffering back pain and had been for the past week, giving the doctor no information about his industrial injury. On this inaccurate history, Dr. Berselli released the claimant for work on November 11, 1976.

The Referee found, based on the medical evidence, that claimant's condition is medically stationary and has been for quite some time. He felt that there was no reason to award temporary total disability for the period of time claimant was seeing Dr. Berselli and affirmed the Determination Order of September 14, 1976.

The Board, after de novo review, concurs with the conclusion of the Referee.

ORDER

The order of the Referee, dated March 1, 1977, is affirmed.

NO NUMBER SEPTEMBER 27, 1977

MARGARET D. ATKINSON, CLAIMANT
David W. Hittle, Claimant's Atty.
Brian Pocock, Defense Atty.
Joint Petition for Own Motion

Comes now the Claimant, Margaret D. Atkinson, in person and by and through David W. Hittle of her attorneys Dye & Olson, and the State Accident Insurance Fund, by and through Brian Pocock and Petition the Workmen's Compensation Board for exercise of Own Motion jurisdiction. The claimant suffered a compensable injury to her low back on March 30, 1966, while employed by Jackson County Courthouse. By Determination Order issued February 7, 1966, Claimant received an award for permanent partial disability equal to 5% loss of an arm by separation for unscheduled disability and 5% loss of a portion of the right arm. By second Determination Order entered July 8, 1970, the Claimant received an additional award of 29 degrees for unscheduled low back disability as compared to loss of an arm by separation, and no degree for permanent loss of wage earning capacity. By third Determination Order issued September 28, 1971, Claimant received an additional award of 6 degrees for partial loss of the right leg. Since the issuance of the third Determination Order, the Claimant's low back condition has worsened. Consequently, the Claimant, her counsel, and the State Accident Insurance Fund hereby jointly petition the Workmen's Compensation Board for exercise of Own Motion jurisdiction to award Claimant additional permanent partial disability equal to 64 degrees for 20% unscheduled low back disability.

It is so ordered.

WCB CASE NO. 76-6393 SEPTEMBER 27, 1977

DONNA KINGSLEY, CLAIMANT
Richardson, Murphy & Nelson, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of the Referee's order which granted claimant an increase of 25% unscheduled disability for a total of 112° for 35%. He also granted claimant 5% permanent partial disability for loss of the right leg and 5% for loss of the left leg. The employer contends that the Determination Order should be reinstated, with the award of 32° for 10% unscheduled disability being adequate.

On May 8, 1974, claimant suffered a compensable injury when an autoclave exploded, throwing hot milk on her face, neck, chest, abdomen, thighs and leg, causing second and third degree burns. Under the care of Dr. Spaulding, claimant underwent two separate debridement and grafting operations. He found her burns healed well and released her to return to work on September 9, 1974. He put no restriction on her activities and did not anticipate any in the future. On February 15, 1975, claimant saw Dr. Grisez who felt that most of her scars would soften and subside on their own. Because of a possibility of excision and replacement with skin grafts, the doctor indicated he would follow up on the claimant periodically for some period of time. On September 23, 1976, Dr. Grisez found that for the most part, claimant's symptoms were not disabling, although they did create discomfort. He did not feel surgery was indicated and that her disfigurement was probably permanent. On March 11, 1977, Dr. Perrin indicated that claimant had complained to him of itching and a "pins and needles" sensation in the areas of the grafts. She told him she had no particular difficulty with general activities being restricted by the scars. The doctor found claimant's scars to be well healed with the exception of the area of the right breast, which is really in a non-functional area and does not restrict motion. He concurred with Dr. Grisez's evaluation of her scars and also found that surgery would do little to help her. He related the pulling or painful sensations to claimant's marked obesity which probably aids in putting pressure on the unyielding scars. He felt the only real impairment of claimant's condition was from the standpoint of her appearance.

Claimant is now working with her husband in a beer and wine bar, both cooking and serving. The Referee breaks down her complaints into three areas: psychological, cosmetic and physical. He finds that claimant has a fear of heat which is a problem in her job because of the work she does with the grill. He notes that claimant must wear dark clothing, high-necked outfits

and no short skirts because of her appearance, which is a handicap in her work as a cocktail waitress. She also claims to have many physical difficulties which hinder her in her work such as itching, inability to kneel or bend, throbbing feet and tight legs, in addition to bruising easily.

The Board, after de novo review, finds that the award of the Referee was excessive and feels that the unscheduled award of the Determination Order should be reinstated. There is absolutely no proof of any psychological problems resulting from claimant's injury. It was evident in the record that claimant works at the grill almost every work day and her only real fear is cleaning the grill. The cosmetic residuals are very real and claimant has to wear high-necked outfits as a result. The Board feels that the award granted by the Determination Order adequately compensates claimant for this inconvenience. The major physical problem is in the area of her right breast which is non-functional and should not present any real difficulty. The other complaints relating to pulling or pain sensations seem to be related mostly to claimant's overweight problem and not the scars. The Board finds that the 10% award of the Determination Order is adequate to compensate claimant for her disability. The awards granted by the Referee for the left and right legs are affirmed.

ORDER

The order of the Referee, dated April 12, 1977, is modified.

The unscheduled award of the Determination Order of October 20, 1976 is hereby reinstated, granting claimant 32° for 10% unscheduled disability along with 7.5° each for 5% loss of function of the right and left leg all resulting from the compensable burn injury.

WCB CASE NO. 76-2373 SEPTEMBER 27, 1977

LENNA VAN CAMP, CLAIMANT
Hugh K. Cole, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial for claimant's condition of ulcerative colitis and assessed penalties in the amount of 25% of the temporary total disability benefits due claimant from January 29, 1976 through May 24, 1976.

Claimant has suffered from a colitis condition for some 10 years which she alleges is a result of stress on her job of 12 years. Claimant was employed as a director of medical records at the Douglas Community Hospital in Roseburg up to the point of her retirement in December 1975. According to her testimony, the work became more demanding each year in addition to the fact that she was on call 24 hours a day. The testimony of three employees in the medical records department corroborate claimant's contentions.

On January 29, 1976, Dr. Vajda informed claimant that her work for the hospital was a material contributing factor to the failure to control her ulcerative colitis. He advised her to retire from her job or she would probably need a total colectomy. On March 10, 1976, Dr. Leslie stated that claimant's condition could not, in any way, be related to the tension at her work. Dr. Vajda, on March 26 of that year, again stated that claimant's condition, and especially her flu-like illness in December of 1975, were definitely due to her stress on the job. On May 24, 1976, a total abdominal perineal colectomy was performed. On July 22, 1976, Dr. Leslie stated that claimant's work activity was not the cause of her condition. Dr. Baker, on October 25, 1976 agreed with this conclusion, stating that doctors are uncertain as to what the cause of colitis really is. However, in his deposition testimony, Dr. Baker was strong in his opinion that emotional stress can have a definite adverse affect in the management and control of the disease. He felt that emotional stress, such as the kind claimant experienced on her job, could definitely cause exacerbations of her disease to the point of serious relapses. He mentioned that these exacerbations are not always temporary and could possibly lead to the need for surgery.

The Referee chose to rely on the reports of Dr. Leslie for his authority, finding that claimant's condition was not related to claimant's work stresses. He found the case a very close one but felt that Dr. Vajda's opinion was based on a history given to him by claimant and therefore was not fully reliable. Since Dr. Baker did not actually examine or treat the claimant, he gave very little weight to his conclusions. In addition to affirming the carrier's denial, the Referee assessed penalties against the Fund for its unreasonable delay in accepting or denying claimant's claim. The Form 801 was filed on January 29, 1976 and it was not until May 24, 1976 that the Fund issued its denial, well over the 60-day limit in the statute. Also, the Fund failed to pay temporary total disability benefits within 14 days of notice or knowledge of the claim as required in ORS 656.262. Claimant was awarded 25% of the temporary total disability payments due for the period of January 29, 1976 through May 24, 1976.

The Board, after de novo review, finds that the reports of Drs. Baker and Vajda seem to be in real agreement that claimant's work stress is related to her condition, although probably not the cause. Dr. Leslie was strong in the opinion that her condition was not caused by her job, but he seemed to miss the point

of this case when he failed to consider the possibility of claimant's emotional condition causing exacerbations of her disease to the point of surgery being required.

The Board concludes that the penalties assessed against the Fund should be affirmed and that claimant's claim for her ulcerative colitis condition should be accepted. Also, the attorney's fee awarded at the hearing will be increased from $350 to $800.

ORDER

The order of the Referee, dated April 11, 1977, is modified.

Claimant's claim is hereby remanded to the State Accident Insurance Fund for acceptance and payment of compensation to which claimant is entitled pursuant to ORS 656.268.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with the hearing and this Board review in the amount of $1250, payable by the carrier.

WCB CASE NO. 76-5758 SEPTEMBER 27, 1977

LESLIE WILKEY, CLAIMANT
Merten & Saltveit, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of his claim for aggravation.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

While filing of briefs is not mandatory, the Board appreciates and finds helpful the parties' analysis and viewpoints on the relativity of the evidence to the issues and would urge the submission of briefs, particularly when there is an absence of written closing arguments.

ORDER

The order of the Referee, dated March 28, 1977, is affirmed.

SAIF CLAIM NO. FC 249676 SEPTEMBER 28, 1977

HELEN M. EWIN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 16, 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 June 4, 1970. Claimant furnished the Board with two reports, one from Dr. Gray and one from Dr. Rusch, in support of her request.

On September 7, 1977, the Board sent the Fund a letter with copies of the medical reports sent by claimant attached and advised them to respond to claimant's petition for own motion relief within 20 days.

On September 20, 1977, the Fund responded, stating that, in its opinion, claimant's recent surgery was connected to her June 4, 1970 injury. They felt her claim should be reopened from the date of surgery so that claimant could receive time loss compensation and medical and hospital benefits. They indicated that when claimant is medically stationary, her claim should be closed and any further medical would be paid under ORS 656.245.

The Board, after thorough consideration of the medical reports furnished by the claimant and the response made by the Fund, concludes that the record indicates claimant's claim should be reopened for time loss and medical payments in connection with the hip surgery she received April 8, 1977.

ORDER

Claimant's claim is hereby reopened as of the date of her hip surgery, April 8, 1977, with time loss commencing on that date and payment of all medical expenses until closure is authorized pursuant to ORS 656.278.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in the amount of 25% of the temporary total disability granted to claimant, not to exceed $500.

WCB CASE NO. 76-6011 SEPTEMBER 28, 1977

LEWIS GARDNER, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson, Moore and Phillips.

The employer seeks Board review of the Referee's order which remanded the claim to it for acceptance and payment of benefits to which claimant is entitled.

The majority of the Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated February 14, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $300, payable by the carrier.

Board Member George A. Moore dissents as follows:

I respectfully dissent from the majority opinion of the Board and find claimant has not sustained his burden of proving he suffered a compensable industrial injury on July 2, 1976.

The first basis for my finding is lack of corroboration by a fellow employee, Mr. Bumgardner, who assisted claimant with the barrel of resin when the alleged incident occurred. Mr. Bumgardner testified he did not remember if claimant complained to him about being injured and further testified that if claimant had made such complaints to him "I think I would remember it."

Second, claimant did not notify the employer about the alleged accident within 30 days. Claimant, and this goes against his credibility, testified he had never filed any workmen's compensation claims before but after strong cross-examination he did remember filing one or two when, in fact, claimant had filed seven prior claims and well understood the procedures he was responsible to follow.

Third, and possibly the strongest evidence against compensability, is claimant not giving a history of the alleged injury to his treating physician. Claimant saw Dr. Copeland on July 24, 1976 complaining of right hip pain with no history of

injury or strain. Dr. Copeland saw claimant on August 2, 1976 still giving no history of an injury. Again on August 9, 1976 claimant saw Dr. Copeland and again never mentioned any injury. In fact the first mention of this alleged incident appears in a letter written by Dr. Satyanarayan to the carrier dated November 9, 1976. A stronger case against credibility is the medical report from Dr. Brodhacker dated October 11, 1976 wherein he indicated he examined claimant on June 26, 1976, prior to the accident, with claimant complaining at that time of "pain in his right hip that had been present for 2-3 weeks". Claimant specifically at that time indicated no incident or effort that caused his symptoms which also radiated down his right leg. These are the very same complaints in the same body areas as claimant made after the alleged accident of July 2, 1976. Whereas credibility is normally better assessed by the trier of fact, in this instance reading the transcript is of more value than hearing the testimony and relying on notes, as the statements are of more significance than the demeanor of the witness.

Based on all of the above facts of this case, I would reverse the order of the Referee, dated February 14, 1977, and sustain the denial.

/s/ George A. Moore

WCB CASE NO. 76-3322 SEPTEMBER 28, 1977

SUE ROBERTS, CLAIMANT
Willard E. Fox, Claimant's Atty.
SAIF, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

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

Claimant allegedly suffered a compensable injury on April 29, 1976. The Fund contends that the evidence used to support claimant's claim was so contradictory and inconsistent that the finding by the Referee of the credibility of the claimant carries no weight whatsoever. The Referee found, however, that those inconsistencies were satisfactorily explained by claimant and her witnesses to the extent that he disapproved the denial of the Fund.

The Referee found that the problem of what exact date the injury occurred was easily explained when claimant was reminded of the fact that the injury happened the same day she went to town

to get her promise ring and this was corroborated by lay testimony. Claimant was actually only one day off in her calculation and the Referee felt this was understandable. Other small inconsistencies by the witnesses were felt to be insignificant because of the length of time between the date of the injury and the hearing. It was for these reasons that the Referee ordered the Fund to pay claimant the compensation benefits to which she was entitled.

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

ORDER

The order of the Referee, dated April 22, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the carrier.

WCB CASE NO. 76-2284 SEPTEMBER 28, 1977

LEO N. WALDAHL, CLAIMANT
Galton & Popick, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appeal by Claimant

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which affirmed the Determination Order of April 29, 1976 together with assessing penalties and attorney's fees. The Fund failed to indicate any issues on appeal. Claimant cross-appealed the order of the Referee, stating that claimant is entitled to temporary total disability from March 27, 1976 through August 3, 1976 in addition to penalties equal to 25% of that amount.

On May 8, 1974, claimant sustained an industrial injury while picking up a five-gallon can of paint. Dr. Cohen, on May 14, 1974, diagnosed strain of the left iliolumbar ligament with radicular pain in the left lower extremity. Claimant returned to work in July 1974 with some continuing back pain. Claimant was still not medically stationary and a subsequent myelogram and laminectomy were performed. On August 7, 1975, Dr. Cohen reported that claimant was working at a job requiring no lifting and doing somewhat better, although he was not stationary at that time.

On February 17, 1976, Dr. Pasquesi found claimant stationary and felt he could work if he didn't have to lift anything

over 50 pounds and his job didn't require repetitive bending, stooping or twisting. He would also probably have trouble standing on his feet 8 hours a day. He recommended claim closure. On March 16, 1976, Dr. Cohen concurred with the findings of Dr. Pasquesi and felt the claim could be closed. He noted that the job claimant was doing at that time should present no problems to him. All that was involved was taking telephone orders and getting up and checking the stock for will call orders together with giving will call orders to the counter salesman.

Claimant worked at this desk job from May 27, 1975 to early March 1976. It was at this time that the employer moved claimant from his job to a similar order-taking job at the counter. Within one hour claimant walked off the job, an action which resulted in a strike. The strike ended when claimant returned to work but he stayed for only one week when he quit again on March 27, 1976. Claimant's attorney started advising the Fund that claimant was temporarily totally disabled in May of that year.

On April 29, 1976, the Determination Order in question was entered granting claimant temporary total disability from May 8, 1974 through May 18, 1975, less time worked, along with 64° for 20% unscheduled disability to the low back.

Both Dr. Cohen and Dr. Rosenbaum reiterated the fact that claimant could not do any work involving lifting, but that he was released for light or sedentary work. They seemed to be under the mistaken impression that claimant's new job, which he started in March 1976, involved lifting whereas it was very little different from the type of work he was doing from May 1975 to March 1976. Walking the picket line from 7 a.m. to 4 p.m. for four or five days was much more strenuous.

The Referee found that claimant had not proven that his claim was prematurely closed nor had he proven that he is vocationally handicapped. Claimant was officially referred for vocational rehabilitation on August 3, 1976 at which time time loss should be reinstated. There is no evidence in the record that claimant is entitled to time loss benefits from March 27, 1976 through August 3, 1976.

The Board, after de novo review, concurs with the conclusion of the Referee and affirms his order.

While filing of briefs is not mandatory, the Board appreciates and finds helpful the parties' analysis and viewpoints on the relativity of the evidence to the issues and would urge the submission of briefs, particularly when there is an absence of written closing arguments.

ORDER

The order of the Referee, dated February 11, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $500, payable by the Fund.

WCB CASE NO. 76-1033 SEPTEMBER 29, 1977

DALE J. EDWARDS, CLAIMANT
Green & Griswold, Claimant's Atty.
SAIF, Legal Services, 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 Disability Prevention Division to reconsider claimant's eligibility for vocational rehabilitation retraining and further, in the event claimant was found ineligible for vocational rehabilitation, granted claimant an award of 32° for 10% unscheduled disability.

Claimant sustained a compensable injury on September 13, 1974 which evolved into bilateral hernias. On January 8, 1975 a Determination Order granted claimant no award for either temporary total disability or permanent partial disability indicating claimant suffered an occupational injury and had been advised of ORS 656.220 and corrective surgery had not been scheduled. Claimant had declined the recommended surgery for religious reasons.

On September 4, 1975 Dr. Bennett performed the bilateral hernia repair surgery on the claimant. Thereafter, a Second Determination Order granted claimant time loss only.

On February 3, 1976 an Interim Order was issued by the Board setting aside the Second Determination Order and finding claimant to be vocationally handicapped, with a medically stationary date of November 24, 1975.

Claimant was then enrolled in a vocational rehabilitation program in waste water technology; on February 10, 1976 claimant received a letter from the Disability Prevention Division informing him that his official referral was withdrawn due to his hernia and the provisions of ORS 656.220. On March 9, 1976 the Disability Prevention Division again wrote to claimant informing him that their letter of February 10, 1976 was in error but that the referral was still being withdrawn but for the reason that claimant was slight of stature, small build and should not have been engaged in heavy construction work to start with.

On March 26, 1976 Vocational Rehabilitation Department wrote to claimant advising him his file had been closed and his training program terminated because of lack of funds and no official referral from the Workmen's Compensation Board.

Claimant, after the surgery for bilateral hernia repair, developed two conditions, uracratia and a varicocele. On September 26, 1976 Dr. Hand examined claimant and diagnosed a left varicocele. On October 29, 1976 Dr. Hand wrote in response to questions that "yes" claimant had a varicocele which was not caused by, but was aggravated by the hernia and also his work. This condition does interfere with claimant's day to day living and causes limitation of work. Dr. Hand recommended treatment consisting of (1) scrotal support, and (2) rehabilitation. Claimant also has incontinence when bending forward and lifting and lifting 40-50 pounds causes him to wet his pants. A cystoscopy was recommended to study this condition and determine what might relieve his symptoms. Radical surgery, which has some short comings, was a possibility for the varicocele. Most physcians are opposed to performing this surgery. Dr. Hand felt that claimant was prepared to proceed with any necessary diagnostic study in September, 1976 but in October, 1976 claimant did not profess any desire to follow through with the necessary studies.

Dr. Hand felt the necessary studies should be a consideration of the elevated total and direct bilirubin as noted in a chem screen, hemorrhoids and the possibility of multiple sclerosis.

The Referee found that claimant's condition of the varicocele was related to the industrial injury but the condition of uracratia was not. The Referee ordered that which appears in the first paragraph of this order.

The Board, after de novo review, first finds that the letter dated March 9, 1976 from Ralph Todd to the claimant was an abuse of discretion as defined in OAR 61-060(2)(d) and that claimant should be granted the services of the Disability Prevention Division to be placed in a retraining program as he is vocationally handicapped as defined in OAR 61-005(4).

The Board further finds that claimant's conditions of a varicocele and uracratia are compensably related to claimant's hernia surgery and that they shall be accepted. Claimant is not medically stationary. Dr. Hand recommends various diagnostic studies be performed on claimant in order to treat his conditions to enable him to return to gainful employment. Claimant at times has refused to undergo any further studies. The Board feels that claimant should take advantage of all diagnostic examinations and recommended treatment thereafter; if he refuses this then the carrier is authorized to submit his claim for closure pursuant to ORS 656.268.

ORDER

The determination of ineligibility as expressed in the letter from Ralph Todd dated March 9, 1976 has been found to be an abuse of discretion and claimant is vocationally handicapped as defined in OAR 61-005(4). Claimant is to be offered placement in a vocational rehabilitation retraining program.

Claimant's conditions of a varicocele and uracratia are found to be compensably related to his industrial injury and are therefore remanded to the employer for acceptance and the payment of compensation as provided by law commencing October 29, 1976, the date of Dr. Hand's letter. If claimant refuses to undergo the recommended diagnostic studies and he is no longer in an approved training program, then the Fund may submit the claim to the Evaluation Division to enter a determination pursuant to ORS 656.268.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $900, payable by the Fund.

SAIF CLAIM NO. BG 81210 SEPTEMBER 29, 1977

JEANETTE FARAH, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 30, 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 June 8, 1964. On January 10, 1977, an Own Motion Determination was entered by the Workman's Compensation Board closing claimant's claim. Claimant furnished the Board with three reports in support of her position, one from Dr. Schlim and two from Dr. Noall.

On September 6, 1977, the Board advised the Fund to respond within 20 days stating its position with respect to the claimant's request for own motion relief. On September 12, 1977, the Fund informed the Board that they did not have the medical reports attached to claimant's petition for own motion and that there was nothing to substantiate a reopening of claimant's claim. The Board replied on September 14, 1977, stating a description of the three reports and again asking the Fund for their opinion. On September 20, 1977, the Fund responded that all three reports were considered in the Own Motion Determination made by the Board on January 10, 1977 and that their position was still that there was no further medical evidence to warrant a reopening of claimant's claim.

The Board, after thorough consideration of the medical reports furnished by the claimant and the response made by the Fund, concludes that the record does not indicate that there is any reason to reopen claimant's claim.

ORDER

Claimant's petition for own motion relief, pursuant to ORS 656.278, is hereby denied.

WCB CASE NO. 76-1891 SEPTEMBER 30, 1977

BRUCE ANDERSON, CLAIMANT
Jones, Lang, Klein, Wolf
& Smith, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the Determination Order of March 17, 1976 which awarded no permanent partial disability.

Claimant suffered an industrial injury on May 15, 1975 when he fell on the railroad track and sprained the left wrist. In 1973, claimant had injured the same wrist which caused a bone spur to develop on the dorsum of the wrist. Claimant underwent treatment with Dr. Grossenbacher, who felt that his complaints were related to his accident in 1973.

In Dr. Grossenbacher's report of October 1976, he found claimant had a bone spur over the dorsal aspect of the wrist which was related to the 1973 injury, and that, except for that, no disability exists in reference to the function of the wrist. In the doctor's deposition, he stated that the complaints of pain claimant manifested in May 1976 were presumed to be secondary to the irregularity in the bone surface and he relates this to the 1973 injury. He did feel that the 1975 injury aggravated the original injury in 1973, but that there would be no permanent disability as a result of the 1975 injury.

On the basis of this medical evidence and claimant's testimony at the hearing, the Referee found claimant was not entitled to an award of permanent partial disability. The Board, however, after de novo review, finds that the credibility of the claimant at the hearing does carry some weight in this decision. The Referee did seem to find claimant credible and therefore claimant's descriptions of pain cannot be overlooked entirely. He stated that subsequent to the injury of 1973, he suffered pain only two or three times per month, whereas after the May 1975 incident, claimant's wrist was constantly in pain. He has had to modify his job to some extent in order to compensate for the pain and he has full range of motion in his wrist only when moved slowly. As a result of this testimony, the Board finds that claimant has suffered a loss of function of the left wrist equal to 10% disability. The Referee's order should be reversed.

ORDER

Claimant is hereby granted 10% scheduled permanent partial disability of the left wrist as a result of his industrial injury.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of 25% of the increase in compensation.

WCB CASE NO. 76-2154 SEPTEMBER 30, 1977

ROBERT DURFEE, CLAIMANT
Galton & Popick, Claimant's Atty.
Dezendorf, Spears, Lubersky & Campbell,
Defense Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of benefits to which claimant is entitled.

Claimant suffered an alleged injury on January 9, 1976 when he felt a sharp pain in his neck while unloading pipe. Prior to this, on December 16, 1974, claimant strained his low back and neck in an industrial injury; the claim was accepted.

On March 10, 1976, claimant gave Dr. McGee a history of an incident in October of 1975 which seemed to precipitate his increase in neck pain. The doctor diagnosed this problem as chronic posterior cervical pain secondary to chronic osteoarthritis of the cervical spine. He found that the majority of claimant's symptoms were a result of the osteoarthritis of the cervical spine.

On April 23, 1976, the Fund denied claimant's claim, stating that his condition was not the result of the incident claimant alleged happened and that it did not arise out of and in the course of his employment. On May 13, 1976, Dr. Cherry agreed with Dr. McGee's diagnosis and felt that claimant's alleged work incident was an aggravation of his pre-existing osteoarthritis. On September 13, 1976, Dr. McGee stated that it would be conceivable that claimant's work activity of January 8, 1976 aggravated his pre-existing condition of chronic osteoarthritis of the cervical spine. He was of the opinion that claimant's work duties, which included the use of a jackhammer and heavy lifting activities in which stress is applied to the shoulders and neck, could easily have aggravated claimant's underlying degenerative processes of the cervical spine. On deposition, Dr. McGee noted that he based his contention of aggravation on claimant's history, which he believes completely.

Claimant alleges that while unloading pipe towards the end of his shift, he felt a sharp pain and his neck started bothering him. He couldn't remember if he told anyone about the incident or not. The next morning, claimant could hardly roll over in bed and called the dispatcher to inform him that he would be going to the doctor as his neck hurt. Two witnesses testified that they did not unload the pipe in the afternoon, but actually did very little while waiting for an engineer to show up at the job site.

The Referee found that an investigative report taken shortly after the incident was more accurate than the witnesses' testimony because of the length of time between the date of the alleged injury and the hearing. The report corroborated claimant's story concerning the time of day and the activity the men were engaged in. The Referee noted the flare-ups of claimant's neck problems, but felt that the occurrence in January 1976 disabled him to the point that he could no longer work. It was on this premise that the Referee found claimant's alleged injury of January 8, 1976 to be compensable as a new injury.

The Board, after de novo review, has some question about whether an incident, per se, actually occurred on January 8, 1976. The testimony of several witnesses does not coorborate claimant's contentions, together with the fact that claimant failed to notify his employer of the accident and did not file a claim until two months later. In considering the medical evidence further, the Board finds that claimant suffered back and neck strain as a result of his industrial injury of December 16, 1974. In October 1975, claimant went to Dr. Lowry with the same complaints of pain between the shoulders and swelling that he experienced in January 1976. It was at the time of the January 1976 incident that the doctors were able to diagnose an underlying condition of osteoarthritis of the cervical spine which was progressively getting worse, partly as a result of the heavy lifting and other stress claimant was undergoing at work. The Board finds that claimant's alleged injury of January 8, 1976 was probably an aggravation of his original industrial injury of December 16, 1974. It is its opinion that the order of the Referee should be modified to indicate that fact.

ORDER

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

Claimant's claim is remanded to the Fund to be accepted as an aggravation of claimant's December 16, 1974 industrial injury and for the payment of compensation as provided by law until closure is authorized pursuant to ORS 656.268.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $200, payably by the Fund.

WCB CASE NO. 76-6243 SEPTEMBER 30, 1977

FRED FINLEY, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which granted claimant 160° for 50% unscheduled low back disability. Claimant contends that he is permanently and totally disabled.

Claimant, at the age of 52, injured his low back on October 7, 1975 while unloading tile off a truck. The diagnosis by Dr. Endicott the next day was lumbosacral strain and re-injury at level of disc removal.

Claimant saw Dr. Anderson in November 1975 who found osteoarthritis at L4-5 with progressive symptoms. Dr. Endicott reported on February 27, 1976 that claimant seemed to have developed another disc at L3-4 and L4-5 area which was causing nerve root disability. He recommended surgery, but claimant would not consent to such and the doctor indicated that, at that time, claimant was completely disabled.

On March 16, 1976, Dr. Martens indicated that claimant has a herniated disc at the lumbar 4-5 level, that he would not consent to surgery and that at the present time he was totally disabled. On July 12, 1976, Dr. Endicott confirmed this conclusion. In August of that year, the same doctor felt that claimant was not a good candidate for rehabilitation because of his totally disabled condition. On January 5, 1977, Dr. Martens again stated that claimant was totally disabled and Dr. Endicott agreed with this on February 23.

Since claimant has refused further medical, diagnostic and possible surgical treatment, the opinion of the doctors is that he is totally disabled. The claimant indicates that he does not want further surgery as his first laminectomy had not helped his condition and he is not guaranteed success by the doctors. The Referee does not find this sufficient reason to refuse surgery and that if claimant does not undergo further medical treatment it would be hard to ascertain claimant's true disability. Based upon these conclusions, the Referee granted claimant 50% unscheduled low back disability.

The Board, after de novo review, finds that under the circumstances it was reasonable for claimant to refuse surgery. None of the doctors urged claimant to undergo surgery, it was merely suggested by them as a possibility. Based upon the con-

clusion reached by the Court of Appeals in Waldroup v. J.C. Penney Company, 30 Or App 443, the Board finds that claimant's refusal to undergo surgery is not unreasonable and that, therefore, he is permanently and totally disabled.

ORDER

The order of the Referee, dated April 15, 1977, is reversed.

Claimant is hereby granted an award of permanent total disability as a result of his injury sustained on October 7, 1975 which is effective January 5, 1977, the date of Dr. Martens' report. The Fund may offset any permanent disability payments made since that date against the award.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of 25% of the increase in compensation granted by this order, not to exceed $2300.

WCB CASE NO. 76-4938 SEPTEMBER 30, 1977

RONALD B. HOLMES, CLAIMANT
Cosgrave & Kester, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the denial of the employer for an aggravation claim.

Claimant sustained a compensable injury on November 21, 1969 when he was run over by a hyster-type lift truck. The immediate injury was a compound fracture of the right ankle requiring open reduction and pinning with metal surgical screws. Shortly thereafter, claimant began having increased back pain and came under the care of Dr. Charles A. Fagan who felt claimant had also sustained a lumbosacral strain as a result of the injury. Dr. Blauer concluded in his closing examination that claimant had permanent partial disability involving both his left ankle and his back.

Claimant's claim was closed November 9, 1971 with an award of 48° for unscheduled low back disability and 27° for partial loss of the right foot.

In August of 1972 claimant began experiencing pain and mobility problems in his ankle and foot. A brief attempt at run-

ning a pet shop with his wife failed and claimant then returned to work as a pipefitter which he had done before the accident and most of his working life. This work bothered his back considerably. Claimant continued to have symptoms and was evaluated by Dr. Fagan and hospitalized in January of 1976. Dr. Fagan was not able to account for claimant's symptoms entirely on the basis of physical findings and referred claimant to Dr. Maurice Bowerman, a psychiatrist, for evaluation. Claimant's claim of aggravation, based on reports by Dr. Fagan and Dr. Bowerman, was denied by the carrier.

When Dr. Bowerman first saw claimant in the hospital he felt claimant was not being forthright in underestimating his symptoms and tried to overestimate his health. He also felt claimant was having periods of amnesia, suffered fatigue, memory drift, balance and had sudden onsets of speeding up of the heartbeat for a minute or two. Dr. Bowerman characterized claimant as one having a "hypomanic character". He explained that this type of person conducts his activities at above average speed and has a tendency to deteriorate physically when faced with a traumatic situation. The doctor's diagnosis was "chronic brain syndrome" which affects a person's ability to reason and to remember together with causing problems with fatigue, irritability and loss of physical strength. The doctor stated these symptoms can be brought about by stress. He felt that because of the type of personality claimant has, the injury of 1969 probably produced a permanent change in his metabolism.

Claimant's case obviously depends on the persuasiveness of the opinion of Dr. Bowerman as it related to causation. The Referee did not find Dr. Bowerman's testimony persuasive and found that claimant had not carried his burden of proof and accordingly sustained the denial of claimant's aggravation claim.

The Board, after de novo review, notes the lack of any physical condition to account for claimant's symptoms, but is of the opinion that Dr. Bowerman's diagnosis explains the physical manifestations of symptoms which do not have a definitive analytical source and are now of severity to preclude claimant from engaging in a gainful occupation.

The Board, therefore, accepts Dr. Bowerman's opinion that the condition from which claimant now suffers is related to his original industrial injury and finds his claim for aggravation should be accepted. There was no contradictory evidence to refute the testimony of Dr. Bowerman.

ORDER

The order of the Referee, dated February 4, 1977, is reversed.

Claimant's claim is hereby remanded to the State Accident Insurance Fund for acceptance and payment of compensation to which

claimant is entitled by law, until closure is authorized under ORS 656.268.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services at the hearing and on Board review in the amount of $1,200, payable by the State Accident Insurance Fund.

WCB CASE NO. 76-6830 SEPTEMBER 30, 1977

HENRY McMILLIAN, CLAIMANT
Malagon, Starr & Vinson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded the claim to it for acceptance and payment of compensation to which claimant is entitled.

Claimant suffered a sudden onset of severe pain in his back on October 13, 1976 when he loaded a box of books into a teacher's car while at work as a custodian. Claimant has a history of back problems starting in 1963 when he was injured in an industrial accident in California. In 1967, claimant had a flare-up in his back and was eventually terminated from his job because he missed too much work.

Claimant did not mention the incident of October 13, 1976 in the 801 report of injury, instead relating his back problem to the 1963 incident and the problem in 1967. Dr. Mundall reported examining claimant as far back as August 1976 and noted that claimant had a significant disability in his back. He reiterated this finding on October 18, 1976 after again seeing the claimant. Dr. Mundall felt that claimant's back problems were a continuation of his injury in 1963 for which he was operated on by Dr. King in 1974. In his report of March 11, 1977, Dr. Mundall felt that claimant's back condition was an exacerbation of claimant's injury in 1963 which happened either with repeated stress over a period of time or a single re-injury such as the incident with the box of books reported by claimant.

Claimant's testimony indicates that, although he was having some back problems prior to the injury of October 1976, he was able to perform his work. Subsequent to the accident on October 13, he found he was unable to perform his regular duties and had his son work for him. Several days later, claimant called his supervisor and said that his back was too far gone and he would have to quit work.

The Referee finds that claimant suffered a compensable injury on October 13, 1976 both from the medical evidence and from the claimant's testimony along with that of his family.

The Board, after de novo review, concurs with the findings of the Referee and affirms his order. They also find that the State Accident Insurance Fund should submit claimant's claim to the Evaluation Division for closing.

ORDER

The order of the Referee, dated April 26, 1977, is affirmed.

The State Accident Insurance Fund is hereby ordered to submit claimant's claim to the Evaluation Division for closure under the provisions of ORS 656.268.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $250, payable by the carrier.

WCB CASE NO. 76-5561 SEPTEMBER 30, 1977

STEVE MINOR, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant has requested Board review of the Referee's order which affirmed the Determination Order dated October 6, 1976, which made no award for permanent partial disability.

The Board, after de novo review, concludes that claimant did not prove, by a preponderance of medical evidence, that he was entitled to an award of compensation for permanent disability based primarily on the inability of the doctors to come to a definite conclusion as to the nature of claimant's injury and the treatment thereof. In addition to the confused state of the medical record, there appeared to be an obvious lack of communication and cooperation between the claimant and his treating and consulting doctors.

The Board affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

WCB CASE NO. 76-6197 SEPTEMBER 30, 1977

WILLIAM L. RUNYON, CLAIMANT
Marvin S. Nepom, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant has requested Board review of the Referee's order which affirmed a Determination Order awarding 90% loss of function of the left foot. Claimant contends he is entitled to an award of unscheduled disability for residuals following a sympathectomy and the implantation of a peripheral nerve stimulator on the sciatic nerve.

Claimant was enrolled at the Portland Pain Rehabilitation Center where he developed an increase in the mobility of his foot and received relief from pain. Following this treatment, it was felt he could return to truck driving. Because of a painful reaction around the subcutaneous wire, Dr. Misko removed the sciatic nerve stimulator. Since its removal claimant complains the inside of his leg is sore and aches like a bruise. He also complains of his stomach knotting up.

Citing Kajundzich v. SIAC, 164 Or 510, 102 P2d 924, where the Oregon Court recognized that an injury to one part of the body could result in the loss of function of another part, claimant contends that the crushing injury to his left foot and the subsequent surgeries, stimulator implant, etc., have resulted in a loss of function to claimant's left leg and unscheduled stomach and low back disability.

The Referee relied primarily upon the films which showed claimant actively engaged in performing his duties at the business owned by his wife, and affirmed the award of 90% loss of function of the left foot made by the Evaluation Division.

The Board, after de novo review, affirms the order of the Referee and, in addition, finds no substantial evidence upon which to make an award for unscheduled disability which is measured by loss of wage earning capacity.

ORDER

The order of the Referee, dated March 24, 1977, is affirmed.

The Referee found claimant was not overly motivated but felt that his physical disabilities far outweighed this shortcoming. The reports from the Vocational Rehabilitation Division show that claimant has a hard time holding down a job, that he is not willing to change his life style in order to get a job, and that he is mainly interested in getting a larger settlement as he feels he cannot hold down regular work. Claimant seems to be content to live on his seven acres near Cave Junction, Oregon and does not want to make any effort to change either his life style or location in order to become regularly employed again. He is interested in furthering a career in art, but is apparently unsure of how to get going in this field which is greatly limited. The Referee granted claimant 50% unscheduled disability.

The Board finds, based upon claimant's physical residuals, his apparent lack of motivation and his refusal to adjust his life style to obtain employment, that the award granted by the Referee was high. It is their opinion that 30% is adequate to compensate claimant for his condition.

ORDER

The order of the Referee, dated March 29, 1977, is modified to grant claimant 30% permanent partial unscheduled disability.

WCB CASE NO. 76-7150 SEPTEMBER 30, 1977

DOMITILA SOLANO, CLAIMANT
Harold W. Adams, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of her claim for compensability of an injury to her right foot.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated April 27, 1977, is affirmed.

WCB CASE NO. 76-3370 SEPTEMBER 30, 1977

DANIEL I. WOOD, CLAIMANT
Robert Robertson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which granted claimant an award of 160° for 50% permanent partial scheduled disability (which he meant to be unscheduled disability). The Fund contends that this award is excessive.

Claimant suffered a compensable injury to his back on September 12, 1972 while working as a welder. After conservative treatment and basically no physical findings of disability, the matter was closed. Claimant retained legal counsel, after which his claim was reopened and he came under the treatment of Dr. Dunn, a neurosurgeon. The Referee relies quite heavily on the report of Dr. Dunn, but it is felt that he tended to be quite generous in his assessment of the medical evidence given by the doctor. The doctor, in his report of April 12, 1976, recommended claim closure with the statement that claimant had no apparent disability. His testimony at the hearing was that claimant's impairment was moderate and that most of claimant's disability was by report, not by any significant objective findings.

TABLE OF CASES

SUBJECT INDEX

Volume 22

AGGRAVATION

Allowance affirmed: M. Korman ---------- 62
Allowance affirmed over SAIF appeal: C.Suell ---------- 174
Allowed on reversal: B. Urbano ---------- 10
Allowed: J. Stiltner ---------- 204
Allowed in reversal: K. McGinnis ---------- 216
Blue Cross in picture: T. Bernards ---------- 115
Denial affirmed on back strain case: C. Billings ---------- 49
Denial affirmed: B. Williams ---------- 65
Denial affirmed: C. Danford ---------- 140
Denial affirmed: R. Teed ---------- 241
Denial affirmed: L. Wilkey ---------- 269
Denial reversed by Board: R. Holmes ---------- 282
Low back from 1971: C. Oakes ---------- 18
Medical due even after five years: A. Kephart ---------- 163
Medical report cost denied: M. Kirkness ---------- 248
Multiple claims denied: L. Nash ---------- 69
New injury OR: E. Suden ---------- 40
New injury OR: R. Abbott ---------- 48
New injury OR: T. Bernards ---------- 115
New injury OR: pro-rate reversed: M. Gilroy ---------- 176
New injury OR: aggravation this time: K. Humphrey -------- 224
New injury OR: aggravation this time: R. Durfee ---------- 279
Old "medical only" claim: J. Stewart ---------- 101
Penalties denied: V. Michael ---------- 80
Settled for $6000: C. Mumper ---------- 207
While appeal pending: J. McCammon ---------- 28

AOE/COE

Acceptance affirmed: G. Sullivan ---------- 240
Allowance affirmed: P. Grife ---------- 67
Allowance affirmed: F. Castles ---------- 139
Allowance affirmed: C. Chilson ---------- 197
Allowance of neck claim affirmed: G. Mayes ---------- 243
Allowance affirmed: L. Conrad ---------- 247
Allowance affirmed: I. Jackson ---------- 248
Allowance affirmed over dissent: L. Gardner ---------- 271
Allowance affirmed: S. Roberts ---------- 272
Allowance affirmed where prior injuries: H. McMillian ----- 284
Allowed over employer appeal: R. Upshaw ---------- 183
Amyotorphic lateral sclerosis condition: R. Pearson ------- 209
Arthritis claim allowed: J. Last ---------- 225
Back claim allowed: R. Lusch ---------- 215
Chronic lung condition: M. Smith ---------- 46
Claim allowed: D. Fox ---------- 133

Claim allowed: M. Bonner ---------- 155
Claim allowed: M. Kizer ---------- 200
Colitis claim allowed: L. VanCamp ---------- 267
Cosmetic problem after burn: D. Kingsley ---------- 266
Denial affirmed: W. McKinnon ---------- 36
Denial affirmed on late filing: B. Meader ---------- 37
Denial affirmed: R. Roesner ---------- 39
Denial affirmed: C. Cairns ---------- 74
Denial reversed: R. Clough ---------- 75
Denial reversed: G. Corbett ---------- 76
Denial affirmed: A. Goodhart ---------- 92
Denial affirmed: F. May ---------- 98
Denial reversed over dissent; three pages long: L. Derksen- 117
Denial reversed: R. Rowden ---------- 135
Denial affirmed: R. Clark ---------- 139
Denial affirmed: H. Deaton ---------- 140
Denial affirmed: R. Earl ---------- 160
Denial affirmed: L. Davis ---------- 197
Denial affirmed: E. Keech ---------- 200
Denial affirmed: C. Stevie ---------- 204
Denial affirmed: J. Wilson ---------- 205
Denial affirmed: R. Curl ---------- 213
Denial affirmed: M. Hermann ---------- 221
Denial reversed in three pages: R. Sherman ---------- 226
Denial reversed: E. Gorecki ---------- 232
Denial affirmed: D. Morgan ---------- 235
Denial affirmed: I. Soulagnet ---------- 240
Denial affirmed: L. Fullager ---------- 242
Denial affirmed: H. Clemons ---------- 246
Denial affirmed: P. Cox ---------- 259
Denial affirmed: D. Solano ---------- 287
Denials of both employers affirmed: R. Waggoner ---------- 241
Emphysema claim: C. Stupfel ---------- 128
Gunshot wound denied: R. Hunt ---------- 14
Hearing loss not related to injury: P. Stevens ---------- 35
Heart claim allowed on testimony of Dr. Griswold: H. Hammond 13
Heart attack affirmed in three pages: E. Gile ---------- 89
Heart claim allowed on reversal: O. Oliver ---------- 167
Hernia claim allowed on reversal: C. Johnson ---------- 162
Hypertension claim settled: R. Krutsch ---------- 107
Hysterectomy: P. Yost ---------- 210
Late hearing request fatal: D. Clark ---------- 51
Neck incidental to back claim in four-page opinion:
K. Ragsdale ---------- 168
New injury OR; pro-rate reversed: M. Gilroy ---------- 176
Non-complying employer wins case that SAIF accepted:
M. Smotherman ---------- 182
Off-job claim first: H. Weller ---------- 113
Order affirmed: L. Scott ---------- 151
Personal election not filed: N. Harris ---------- 60
Psyche disrupted by reprimand: C. Norton ---------- 236
Psychiatric claim settled for $600: W. Graham ---------- 233
Psychiatric care: R. Martin ---------- 251
Psychological problem unrelated to finger injury: J. Miller 153

Psychological services denied: N. Rose ---------- 173
Psychotherapy payable: G. Bloore ---------- 195
Settled for $500: J. Brenchley ---------- 156
Settled for $12,500: J. Combs ---------- 257
Settlement on multiple claim case: M. Hunt ---------- 76
Settlement for $2000: J. Barr ---------- 212
Seventeen vice-presidents: Flyways, Inc. ---------- 141
Stroke claim denied: R. Getchell ---------- 67
Suspect claim allowed: W. Bennett ---------- 175
Three claims denied: E. Tate ---------- 103
Uracratia and a varicocele: D. Edwards ---------- 275
Vision problems must be proven by expert witness: S. Kim -- 105
Volunteer fireman on "off-duty" practice: W. Sullivan ----- 22

COMPLIANCE

Denial affirmed: L. Snow ---------- 263
Order affirmed: M. Bierman ---------- 195
Seventeen "vice-presidents" too many: Flyways, Inc. ------- 141

MEDICAL SERVICES

Payable even after five years: D. Lete ---------- 165
Surgery refusal reasonable: F. Finley ---------- 281

MEMORANDUM DECISION

Affirmed: W. Hodge ---------- 157
Affirmed: M. Hoerling ---------- 157
Affirmed: J. Sewell ---------- 158
Affirmed: M. Suminski ---------- 158
Affirmed: D. Talmadge ---------- 159
Affirmed: J. Whitehurst ---------- 159
Affirmed: R. Combs ---------- 231
Affirmed: J. Hemple ---------- 234

OCCUPATIONAL DISEASE

Medical board case: H. Court ---------- 31

OWN MOTION JURISDICTION

Allowed on 1969 claim: J. Woods ---------- 250
Denied for second time: F. Price ---------- 21
Denied on 1965 claim: M. Lindsey ---------- 83
Denied: J. Hunter ---------- 143
Denied: L. Knutzen ---------- 152
Denied on 1967 claim: R. White ---------- 154
Denied where ORS 656.245 adequate: A. Ruszkowski ---------- 218
Denied on 1967 claim: R. Stoltenburg ---------- 250
Denied on 1964 claim: J. Farah ---------- 277
Determination on 1969 claim: M. Clinton ---------- 3
Determination on foot claim: D. Hubbs ---------- 5
Determination vacated and re-entered: J. Stephens --------- 71

Determination on 1967 back claim: W. Leeman ---------- 82
Determination on 1967 back claim: H. Schelske ---------- 85
Determination corrected: D. Hubbs ---------- 93
Determination of 10% total for mild impairment: L. Smith -- 126
Determination on 1963 claim of total disability: H. Harvey 134
Determination on 1967 back claim: W. Johnson ---------- 145
Determination on badly injured leg: R. Lewis ---------- 146
Determination on 1971 claim: E. Smith ---------- 181
Determination on 1968 neck claim: J. Belk ---------- 184
Determination on 1966 claim: N. Fountain ---------- 214
Determination on 1967 leg claim: R. Rice ---------- 237
Determination on 1965 blood clot: P. Simmons ---------- 239
Determination on 1954 leg claim: D. Barnett ---------- 245
Determination on 1968 claim: L. Roberts ---------- 256
Dismissed: P. Smith ---------- 127
Increase of 20% by stipulation: M. Atkinson ---------- 265
Permanent total disability on 1973 claim: J. Christian ---- 1
Relief denied: A. Ruszkowski ---------- 34
Remanded for hearing: B. Poulson ---------- 20
Remanded for hearing: E. Aichele ---------- 58
Reopened 1968 claim: J. Morland ---------- 30
Reopened: J. Markham ---------- 55
Reopened 1968 claim: R. Cheney ---------- 66
Reopened 1964 leg claim: L. Pence ---------- 84
Reopened: D. Berg ---------- 130
Reopened for hip surgery: H. Ewin ---------- 270
Reopening allowed: P. Carpenter ---------- 2
Third effort to get paid for some claim not successful:
H. Douglas ---------- 103
Vacated determination where aggravation correct remedy:
H. Burt ---------- 42

PENALTIES AND FEES

Allowed for refusal to pay determination: J. Smalley ------ 202
Fee by employer should be same as claimant would have paid:
L. Molver ---------- 32
Fee allowed for $350: F. Hill ---------- 68
Fee increased to $1500: E. Gile ---------- 89
Fee allowed: L. Scott ---------- 173
Fee of $650 allowed: O. Mast ---------- 216
Fee of $1000 on aggravation: K. McGinnis ---------- 216
Fee for delay: C. Ficek ---------- 260
Fifty dollar fee where no brief: I. Jackson ---------- 248
Penalty for 74-day delay in denial: W. Sullivan ---------- 24
Penalty on medical services: L. Nash ---------- 69
Penalty for failure to pay medical: A. Kephart ---------- 163
Penalty denied: W. Bennett ---------- 175
Penalty affirmed: N. Schuette ---------- 219
Penalty affirmed: A. Holstein ---------- 222
Penalty affirmed: R. Morris ---------- 235
Penalty for delayed denial: L. VanCamp ---------- 267
Time records used to set $700 fee: S. Norris ---------- 208

PERMANENT PARTIAL DISABILITY

(1) Arm and Shoulder
(2) Back - Lumbar and Dorsal
(3) Fingers
(4) Foot
(5) Forearm
(6) Leg
(7) Neck and Head
(8) Unclassified

(1) ARM AND SHOULDER

Arm: 15% on reversal: M. Munyon ---------- 191
Arm: 30% reduced from 50%: D. Risner ---------- 171
Shoulder: 15% reversed: W. Farris ---------- 131
Shoulder: 25% increased to 40%: L. Barnett ---------- 228

(2) BACK

Back: none affirmed: J. Strachan ---------- 127
Back: none for contusion: D. Beckley ---------- 230
Back: none for moderate functional overlay: A. Allen ----- 263
Back: 5% where psychiatric problems: R. Markum ---------- 93
Back: 10% affirmed: J. Johanson ---------- 98
Back: 10% for mild disability: L. Homan ---------- 122
Back: 10% on reduction from 30%: D. Hargens ---------- 161
Back: 15% for some disability: M. Hazle ---------- 178
Back: 15% for mild soft tissue injury: W. Johnston ------- 185
Back: 15% affirmed on employer appeal: D. Horak ---------- 261
Back: 20% on reduction from 25%: F. Cabal ---------- 192
Back: 20% affirmed: B. Dawley ---------- 242
Back: 25% where unrelated complications: C. Tippie ------- 41
Back: 25% where not interested in retraining: R. Dutton -- 120
Back: 25% affirmed: N. Schroeder ---------- 201
Back: 30% for moderate disability: R. Hutson ---------- 16
Back: 30% affirmed: W. Sullivan ---------- 220
Back: 30% on reduction for moderate disability: D. Wood -- 287
Back: 35% for mild to moderate problems: H. Nichols ------ 109
Back: 35% affirmed: W. Hill ---------- 199
Back: 40% for chronic strain: K. Ragsdale ---------- 168
Back: 40% where prior 60% award on reduction for mild disability: G. Lawrence---------- 187
Back: 40% where want total: M. Corbett ---------- 259
Back: 45% for mild back injury: R. Johnson ---------- 124
Back: 50% affirmed where want total: L. Robinson --------- 111
Back: 50% where want total: L. Folk ---------- 194
Back: 60% affirmed: R. French ---------- 198
Back: 60% affirmed: D. Harmon ---------- 199
Back: 60% where want total: W. Serles ---------- 201
Back: 60% affirmed: T. James ---------- 225
Back: 70% for chest and upper back: R. Bowman ---------- 7
Back: 70% increased to total: W. Provience ---------- 254
Back: 75% in good opinion: L. Martin ---------- 56
Back: 75% where want total: W. Krieskott ---------- 165

Back: 80% affirmed: E. Serjeant ---------- 180
Back: 85% on reduction from 100%: G. Howard ---------- 223

(3) FINGERS

Finger: 90% affirmed for ring finger: W. Martin ---------- 78

(4) FOOT

Foot: 5% affirmed: R. Seelye ---------- 180
Foot: 40% loss each foot reduced to 10%: L. Terrell ------ 88
Foot: 90% affirmed: W. Runyon ---------- 286

(5) FOREARM

Forearm: 10% on increase: B. Anderson ---------- 278
Forearm: 20% affirmed: G. Smetana ---------- 100
Forearm: 40% affirmed: P. Johnson ---------- 145

(6) LEG

Leg: 10% on reduction from total: L. Wolfe ---------- 137
Leg: 15% for electrical shock: J. Rimer ---------- 63
Leg: 20% for mild disability: M. Craig ---------- 206
Leg: 25% affirmed: S. Brewer ---------- 51
Leg: 65% affirmed: W. Ritchie ---------- 39
Leg: 100% and 50% on settlement: F. Moncrief ---------- 252

(7) NECK AND HEAD

Head: 5% for fireman for headache: J. Wesley ---------- 72

(8) UNCLASSIFIED

Burns: 10% on reduction: D. Kingsley ---------- 266
Dentures: none for breakage: C. Stembridge ---------- 86
Dermatitis: 15% affirmed: B. Gardner ---------- 261
Heart: 40% for angina: K. Church ---------- 220
Heart attack: 80% where only light activities: W. Hayes -- 27
Hysterical conversion: none increased to total disability:
F. Hill ---------- 43
Spastic colitis: none: P. Yost ---------- 210
Unclassified: none affirmed: S. Minor ---------- 285
Unknown injuries: affirmed where large prior disability:
P. Petite ---------- 6
Unspecified injuries: Nothing: P. Kokas ---------- 55

PROCEDURE

Appeal dismissed on referral to rehabilitation: R. McLain - 100
Briefs encouraged: L. Waldahl ---------- 273
Childish brief: D. Miller ---------- 17
Compensation denied until agree to surgery: T. Wallace ---- 205
Cross-appeal mandatory: R. Rhine ---------- 243

Defacto denial: V. Michael ---------- 80
Determination vacated: J. Hall ---------- 143
Dismissed where reopening: B. Lingo ---------- 62
Disputed claim settlement set aside: M. Inman ---------- 52
"Good cause" not shown: C. Merck ---------- 249
Late request fatal: D. Clark ---------- 51
Late brief not considered: S. Norris ---------- 208
Medical only closing on old claim: J. Stewart ---------- 101
Non-complying employer shafted by SAIF: M. Smotherman ----- 182
Old "medical only" claim: R. Bell ---------- 65
Oral denial not valid: M. Inman ---------- 52
Order corrected: J. Short ---------- 31
Order corrected: C. Norton ---------- 262
Payments made not refundable: M. Smotherman ---------- 182
Reconsideration denied: C. Oakes ---------- 84
Reconsideration denied: F. Hill ---------- 92
Reconsideration denied: J. McCammon ---------- 96
Reconsideration denied: W. Worman ---------- 97
Reconsideration does not extend appeal time: L. Swalling -- 151
Reconsideration denied: J. Smalley ---------- 245
Remand denied: W. Lynch ---------- 10
Remand for extra medical report denied: D. Compton -------- 59
Remanded for consideration: W. West ---------- 253
Settled for $4,000: B. Terry ---------- 25
Settled for 7.5%: R. Farmer ---------- 105
Settled for status quo: D. Wagner ---------- 115
Whole record reviewed: M. Strack ---------- 21

REQUEST FOR REVIEW

Dismissal denied: R. Lewis ---------- 68
Dismissed: O. Cole ---------- 117
Withdrawn: W. Catt ---------- 3
Withdrawn: L. Hartung ---------- 4
Withdrawn: C. Herzberg ---------- 28
Withdrawn: E. King ---------- 28
Withdrawn: S. Almond ---------- 74
Withdrawn: M. Taylor ---------- 130
Withdrawn: N. Byerly ---------- 131
Withdrawn: R. Fassett ---------- 198
Withdrawn: J. Burke ---------- 231
Withdrawn: A. Blaker ---------- 253

SECOND INJURY FUND

Relief denied: C. Hankins ---------- 60
Some relief: A. Melton ---------- 218

TEMPORARY TOTAL DISABILITY

Date of reopening affirmed: C. Bartley ---------- 230
Payable prior to denial: L. VanCamp ---------- 267
Prior to denial: L. Molver ---------- 32
Reopened but not retroactive: R. Durgan ---------- 247

Reopening reversed: M. Hazle ---------- 178
Six months' time loss eliminated on appeal: R. Rhine ------ 243

TOTAL DISABILITY

Affirmed for artificial hip: D. Miller ---------- 17
Affirmed: J. Hutson ---------- 144
Affirmed: A. Juve ---------- 214
Affirmed: E. Cleveland ---------- 254
Allowance affirmed: M. McKee ---------- 99
Allowed on increase from nothing: F. Hill ---------- 43
Award affirmed: O. Mast ---------- 147
Denied for psychiatric problems: R. Markum ---------- 93
Denied where first off-job claim: H. Weller ---------- 113
Reduced to 10%: L. Wolfe ---------- 137
Reduced to 50%: C. Owen ---------- 148
Surgery refused: F. Finley ---------- 281
Total allowed by board: W. Provience ---------- 254

THIRD PARTY CLAIM

Distribution dispute: R. Seymour ---------- 238

VOCATIONAL REHABILITATION

Benefits ordered: D. Edwards ---------- 275
Fee allowed: R. McLain ---------- 217
Reimbursement allowed: R. James ---------- 97
Reimbursement denied where overpay through negligence:
W. Lilley ---------- 188

ALPHABETICAL INDEX

Volume 22

NAME	WCB NUMBER	PAGE
Abbott, Richard D., Jr.	76-4150-B	48
Aichele, Edna	SAIF Claim No. KC 120599	58
Allen, Anthony J.	76-5452	263
Almond, Steven L.	76-6532 and 77-1307	74
Anderson, Bruce	76-1891	278
Atkinson, Margaret D.	No Number Available	265
Barnett, David H.	SAIF Claim No. A 441689	245
Barnett, Lee	76-3728	228
Barr, James R.	77-7 and 77-2421	212
Bartley, Connie	76-5436	230
Beckley, Daniel L.	76-5439	230
Belk, James H.	SAIF Claim No. FC 157167	184
Bell, Ralph E.	Claim No. 1585	65
(Bennett), Donna Compton	76-5087	59
Bennett, Walter	76-3158	175
Berg, Daniel P.	77-2470	130
Bernards, Ted	76-2353	115
Bierman, Mark	76-4345	195
Billings, Carolyn S.	76-5572	49
Blaker, Alfred M.	76-4319	253
Bloore, Gerald B.	76-4754	195
Bonner, Melvin R.	76-3131	155
Bowman, Richard	75-3267	7
Brand S Corporation	76-6162-SI	60
Brenchley, Jesse L.	SAIF Claim No. B 143406	156
Brewer, Steve	76-278	51
Burke, John	77-1283	231
Burt, Harvey	77-1536	42
Byerly, Nita	76-4697	131
Cabal, Francis	76-1756	192
Cairns, Chester V.	76-1911	74
Carpenter, Patsy (Mathis)	73-3243 and 74-2075	2
Castles, Freda J.	76-6276	139
Catt, Warren	76-2617	3
Cheney, Robert	Claim No. 05X-005891	66
Chilson, Charles	76-3604	197
Christian, Jerl H.	SAIF Claim No. BB 16675	1
Church, Kirk	76-4927	220
Clark, Daniel	76-1131	51
Clark, Ruben	76-4343	139
Clemons, Harry	76-6863	246
Cleveland, Edward E.	76-1350	254
Clinton, Marion	SAIF Claim No. EC 193499	3
Clough, Robert L.	76-1825	75

NAME	WCB NUMBER	PAGE
Cole, Orville W.	76-7038	117
Combs, John L.	75-2458-E	257
Combs, Richard	74-2987 and 74-4435	231
Compton, Donna (Bennett)	76-5087	59
Conrad, Loy E.	75-3059	247
Corbett, Gary L.	76-2242	76
Corbett, Max E.	76-279	259
Court, Hollis, Sr.	71-1752	31
Cox, Priscilla	76-5939	259
Craig, Margaret	77-1062	206
Curl, Ronald	76-5378	213
Cushman, George		
Cushman, Ruth	76-2838	263
Danford, Charles J., Jr.	76-5293	140
Davis, Lora	76-6166	197
Dawley, Bruce J.	76-5634	242
Deaton, Henry	76-2357	140
Derksen, Lila	76-1796	117
DeShasier, Geraldine	75-5239	182
Douglas, Herman	Claim Nos. B53-133555 and B53-133711	103
Durfee, Robert	76-2154	279
Durgan, Robert L.	76-5266	247
Dutton, Richard L.	75-4355	120
Earl, Robert A., II	76-4651	160
Edwards, Dale J.	76-1033	275
Ewin, Helen M.	SAIF Claim No. FC 249676	270
Farah, Jeanette	SAIF Claim No. BG 81210	277
Farmer, Robert A.	77-232	105
Farris, William L.	76-5675	131
Fassett, Rosalie	77-2078	198
Ficek, Charlotte	76-2492	260
Finley, Fred	76-6243	281
Fletcher, Jerry K. (Emp.)	76-4345	195
Flyways, Inc.	76-6079	141
Folk, Lili	76-1654	194
Fountain, Norman	SAIF Claim No. GC 20123	214
Fox, Dalton	75-5240	133
French, Roy B.	76-5852	198
Fullager, Louise	76-507	242
Gardner, Barbara A.	76-1994	261
Gardner, Lewis	76-6011	271
Getchell, Raymond	75-2925	67
Gile, Ernest	75-2148	89
Gilroy, Michael	76-2678 and 76-2679	176

NAME	WCB NUMBER	PAGE
Glantz, John P. (Emp.)	75-5239	182
Goodhart, Andre J.	76-1679	92
Gorecki, Egon	76-4883	232
Graham, Warren	76-3350	233
Grife, Patricia	76-2378-B	67
Hall, John W.	75-5052	143
Hammond, Hershel	75-5066	13
Hankins, Catherine	76-6162-SI	60
Hargens, Dorothy M.	76-2293	161
Harmon, DeLaris A.	76-3103	199
Harris, Nita	76-210	60
Hartung, Leslie	77-100	4
Harvey, Henry L.	Claim No. GB 15618	134
Hayes, Walter	76-5093	27
Hazle, M. Greg	76-5172	178
Hemple, Jack	76-2630	234
Hermann, Myra	76-2975	221
Herzberg, Carl	76-6493	28
Hill, Floyd O.	76-1379	43
Hill, Floyd O.	76-1379	68
Hill, Floyd O.	76-1379	92
Hill, Walter	75-5418	199
Hodge, Willis	76-314	157
Hoerling, Martin	76-5641 and 76-4970	157
Holmes, Ronald B.	76-4938	282
Holstein, Ardis	75-4881	222
Homan, Lewis C., Jr.	76-4702	122
Horak, Diane	76-5062	261
Howard, Gerald	75-5137 and 75-5138	223
Hubbs, Diana	SAIF Claim No. YC 85849	5
Hubbs, Diana	SAIF Claim No. YC 85849	93
Humphrey, Ken	76-4267 and 76-4268	224
Hunt, Martin	76-6542 and 76-6257	76
Hunt, Robert	76-805	14
Hunter, Jack	Claim No. D 53-124426	143
Hutson, James	75-5404	144
Hutson, Richard	76-2408	16
Inman, Melvin	75-3484	52
Jackson, Isiah	76-6314	248
James, Ronald	77-2034	97
James, Thomas	76-2858	225
Johanson, John	76-2798	98
Johnson, Cecil C.	76-5507	162
Johnson, Peter W.	76-5556	145
Johnson, Richard	76-4940	124
Johnson, Walter D.	SAIF Claim No. ZC 65073	145
Johnston, William K.	76-5241	185
Juve, Arnold	76-1589	214

NAME	WCB NUMBER	PAGE
Keech, Edward	76-1965	200
Kephart, Archie	76-3649	163
Kim, Seung K.	76-2721	105
King, Eugene	75-4007	28
Kingsley, Donna	76-6393	266
Kirkness, Montague P.	76-2109	248
Kizer, Marion	76-1864	200
Knutzen, Loy	SAIF Claim No. BC 210163	152
Kokas, Patrick	76-4283	55
Korman, Michael	76-4364	62
Kreiskott, Walter	76-3199	165
Krutsch, Roy P.	77-2082	107
Last, James E.	76-4705	225
Lawrence, George	76-3422	187
Leeman, William J.	Claim No. B 53-115738	82
Lete, Domingo	76-4797	165
Lewis, Richard A.	76-3286	68
Lewis, Russell F.	Claim No. WC 66247	146
Lilley, William	No Number Available	188
Lindsey, Melvin H.	Claim No. B 114296	83
Lingo, Barbara	76-5985	62
Lusch, Roy C.	76-3768	215
Lynch, William H.	77-243	10
Markham, Jesse	No Number Available	55
Markum, Richard L.	76-2916	93
Martin, Lillian	76-1069	56
Martin, Ralph	76-4528	251
Martin, William	76-2720	78
Mast, Oliver	75-3588	147
Mast, Oliver	75-3588	216
(Mathis), Patsy Carpenter	73-3243 and 74-2075	2
May, Frederick	76-3426	98
Mayes, Gerald W.	76-623	243
McCammon, Joyce	75-5358	28
McCammon, Joyce	75-5358	96
McGinnis, Kathy A.	76-4944	216
McKee, Mike	75-3136	99
McKinnon, William	76-4028	36
McLain, Reva	76-6056	100
McLain, Reva	76-6056	217
McMillian, Henry	76-6830	284
Meader, Beadrick	75-5173	37
Melton, A. E.	76-5666-SI	218
Merck, Christine	76-5830	249
Michael, Vernon	74-1843	80
Miller, Doris	76-2017	17
Miller, James I.	76-3614 and 76-4269	153
Minor, Steve	76-5561	285

NAME	WCB NUMBER	PAGE
Molver, Louisia	76-595	32
Moncrief, Franklin E.	76-5790	252
Morgan, Deborah E.	76-3384	235
Morland, John	SAIF Claim No. C 110322	30
Morris, Robert, Jr.	76-688	235
Mumper, Charles	76-4357	207
Munyon, Mary Lou (Smith)	76-3711	191
Nash, Leonard	74-2359 and 75-4849	69
Nichols, Homer	75-3675	109
Norris, Susie	76-5309	208
Norton, Charles	76-4221	236
Norton, Charles	76-4221	262
Oakes, Carl	75-4820	18
Oakes, Carl	75-4820	84
Oliver, Orval	76-5069	167
Owen, Clair	76-3857 and 76-4165	148
Pearson, Raymond A.	76-5991	209
Pence. Lincoln	SAIF Claim No. PB 94443	84
Petite, Pete	72-2337	6
Poulson, Bruce	SAIF Claim No. B 17282	20
Price, Frank	76-2607	21
Provience, William	76-3390	254
Ragsdale, Kennedy	75-5456	168
Rhine, Rachel	76-1385	243
Rice, Richard L.	Claim No. 05X005297	237
Rimer, James, Sr.	76-4823	63
Risner, Donald L.	76-5072	171
Ritchie, Warren L.	75-3232 and 75-5157	39
Roberts, Larry	SAIF Claim No. YC 120527	256
Roberts, Sue	76-3322	272
Robinson, Loyce D.	76-1245	111
Roesner, Ric	76-4414	39
Rose, Norman W.	76-3150	173
Rowden, Rockne C.	76-3859	135
Runyon, William L.	76-6197	286
Ruszkowski, Avis	SAIF Claim No. RC 228129	34
Ruszkowski, Avis	SAIF Claim No. RC 227129	218
Schelske, Harry J.	SAIF Claim No. EC 77622	85
Schroeder, Naomi	76-5074	201
Schuette, Nancy	76-5035	219
Scott, Linda J.	76-4133	151
Scott, Linda J.	76-4133	173
Seelye, Robert L.	75-3957	180
Serjeant, Evelyn	76-1567	180
Serles, Wilbert	75-180-E	201
Sewell, Jim	76-475	158
Seymour, Richard	76-6724	238

NAME	WCB NUMBER	PAGE
Sherman, Richard L.	76-4709	226
Short, Jerome	75-4852	31
Simmons, Paul J.	Claim No. FB 121801	239
Smalley, Jim D.	76-3463	202
Smalley, Jim D.	76-3463	245
Smetana, Glenn	75-3020	100
Smith, Elsie Mae	Claim No. C604-7080	181
Smith, Laura	Claim No. B53-141693	126
Smith, Marshall	76-1389	46
(Smith), Mary Lou Munyon	76-3711	191
Smith, Perry. D.	Own Motion	127
Smotherman, Mary E.	75-5239	182
Snow, Lois L.	76-2838	263
Solano, Domitila	76-7150	287
Soulagnet, Ileen B.	76-5838	240
Stembridge, Charles	76-5928	86
Stephens, Joyce J.	SAIF Claim No. GODC 1254	71
Stevens, Phillip	75-479	35
Stevie, Charles E.	76-3721	204
Stewart, Joe	76-2580	101
Stiltner, Jesse	76-3011 and 76-4316	204
Stoltenburg, Roy R.	SAIF Claim No. BC 95240	250
Strachan, Joyce	76-5342	127
Strack, Maria	76-2523	21
Stupfel, Clair	76-3777	128
Suden, Ernest Tum	76-4833-B	40
Suell, Curley	76-4173	174
Sullivan, George W.	76-5515	240
Sullivan, William	76-2931	22
Sullivan, William	76-3153	24
Sullivan, William	76-1690	220
Suminski, Michael T.	76-3904	158
Swalling, Leslie	76-4642	151
Talmadge, Daniel	76-4368	159
Tate, Eddie	76-922, 76-923 & 76-924	103
Taylor, Mary B.	76-6461, 76-6779 & 76-6890-E	130
Teed, Richard	76-5400 and 76-5401	241
Terrell, Lowell J.	75-2446	88
Terry, Bonnie	74-2243	25
Tippie, Carol	76-2987	41

NAME	WCB NUMBER	PAGE
Upshaw, Relda	76-3950	183
Urbano, Bernice	76-3570	10
VanCamp, Lenna	76-2373	267
Waggoner, Ronald	75-5499 and 75-5483	241
Wagner, David M.	77-202	115
Waldahl, Leo N.	76-2284	273
Wallace, Terry	76-732 and 76-733	205
Weller, Harold J.	76-2353	113
Wesley, James G.	76-539	72
West, William E.	77-1995	253
Wetzel, Scott, Services, Inc.	No Number Available	188
White, Richard	Claim No. 87 CM-1111 N	154
Whitehurst, Janet M.	75-2157	159
Wilkey, Leslie	76-5758	269
Williams, Barbara	76-3338	65
Wilson, James B.	76-4690	205
Wolfe, Lester	75-4066	137
Wood, Daniel I.	76-3370	287
Woods, John	SAIF Claim No. KC 186886	250
Worman, William C.	76-2966	97
Yost, Priscilla	76-2611	210

ORS CITATIONS

ORS 656.001 ---------- 141
ORS 656.027 ---------- 141
ORS 656.027 (7) -------- 141
ORS 656.039 ---------- 141
ORS 656.054 ---------- 182
ORS 656.054 ---------- 195
ORS 656.220 ---------- 275
ORS 656.222 ---------- 188
ORS 656.230 (2) -------- 104
ORS 656.245 ---------- 70
ORS 656.245 ---------- 163
ORS 656.245 ---------- 165
ORS 656.245 ---------- 195
ORS 656.245 ---------- 218
ORS 656.245 ---------- 248
ORS 656.245 ---------- 250
ORS 656.262 (6) -------- 102
ORS 656.262 (8) -------- 260
ORS 656.268 ---------- 102
ORS 656.268 (3) -------- 51
ORS 656.268 (8) -------- 70
ORS 656.273 ---------- 70
ORS 656.273 (1) -------- 29
ORS 656.273 (3) -------- 102
ORS 656.273 (3) -------- 216
ORS 656.278 ---------- 130
ORS 656.278 ---------- 250
ORS 656.289 (3) -------- 244
ORS 656.289 (4) -------- 258
ORS 656.295 (5) -------- 54
ORS 656.295 (8) -------- 152
ORS 656.307 ---------- 48
ORS 656.319 (1) -------- 51
ORS 656.325 ---------- 95
ORS 656.382 ---------- 70
ORS 656.382 ---------- 183
ORS 656.593 (3) -------- 238
ORS 656.735 (4) -------- 142
ORS 656.794 ---------- 141
ORS 656.814 ---------- 32

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Robert VanNatta, Editor

CUMULATIVE INDEX

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CUMULATIVE INDEX
Volume 1-20

ADMINISTRATIVE RULES

Vol. 9

Administrative Order 4-1970 ---- 15
Policy Directive 63-3 ---- 284
Order 3-1966:119 ---- 119
Order 3-1966 ---- 125
Rule 3.01 ---- 49
Rule 3.04 ---- 82
Rule 4.01 (a) ---- 159
Rule 4.01 ---- 170
Rule 4.01A ---- 170
Rule 5.05 (D) ---- 26
Rule 7.01 ---- 2
Rule 7.01 ---- 15
Rule 7.02 ---- 2
WCB #3-1966 ---- 74
WCB #5-1970 ---- 91

Vol. 10

Order 3-1966 ---- 231
Order 16-1970 ---- 260
Rule 6-1972 ---- 223

Vol. 11

Rule 16-1970 ---- 30
Rule 4.01 ---- 139
Various on claim closure and aggravation rights: E. Simmons ---- 282

Vol. 12

OAR 436-61 ---- 150

ADVANCE PAYMENT

Vol. 1

Hearing may still be obtained by repayment to employer; J. G. Myers ---- 112

Vol. 2

Allowed hearing after lump sum award where claim for medical services; R. Carter ---- 20
Review dismissed: J. Braley ---- 167
Hearing rights lost: E. Pittsley ---- 140

Vol. 3

Made to Puerto Rico native: A. Pagan ---------- 182

Vol. 4

When compensation is payable: C. Lisoski ---------- 27

Vol. 5

Taken before attempted hearing: R. Robbins ---------- 67
Applied for and received: B. Carter ---------- 229
Statute means what it says: J. Small ---------- 245

Vol. 6

Receipt of payment fatal to appeal: G. McElroy ---------- 202

Vol. 7

No appeal means what it says: L. Trask ---------- 246

Vol. 8

Back claim after advance payment for arm: A. Liggett ---------- 61
Modification of award by WCB reinstates right to hearing regardless of advance payment: M. Land ---------- 188

Vol. 10

Aggrevation attempt avoid bar Adv. pay. rule: C. Burnham ---------- 241
Lump sum payment defeated appeal: M. Leedy ---------- 122
Unauthorized advance payment may result in requirement of double payment; H. Douglas ---------- 35

Vol. 19

Advance payment may be offset where reopened and total allowed: H. Horn ---------- 138
Appeal barred: T. Roland ---------- 188
By stipulation: J. Hanlon ---------- 114
Offset procedure: D. Pittman ---------- 154

Vol. 20

Reimbursement required on advance payment and then aggravation to total disability: M. Terry ---------- 202

AGGRAVATION

Vol. 1

Back: Possible evidence of bowling not bar to claim: W. Martin ---------- 50
Back: Aggravation not proven; D. Jones ---------- 102

Degenerative changes: No award in anticipation thereof; L. Carr---- 28
Dismissal of review of present permanent disability award does not waive any rights for aggravation claims; H. Brown---- 31
Head blow did not aggravate preexisting epileptic condition; M. Wing---- 153
Injury must be substantial contributing factor; J. Mayes---- 82
Not only remedy where symptoms appear after closing; E. Stephens---- 39
Prior Washington award not deducted; L. Lang---- 167
Recurring ulcer in burn area; R. Truax---- 124
Request must comply with ORS 656.271; G. Delaney---- 53
Trauma did not aggravate Hodgkins disease; J. Waibel---- 157

Vol. 2

Alleged injury while going to the doctor; W. Coleman---- 12
Allowed for back injury; W. Gill---- 49
Award increased despite doubts about procedure; O. Gaffney---- 155
Back claim agreed to; B. Sodaro---- 163
Back injury from sneezing is new injury; B. McKinney---- 15
"But for" test applied; I. Davidson---- 9
Defined; P. Howard---- 193
Delayed back symptoms not aggravation; D. Conner---- 114
Logger's claim denied for back; F. Davis---- 142
Medical reports insufficient to prove; E. Murray---- 48
Must be injury in first instance before can be aggravation; N. Cooley---- 42
New injury distinguished; J. Dubravac---- 41
New injury found; C. Bryan---- 100
New injury found after lifting; R. Hill---- 44
New injury found after pushing wheelbarrows; G. Ross---- 139
None allowed to farm worker; L. Yancey---- 190
Not a new injury; R. Jackman---- 47
Not a new injury; L. Blackmore---- 98
Not allowed where long history of bad back; P. Chambers---- 144
Not proven; M. Walsh---- 26
Not proven; F. Anthony---- 78
Procedure for processing claim laid out; H. Jones---- 132
Statute of limitations not tolled where voluntary reopening after statute has run; J. Tolley---- 150
Unscheduled shoulder: 15% aggravation claim allowed; W. McCaulley---- 123

Vol. 3

Allowed for crushed finger: D. Smith---- 224
Back problem attributable to new injury: C. Smith---- 202
Hearing of right for prior law injury?: R. Gault---- 163
Hernia aggravation claimed: C. Williams---- 141
Medical reports insufficient: L. Moe---- 36
New injury here: A. Zacher---- 66
No right of hearing: G. Lee---- 259
No hearing until current medical report: A. Deichl---- 11
None allowed to obese woman: M. Englert---- 125
None for degenerative back: N. Fountain---- 51
Not proven: F. Masters---- 246
Not new injury or aggravation: F. Nolan---- 170
Problem of injury under prior law: V. Sims---- 131
Recurring hernia: C. Beck---- 94

Vol. 4

Allowance reversed: E. Mackey---- 46
Allowance reversed: R. Ruiz---- 308
Brain damage: M. Rosenstengel---- 171
Claim allowed: J. Carroll---- 169
Claim disallowed for prior law injury: H. Gardner---- 50
Defective claim: J. Ward---- 70
Fee allowed where claim ignored: E. Patraw---- 145
Foreign doctor: I. Martin---- 218
Medical reports insufficient: L. Antoine---- 115
Medical report insufficient: J. Koch---- 182
Medical reports insufficient: H. Pickar---- 279
Medical reports insufficient: M. Brudana---- 310
Not proven: E. Rodriguez---- 192
Not proven in long opinion: L. Cansler---- 262
Neck claim allowed: A. Parnell---- 37
Remanded for better report: I. Martin---- 218
Reoccurrence not sufficient: D. Wendlandt---- 266
Slip is new injury: C. Railey---- 72
Stipulated increase approved: G. Lee---- 95

Vol. 5

Aggravation claim allowed for foot: R. Roderick---- 68
Allowed where had been advance payment: B. Carter---- 229
Attempt to relitigate prior award: T. McCallister---- 193
Attempt to perfect claim under new law for pre 1966 injury: A. Hayes---- 55
Award of 19.2° allowed to retired claimant: W. Bowles---- 82
Cervical disc problem not an aggravation: N. Lobek---- 131
Claim allowed: E. Green---- 215
Claim settled: G. Baker---- 247
Denial affirmed where several old back claims: O. McMillan---- 53
Medical evidence insufficient: E. Leding---- 255
Medical reports insufficient: V. Sarff---- 223
Medical reports insufficient: R. Gorman---- 233
No supporting medical evidence: C. Keller---- 281
None for headaches: J. Sittner---- 161
None found: M. Goetz---- 93
Hearing claim denied: E. Schoch---- 190
None found on own motion proceeding: J. Huskie---- 170
Own motion claim allowed relating to 1963 injury: A. Kinion---- 286
Remanded for hearing on merits: G. Williams---- 213
Remand where procedure confused: D. Rayburn---- 140

Vol. 6

Allowance of claim affirmed: D. Sydnam---- 65
Allowance reversed: E. Jenkins---- 119
Allowance of claim reversed: G. Aten---- 303
Allowed for delayed back symptoms: J. Wilson---- 112
Allowable even if original closure allowed no permanent disability: F. Bennett 281
Arm not shown to be worse: G. Dalton---- 175

Back: None where only congenital defect: W. Standley---- 233
Back claim allowed: W. Willits---- 192
Back difficulties not related to 1967 injury: J. Neilson---- 205
Claim disallowed where medical reports were insufficient: M. Hamilton---- 289
Medical reports insufficient: R. Gorman---- 223
None where exaggeration of back symptoms: M. Proffitt---- 148
Nothing where long standing back difficulty: W. Thames---- 180
Physician's report must have been made since last fixing of compensation: A. Magee---- 97
Psychologist's report insufficient to meet statutory criteria of Physician's Report: A. Dunham---- 89
Penalties denied in aggravation claim: M. Hibbard---- 151
Procedure where ask for aggravation and direct appeal at same time: R. Royse 228
Proof insufficient: P. Wallace---- 284
Request to reopen treated by employer as aggravation: J. Treadwell---- 247
Records of initial claims proceedings should be introduced: E. Jenkins---- 119
SAIF advised that was aggravation and not new injury until all rights to appeal had expired then terminated aggravation payments: R. Day---- 61
Third party claim effect: E. Bingham---- 226
Wrist problem related to 1968 injury: F. Allen---- 271

Vol. 7

Absolute right to hearing for 1 year after hearing even if theory of case is aggravation: W. Kuykendall---- 22
Aggravation vs. New Injury: L. Fulbright---- 224
Allowance reversed: T. Webster---- 123
Allowance for knee reversed: G. Kampster---- 176
Allowed by majority on 3rd time through hearings process: M. Crawford---- 83
Back claim allowed: J. Cunningham---- 196
Board may take own motion notice of error in original order: N. Gibson---- 251
Chronic back aggravation disallowed: C. Rogers---- 194
Claim allowed: J. Williams---- 155
Credibility doubted here: T. Elmore---- 104
Denial affirmed in back case where obese: A. Ransom---- 3
Dismissal for inadequate medical report held to preclude further hearing with report: E. Cloud---- 265
Dismissed for want of good medical report: M. Gibson---- 56
Effect of denial: R. Davis---- 170
Employer's action not necessary absent bill to be paid: C. Ray---- 142
Findings on whether condition worse should be from date of last hearing: S. Crites---- 100
Foot not aggravated: L. Remington---- 159
Home injury not new injury: E. Patridge---- 247
Medical reports do not meet prima facie corroboration: W. Braukmann---- 33
Medical report no good; appeals from Hearings findings on this point criticized: M. Heckman---- 71
Must be worse from date of last hearing: G. Pitney---- 166
Neck: 32° allowed where mostly impeachment of original award: F. Grumbo 63
New injury found on shoulder: D. Richards---- 54
No medical corroboration: H. Pankratz---- 127
None proven: W. Wait---- 255
None where claim conscious: E. Stafford---- 85
Not proven: R. McFarland---- 55

Or new injury: P. Stang---------- 100
Own motion intervention refused: L. Crone---------- 146
Time critical for worse condition is close of hearing: L. Faulkner---------- 254
Total disability allowed: E. Dewitt---------- 118
Total disability allowed: C. Schafer---------- 173

Vol. 8

Aggravation of back claim not proven: E. Sommerfelt---------- 42
Aggravation of new injury, Neither: R. Mollenhour---------- 164
Allowed where two prior injuries: L. Higgings---------- 249
Attempt to relitigate aggravation claim treated as new injury: J. Neilsen--- 77
Back aggravation successful: T. Graves---------- 65
Back claim reopened for medical care: D. Kembro---------- 287
Back claim reopened for reoccuring back pain: F. Vaughn---------- 263
Claim after denial of new injury-Res judicata: C. Debnam---------- 1
Claim allowed: J. Bonner---------- 178
Claim allowed: P. Johnson---------- 229
Claim denied: O. Jones---------- 228
Claim denied: R. Baker---------- 94
Claim denied: J. Lorett---------- 70
Claim disallowed: V. Stenson---------- 121
Dismissal for want of adequate medical report in the nature of a nonsuit:
B. Walls---------- 48
Dismissed where no medical report: E. Smith---------- 273
Dismissed where not first submitted to employer: G. Chapman---------- 221
Fee where claim accepted: J. Hensley---------- 171
Foreign doctor report permissible: H. Curry---------- 69
Hearing should be consolidated with new injury claim: N. Burkland-------- 15
Medical report sufficient but still no money: P. Drew---------- 212
Medical reports insufficient: C. Debnam---------- 1
Medical insufficient but sompensation ordered anyway: H. Hamilton-------- 219
Medical reports no good: C. Anderson---------- 210
Medical report sufficient: V. Stenson---------- 121
Medical reports inadequate: B. Salveson---------- 119
Medical reports insufficient: E. Drath---------- 146
None: W. Wright---------- 236
None: E. Rhone---------- 234
Occupational disease claim: W. Allen---------- 193
Penalties for not reopening aggravation claim: R. Minugh---------- 259
Procedure where get new medical report: W. Owen---------- 247
Reopening allowed: E. Dedmon---------- 282
Remand for hearing: G. Joern---------- 159
Relitigation denied: R. Murphy---------- 143
Settlement approved: M. Gibson---------- 92

Vol. 9

Allowance affirmed: A. Schlappi---------- 126
Allowance reversed over dissent: D. Smith---------- 253
Allowed: W. Crouch---------- 90
Allowed: W. Bowser---------- 204
Back case with two page opinion: H. Vicars---------- 109
Back claim allowed: E. Smith---------- 121

Back strain claim allowed: A. Foster---- 291
Bad medical report: C. DeLaMare---- 118
Bad medical report: E. Weedeman---- 122
Calculation of time on administrative closure: W. Zumbrun---- 170
Claim allowed on review: R. Johnson---- 149
Claim allowed: D. McKinney---- 175
Claimant is liar: C. Holland---- 11
Denied: C. Talley---- 61
Denied: W. Baker---- 210
Dovetailing of pre-1966 law: C. Herbage---- 266
Emotional condition claim: L. Balfour---- 280
Hernia: T. Choate---- 48
Knee aggravation: L. Hays---- 78
Medical report procedure inadequate: M. Carson---- 1
Medical report no good: V. Mathews---- 64
Medical report consideration for jurisdiction limited to medicals submitted by claimant: J. Frank---- 146
Medical report absent: B. Parnell---- 241
Neck on own motion: K. Stenger---- 225
New injury found is worthless opinion: M. Jackson---- 31
No back aggravation where more recent back injury: J. Stewart---- 13
No demand on Fund before request hearing: C. McLaughlin---- 199
No medical report: M. Cutshall---- 83
None proved: W. Ownbey---- 241
None where chronic low back sprain: J. Taskar---- 284
Present problem unrelated: I. Thomas---- 7
Procedure where no denial: F. Wheatley---- 195
Right expired but will consider on own motion: R. Allman---- 274
Settled: E. Banghart---- 18
Sore behind on old maid: B. Howard---- 114
Temporary disability if was not working at time of aggravation: E. Ornbaun---- 270
Timely filing: J. Irby---- 14

Vol. 10

Aggravation or new injury: E. Marsden---- 220
New injury: C. Wheeler---- 222
Allowance affirmed: C. Jones---- 155
Allowed on appeal with $1500 fee: B. Whitney---- 111
Allowed on reversal: N. Muir---- 217
Allowed where hearing officer thought phoney claim: K. Nelson---- 251
Award made: R. Comer---- 266
Back claim to logger allowed on appeal: M. Neathamer---- 70
Bowling incident compensible: W. Short---- 8
Claim after settlement: G. Heaton---- 98
Claim allowed: G. Hanks---- 108
Claim allowed for eye: W. Dickey---- 264
Claim denied but further diagnostic procedures ordered: C. Debnam---- 132
Claim allowed: G. Serrano---- 164
Claim denied: L. Sills---- 170
Claim allowed: E. Peck---- 172
Claim denied: J. Ferguson---- 173
Claim incredible: C. Anderson---- 108
Critical date is that of hearing officer's order, not end of appealate procedure: J. Mayer---- 30

Denied where first claimed under off job benefits: B. Walls---- 49
Denied where not new injury either: L. Glasbrenner---- 90
Dismissed where was bad all along: W. Wyles---- 288
Dorsal pain allowed as occupational disease for total disability: P. Kernan== 250
Expiration date of right determined: E. Stahlik---- 143
Fell off patio: D. Wright---- 215
Knee injury on claim who now pans for gold: D. Holcomb---- 207
Marie-Strumpel disease: W. Holly---- 261
Medical report sufficient: C. Eggers---- 77
Medical reports inadequate: L. Rouse---- 92
Medical reports insufficient: C. Burnham---- 241
Medical report inadequate: S. Cline---- 248
Motivation absent: J. Albano---- 239
New injury not responsible for back problem: A. Palmer---- 12
New injury here: T. West---- 73
Own motion request on 1949 foot injury: E. Haab---- 118
Philosophical distinction between new injury and aggrevation: E. Sailer---- 203
Procedure where within one year of determination and have previously had a direct appeal: A. West---- 232
Reoccurring back diffjculty dating back to 1938: W. Bush---- 10
Retroactive benefits: J. Lane---- 44
Reopened on own motion where technically not aggravation: G. Almond---- 187
Spondylitis became worse: L. Bauer---- 247
Taxi driver with knee injury: H. Ayer---- 192
Ten percent increase: H. Miller---- 105
Time limit runs from 1st closure: M. Dardis---- 50
Total disability allowance reversed: S. Jones---- 61
Worsening attributed to intervening incidents: M. Talbott---- 144

Vol. 11

Allowance affirmed on appeal: B. Turner---- 7
Allowance affirmed: R. Pitts---- 205
Back award on 1958 injury: J. Robertson---- 276
Back claim where tried 13 different jobs and couldn't do any of them: D. Woodard---- 32
Back claim stuck: S. Kanna---- 91
Back pain after off-job injury: R. Ryan---- 2
Benefits accruing prior to claim are payable: L. Cummings---- 184
Denial affirmed: R. Roy---- 209
Denied: C. Dinnocenzo---- 35
Denied: E. Poirier---- 206
Denied: M. Marshall---- 198
Denied with dissent: W. Jaster---- 34
Denied where not total and already have maximum unscheduled award: K. Ferrell---- 104
Eye injury in fall during recuperation: C. Wilson---- 16
Hip surgery on 1941 injury: J. Croghan---- 263
Medical report issued year after exam is not credible: C. Ross---- 18
Medical inadequate: L. Burkhalter---- 154
Medical reports are bad: L. Townsend---- 173
Medicals bad: A. Serry---- 232
Medicals no good: J. Philpott---- 244
Medicals bad: M. Uppendahl---- 257

Medical only closing vs. aggravation time: E. Simmons---- 282
New injury or: Knee: E. Carraway---- 95
New injury or: Neither where could still whip 4 cops a few days later: G. Roberts---- 102
New injury or: R. Strausbaugh---- 108
New injury or: READ THIS ONE: J. Barrett---- 115
New injury or: Rehab injury: W. Langley---- 125
New injury or: $15,000 settlement: W. Langley---- 125
New injury or: Penalties to 2nd employer for refusing even though was aggravation: J. Westby---- 165
New injury or: L. Wallace---- 180
New injury or: L. Smith---- 229
New injury or: D. Virell---- 227
None proven: J. Lowe---- 143
None where Dr. claimed surgery greatly improved back: G. McElroy---- 151
No medical: A. Rambo---- 223
Osteoarthritis development not proven: W. Stuart---- 86
Penalties for not reopening: S. Keeler---- 287
Proof lacking: J. Throop---- 150
Roofer wants increase over 240°: W. Brown---- 271
Settlement on confused case: R. Smith---- 118
Sorry about conditions that existed at prior settlement: R. Smith---- 14
Surgery related to 1951 injury: K. Murrell---- 68
Total allowed: C. Sutton---- 145
Total allowed: M. Pentecost---- 147
Total allowed: R. O'Dell---- 146

Vol. 12

Allowance affirmed: J. Stogsdill---- 194
Allowance affirmed: C. Burnam---- 236
Allowance affirmed: S. Lind---- 264
Ankle denial affirm = said new injury: H. Cavins---- 137
Attorney's fees fail where tardy medical information: G. Nelson---- 137
Back claim allowed: T. Ranson---- 14
Back flareup: J. Sojka---- 126
Chest pains: C. Pedigo---- 70
Claim denied: N. Roth---- 22
Credibility given the nod: J. Yantis---- 140
Denial affirmed: L. Haynes---- 45
Denial affirmed: E. Weaver---- 201
Denied for second time: M. Campbell---- 19
Dry Claim: C. Long---- 30
Finding of premature closing may include ruling regarding commencement of aggravation period: J. Blumberg---- 199
Knee claim where arthritis: A. Matherly---- 239
Laminectomy on own motion: B. Fremersdorf---- 102
Leg paid claim: E. Williams---- 173
Limitation period readjusted: H. Briggs---- 152
Medical no good: L. Kolaks---- 141
Medical okay: H. Liggett---- 143
Medical adequate: K. Eckley---- 220
Medical sufficient: T. Toureen---- 225
Medical sufficient: R. Fout---- 226

Medicals ruled inadequate: C. Long---------- 30
Medicals no good: A. Rosenstiel---------- 34
Medicals no good: R. Kylmanen---------- 226
Medicals defective for want of key words: D. Szabo---------- 229
Neck: 15% increase where can be watchman: C. Baker---------- 87
New injury: R. Blair---------- 80
New injury or: F. Radie---------- 216
No more medicals after close of hearing: P. Morgan---------- 227
Own motion on 1942 knee injury: L. Kellogg---------- 35
Own motion back claim: F. Dalton---------- 191
Partial denial killed aggravation: D. Scoville---------- 205
Premature closing may not start 5 years: L. Dalton---------- 3
Psychiatric counseling allowed: A. Bartley---------- 288
Psychologist's report is not physician's report: E. Grace---------- 206
Recurring neck pain: E. Walter---------- 203
Reopening may not extend aggravation rights: T. Cody---------- 104
Reversed for deficient handling: M. Harness---------- 88
Ruptured disc: M. Mitchell---------- 184
Second laminectomy: W. Huston---------- 12
Sore foot after kicking cat new injury: F. Sampley---------- 36
Sore neck not either aggravation or new injury: A. Vaughan---------- 210
Time period: Read this case: T. Cody---------- 104
Time period: Commencement of running is justifiable issue: M. Gibson----- 108

Vol. 13

Allowance affirmed: L. Smith---------- 243
Allowed with penalties: C. Moshofsky---------- 112
Allowed on reversal: W. Acker---------- 207
Allowed with penalties: D. Lewis---------- 280
Allowed where no prior permanent award: A. Miller---------- 300
Back claim on 1937 injury: M. Barackman---------- 226
Cancer claim: L. Fish---------- 125
Denial affirmed: H. Swartz---------- 19
Denial upheld but medical allowed: D. Mackey---------- 135
Denial affirmed in three pages: J. McKenzie---------- 273
Denied after unrelated fight: D. King---------- 8
Denied claim settled: A. Sanders---------- 85
Denied where could still go to beauty school: B. Newton---------- 269
Heart attack aggravation: R. Larsson---------- 1
Heart claim on own motion: R. Pattison---------- 158
Increase of 10%: A. Trammell---------- 112
Insurance carriers play musical chairs: W. Benda---------- 259
Interesting case procedurally; E. Austin---------- 78
Leg claim reopened: C. Christy---------- 28
Medical sufficient in hair splitting case: A. Anderson---------- 94
Medical reports sufficient: K. Flora---------- 134
Medicals no good: D. Dixon---------- 10
Medicals sufficient and claim allowed: W. Van Winkle---------- 102
Medicals ruled adequate: C. Van Buskirk---------- 149
Medicals no good: H. Deaton---------- 151
Medicals inadequate: M. Parkerson---------- 195
Medicals inadequate: W. Hamilton---------- 208
Medicals inadequate: M. Work---------- 279

New injury: not here: E. Gibbens---- 33
New injury here: L. Benson---- 84
New injury or own motion on aggravation: J. LaDelle---- 106
New injury by majority vote: B. Palmer---- 161
No more when 75% previously: D. Jones---- 17
Or new injury: confusion: D. Lane---- 214
Own motion consideration in alternative: D. Clyde---- 144
Own motion reopening after aggravation failed: J. Moorer---- 148
Penalties for resistance: P. Drew---- 299
Procedure: J. Bugbee---- 4
Procedure where previous denial: A. Osborne---- 297
Processing of claim note required if inadequate medical: P. Morgan---- 228
Remand for proper medicals not possible: P. Morgan---- 235
Reopening a medical only claim: C. Reynolds---- 92
Request late: J. Moorer---- 13
Rights expired: J. Lowe---- 261

Vol. 14

Administrative closure doesn't start time running: J. Yoes---- 19
Allowed with penalties: H. Crane---- 131
Claim allowed: L. Roberts---- 163
Claim allowed: G. Roylance---- 229
Denied by medical allowed: R. Franklin---- 210
Denied but ORS 656.245: C. Simmons---- 246
Finger amputation where also new injury: F. Parazoo---- 193
Five years doesn't run on administrative closure: M. Rediske---- 74
Five years gone: E. Weedeman---- 156
Medical not required: E. Overall---- 222
Medical opinion not available until after five years: D. Chamberlin---- 66
Medical reports good enough: F. Whitfield---- 165
Medicals inadequate: W. Lawson---- 25
Medicals sufficient: N. Bartlett---- 196
New injury or: K. Pollard---- 132
New injury or: twelve-page opinion: J. Barratt---- 249
No aggravation but 245° available: F. Welch---- 205
No medical report: O. Vetter---- 95
Procedure and carrier duties: A. Anderson---- 293
Psychiatric disease: R. Martin---- 235
Remand for hearing: S. Miller---- 229
Remanded for a hearing: H. Turner---- 240
Repeated trauma doctrine: J. LaDelle---- 297
Shoulder claim successful: M. Martens---- 13
Total disability: H. Liggett---- 157
Total on own motion: L. Frye---- 182
Untimely filed: G. Rickert---- 12

Vol. 15

Aggravation not found where not working anyway: L. Kolaks---- 29
Back pain got worse: A. Clawson---- 70
Claim allowed with fee: D. Magnuson---- 19
Condition same: C. Galusha---- 184

Date of when benefits start determined: H. Vicars---- 27
Defense wins back claim: V. Farmer---- 202
Denial reversed: W. Toliver---- 271
Knee claim allowed: D. Brown---- 284
New injury OR: L. Farnham---- 15
New injury OR: G. Parke---- 62
New time rule: S. Wyrick---- 207
New injury OR: E. Williams---- 240
Off-job lifting is aggravation: E. Dorscher---- 194
Off-job injury: C. Cochran---- 282
Own motion vs. new injury: H. Boutin---- 58
Payment required until denial made: S. Gardner---- 275
Penalty imposed: B. Bowers---- 217
Prior award disregarded: C. Wilkerson---- 136
Psychological injury: D. Pratt---- 93
Remanded for a hearing: O. Grant---- 132
Remanded for hearing: A. Cox---- 139
Remanded for hearing: G. Roth---- 183
Remanded for hearing: L. Nash---- 195
Reopening affirmed: D. Jones---- 302
Request hearing first; file claim later: R. Larson---- 295
Shoulder claim allowed: F. Hurd---- 274
Time loss even though late denial upheld: E. Barr---- 48
Total disability: H. Horn---- 277

Vol. 16

Arthritis not aggravation of lead poisoning: C. Spriggs---- 211
Back unrelated to foot: V. Barnes---- 8
Back claim reopened: J. Temple---- 72
Back pain tied to 1969 injury: M. Norgard---- 141
Back claim allowed: C. Menke---- 307
Denial of back claim: H. Roberts---- 34
Denial affirmed: M. Carson---- 45
Denial affirmed: J. Dulcich---- 48
Denial improper within one year: S. Hollingsworth---- 269
Headache claim: D. Barclay---- 249
Heart attack acceptance under fireman's presumption includes related problems: J. Gerstner---- 193
Medical evidence inadequate: M. Johnson---- 118
New injury OR: L. Barnes---- 230
New injury OR: case reversed: H. Prince---- 256
No more on appeal from second determination: K. Bott---- 198
Off-job injury intervening breaks line of causation: J. Prater---- 146
Psychiatric condition after leg amputation: R. Ledford---- 143
Shoulder claim allowed: E. Allen---- 87
Shoulder claim denied: E. Larson---- 296
Third heart attack: M. Barney---- 158
Time loss payable until denial made even if denial upheld: C. Anderson---- 19
Unrelated matters apparent: G. Christensen---- 159

AGGRAVATION, cont.

Vol. 17

Ankle from 1971 denied: F. Stark---212
Arm claim where paranoid problem: F. Blanton---223
Back claim from 1972 denied: J. Boone---221
Claim allowed where lots of messing around with claim: G. Moore---52
Claim within one year: W. Oswald---96
Degeneration of back not related: P. Manuel---12
Delayed denial: W. Higginbotham---300
Denial affirmed: G. Sells---1
Denial affirmed: R. Hayes---76
Denial affirmed: N. Crawley---100
Denial affirmed: H. Green---102
Denied where appeals to court on direct appeal: M. Williams---39
Failure to deny exposes to liability: A. Green---185
Fractured rib claim denied: M. Dickason---214
Hand claim denied: C. Wiebke---211
Increase of 30% affirmed: O. Vetter---243
Lung condition: W. Higginbotham---300
Multiple claims have some problems: F. Velasquez---229
New injury OR: neither: R. Hills---235
New injury OR: procedurally interesting: F. Villavicencio---251
New injury OR: reimbursement problem after settlement: C. Williams---278
OR new injury: C. Nollen---193
Reopened on stipulation: K. Leonard---43
Secondary injury no defense: F. Reeves---184
Time loss due between demand and denial, even if denial upheld: W. O'Neal 124

Vol. 18

Allowance reversed where 75% before: J. Moravics---236
Allowed for back symptoms: D. Christian---179
Arm injury from 1969: J. Farrah---135
Back award: M. Caldwell---61
Back claim allowed: B. Undi---48
Back injury in 1969: R. Doggett---95
Back surgery upheld: R. Nichols---156
Denial affirmed: V. Hamilton---66
Denial affirmed where no worse: W. Cooper---235
Denials affirmed: B. Whitmore---239
Denied but medical allowed: P. Mardirosian---157
Denied where vague memory: S. Gove---260
Disc out two years after medical only claim: W. McMahon---215
Interesting case: F. Miles---168
Medical only closure: J. House---230
Medicals only allowed: F. Kimball---191
New injury OR: R. Templeton---19
No increase after surgery: R. Dickey---164
Reopened but no time loss: P. Snyder---137
Reopened in hard dispute: R. Mayes---171
Reopened 1969 claim on odd procedure: W. Young---295
Reopening denied: K. Walden---256
Weight loss program not compensable: H. Hammons---145

AGGRAVATION, cont.

Vol. 19

Allowance reversed: C. Plunk---------- 181
Beach injury is new: J. Knight---------- 258
Chiropractor ignored: E. Resch---------- 299
Denial affirmed: S. Wyrick---------- 194
Denial affirmed: F. Reese---------- 261
Denial affirmed: T. Reynolds---------- 274
Denied: E. Stewart---------- 149
Denied: J. Datz---------- 192
Denied after fusion: D. Smith---------- 234
Denied for lack of credibility: K. Martin---------- 97
Denied on psychiatric claim: G. Roth---------- 17
Denied where previous denial: O. Strickland---------- 253
Denied where refuse myelogram: S. Waldroup---------- 100
New injury OR: board divided: S. Gardner---------- 9
New injury OR: R. Bowland---------- 115
New injury OR: apportionment reversed: L. Knowland---------- 284
New injury OR: both denials affirmed: C. Moore---------- 291
New injury OR: multiple insurers: R. Gay---------- 275
New injury OR: own motion joinder of 1966 claim: K. McCray---------- 227
New injury OR: procedure: I. Tallman ---------- 164
None where prior award of 80% : G. Kuskie---------- 251
On 1965 claim where no notice of rights: E. Neufeld---------- 151
Reopening voluntary -- avoid fees: J. Vogue---------- 63
Reversed and denied back claim: F. Wolfe---------- 278
Reversed arthritis claim: E. Helmer---------- 244
Settled for $7840.00: L. Kirk---------- 157

Vol. 20

Back award of 100% increased: M. Terry---------- 202
Bursitis claim: E. Heidloff---------- 38
Denial affirmed on 1972 neck claim: R. Ogden---------- 85
Denied: D. Groom---------- 35
Denied even though not completely disabled: J. Stewart---------- 133
Denied for continuing difficulty: B. Wells---------- 160
Denied where prior award of 50%: J. Pacheco---------- 205
Hernia repair related to low back strain year before: I. Morales---------- 266
Leg no worse now: R. Howard---------- 161
Neck reopened over bitter contest: F. Kirwan---------- 23
New Injury OR: procedural whipsaw: E. Burns---------- 25
New injury OR: R. Falkner---------- 134
New injury OR: M. Hopkins---------- 137
Palliative treatment not basis to reopen: J. Martinez---------- 153
Permanent total allowed: R. Mapes---------- 236
Psychological deterioration not job related: R. Atwood---------- 17
Reopened on stipulation: J. Hannon---------- 143
Same as before: M. Otterstedt---------- 162
Same as before: M. Fleck---------- 166
Three claims mixed together: S. Fay---------- 29

AOE/COE--Unproven Claims

Vol. 3

Accident didn't happen: K. Browning---------- 193
Accident just didn't happen: C. Nelson---------- 204
Accident not proven: S. Johnson---------- 176
Accident not proven: G. Smith---------- 221
Accident not proven: H. Norris---------- 247
Delayed report of non-existent accident: D. Reynolds---------- 276
Denial affirmed: N. Tennyson---------- 104
Low Back claim not proven: R. Krismer---------- 53
Trauma alleged not proven: P. Centoni---------- 153

AOE/COE --Arising Out Of and In the Course of Employment

Vol. 1

Absence of compensation due not excuse for denial of claim: E. Lytle---------- 110
Arthritis in fingers not caused by folding shirts: B. Hergenrader---------- 98
Assault: Compensable: A. Lawson---------- 77
Assault: Incredible explanation: M. Long---------- 78
Assault in which aggressor employee injured compensable: Y. Wrightsman---- 154
Assault while going home from doctor: W. Coleman---------- 64
Audiogram taken only after injury not conclusive: O. Reames---------- 92
Auto accident: Employee who drives without pay to a logging camp not in course of employment: A. Fullmer---------- 31
Auto accident: Ride to and from site of employment: L Freeman---------- 5
Back: Full range of back complaints found not compensable: E. Berry---------- 94
Back injury not from compensable fall: J. Sahli---------- 117
Back injury without objective symptoms ordered accepted: L. Casey---------- 156
Back pains appearing two months after injury are compensable: B. Philibert-- 10
Back problem result of normal aging: P. Bentley---------- 107
Bowler's elbow: Not compensable: E. Withers---------- 75
Bronchitis not from mild steel welding: D. Doud---------- 69
Coincidence of increased back pain and possible increased working hours; not sufficient of itself to establish aggravation: S. Thompson---------- 19
Compensable back injury not consistent with participation in track meet three days later: R. Wood---------- 136
Concussion--relation of various symptoms not found: S. Fullerton---------- 180
Credibility gap: Claimant's testimony impeached: J. Piatt---------- 36
Credibility of claimant: False presumptions should not impeach: J. Johnson- 105
Disability mostly result of other causes: J. Oreskovich---------- 20
Discrepancies in claimant's case must be pertinent: D. Richardson---------- 89
Dramatic onset of symptoms relevant: M. Desgrange---------- 56
Dual purpose trip compensable: P. and G. Medford---------- 46
Fall at doctor's not connected to previous back injury: B. Lemons---------- 167
Falling off horse is intervening injury: J. Williamson---------- 63
Forearm injury not related to concussion: O. Reames---------- 92
Food poisoning on business trip: L. George---------- 2
Glass back hurt again: R. Trimble---------- 85
Grease fume inhalation accidental injury: V. Carr---------- 134
Great delay in attributing injury to accident raises problem of causality: E. Mace---------- 7

Heart attack claim ordered accepted: M. Bowles---------- 45
Heart attack found not compensable: E. Mayes---------- 121
Heart attack not caused by sulfur dioxide gas: L. Moberg---------- 110
Heart attack symptoms began before work: R. Henrikson---------- 58
Hemorrhagic cystitus from fall compensable: S. Seidel---------- 101
Hernia after transfer to heavy lifting job: J. Borland---------- 7
Hernia, failure of proof that compensable: P. Lauber---------- 73
Hernia, double, in woman: S. Dalton---------- 148
Incredible accident: L. Mackey---------- 100
Incredible back injury: C. Egr---------- 56
Incredible shoulder injury: M. Benjamin---------- 54
Initial story attributing injury to prior job won't bar claimant from telling truth later: E. Green---------- 51
Injury must be substantial contributing factor: J. Mayes---------- 82
Intervening con-compensable injuries: K. Tackett---------- 65
Jailhouse accident not to be assumed: M. Brudana---------- 90
Laminectomy after intervening severe car accident: V. Johnson---------- 173
Leukoplakia not occupational origin: T. VanArsdale---------- 68
Lunch hour death from choking on potato chip while sitting in company truck off the employer's premises: M. Luck---------- 3
Medical causation is matter for medical evidence to establish: J. Sisson---- 18
Natural gas fumes may cause illness: D. Baker---------- 146
Neck pain out of thumb amputation: G. Schenck---------- 65
Neuritis from forearm injury: R. Brown---------- 150
Newspaper boy hit by car: D. Oremus---------- 161
Pre-employment physical established injury not preexisting: M. Philips---- 182
Return trip from coffee house three blocks away not compensable where stepped off curb and sprained ankle: R. Jordan---------- 122
School employee fell on street corner on way to doctor: W. Hansen---------- 175
Shoulder injury attributed to prior auto accident: K. Barnett---------- 139
Skidrow hotel and part-time janitor: C. Bean---------- 177
Sprained ankle injury may produce a back injury which would not manifest disabling pain for three months: C. Weakley---------- 16
Time of accident found sufficiently definite: E. Kilgore---------- 45
Trading services: T. Smith---------- 122
Trauma not cause of internal injury: P. Lowe---------- 23
Vascular insufficiency after ankle fracture: F. Rose---------- 129
Welding fumes did not make accidental injury: D. Doud---------- 134
Wrench blow to palm of hand exacerbated tumor: C. Risener---------- 179

Vol. 2

Accident not proven: N. Rosencrans---------- 59
Accidental result back injury: F. Hilton---------- 2
Accidental result back injury--gradually occurring symptoms: T. Shaver---- 105
Activation of latent disability in uninjured knee: W. Donahue---------- 6
Ankle claim ordered accepted despite confusion: N. Cooley---------- 42
Ankle injury not immediately discovered or reported where primary injury was severe contusion of jaw: L. McCormick---------- 61
Asthma claim defeated: O. Loudon---------- 197
Award attached to second of successive injuries: R. Saul---------- 92
Back claim denied where not reported for two weeks: A. Esperanza---------- 27

Back claim ordered accepted: A. Malek, Sr.---- 43
Back claim allowed on accidental result theory: M. McDonald---- 119
Back claim not proven where didn't tell anyone: B. Puckett---- 132
Back claim proven where delayed reporting: B. Logan---- 94
Back claim proven on conflicting facts: M. Snyder---- 95
Back disability attached to prior accident despite nominal intervening event: W. Gill---- 200
Bizzare disability not related: M. Cleveland---- 129
Board ordered claim accepted where delayed reporting: E. Hopkins---- 73
Brain damage from crushing accident: H. Cunningham---- 29
Bronchitis from chlorine: C. Lucas---- 89
Cerebral hemorrhage not caused by anxiety: B. Bearss---- 141
Claimant is not liar, but--: J. Lowe---- 101
Claimant's unrefuted and unimpeached testimony should have been accepted: R. Clark---- 41
Claimant's version not believed: G. Tolbert---- 175
Claim proven where self-diagnosis of heart attack was wrong: E. Lewis---- 95
Concussion claim proven: B. Holmes---- 94
Contact dermatitis claim defeated: W. Jederberg---- 198
Denied claim allowed by Board where contradictions: E. Wheeler---- 194
Dupuytren's contracture not related to contusion: J. Rickman---- 89
Employer's story believed by majority: W. Hedrick---- 72
Ex-Con disbelieved and denied compensation: R. Potter---- 99
Facts alleged not proven: J. Dodge---- 156
Fraudulently obtained surgery not compensable: C. Giltner---- 5
Gas station workman moving own engine: R. Pierce---- 8
Heart attack claim denied: F. Low---- 164
Heart attack claim denied where some vigorous effort: M. Williams---- 124
Heart attack denial affirmed by majority: J. Osborn---- 11
Heart attack death not caused by worrying about back injury: E. Milburn---- 62
Heart attack claim disallowed by Board: C. Heckard---- 182
Heart attack not caused by work: N. Simonsen---- 130
Heart attack not because of job: C. Fagaly---- 117
Heart attack non compensable: R. Boutillier---- 173
Heart attack not compensable: R. Hanlon---- 119
Heart attack not compensable: E. Sahnow---- 32
Heart attack: Overworked lawyer cannot collect: B. Flaxel---- 75
Heart attack allowed where prior attack: C. Hickey---- 87
Hernia claim not proven: P. Burns---- 82
Hernia: Year delay in reporting, too great: G. Johnson---- 136
Intervening injury to back implied: D. Conner---- 114
Intervening injury implied where delayed symptoms: J. Wheeler---- 85
Intervening motorcycle accident cause of low back injury: R. Melius---- 17
Insurance agent going to nightclub to collect insurance and see girl friend, hit by car: R. Rosencrantz---- 137
Kidney injury from lifting: D. Ramberg---- 34
Knee claim proven on conflicting facts: D. Bartlett---- 98
Knee injury not from 3-month-old unwitnessed incident: W. Dickinson---- 56
Knee surgery attributed to old football knee: D. Adams---- 186
Latent symptoms attributed to intervening fall: M. Glover---- 17
No intervening injury found: R. Jackman---- 47
No presumption of job connection where on job death from heart attack: C. Larson---- 127

Nurse contracts tuberculosis: I. Bennett---------- 144
Rectal prolapse claim proven: F. Dingman---------- 99
Salaried employee on way home from mill with firewood which mill needed to be rid of: M. Throop---------- 1
Salesman not independent contractor despite writing to contrary: G. Klinski- 3
Sneezing which causes back injury does not "arise out of employment": B. McKinney---------- 15
Suicide does not preclude benefits already accrued: G. Klinski---------- 104
Toe contusion unreported for 6 months not compensable: L. Bealer---------- 56
Ulcer not aggravated by unwitnessed blow to stomach: J. Scott---------- 72
Ulcers developed after great delay in compensation payments: R. White----- 28
Ulnar nerve palsy which did not show up for 7 months: D. Farley---------- 110
Unwitnessed accident, denial affirmed: D. Purkerson---------- 174
Unwitnessed accident not proven: B. Taylor---------- 168
Unexplained symptoms--denial affirmed: R. Majors---------- 184
Unwitnessed shoulder strain: D. Purkerson---------- 143
Washington injury to Idaho employee: D. Wilson---------- 158
Where no treatment for over 4 months, claim not allowed: M. Barnes------- 80

Vol. 3

Ankle sprain on arthritis: B. Roberson---------- 107
Back claim ordered accepted: E. Ward---------- 110
Back injury connected despite other incidents: A. Byrd---------- 7
Back claim proven: B. Turpin---------- 184
Bowel and urinary problems not associated: C. Brooks---------- 1
Bronchitis not compensable: F. Linton---------- 23
Bronchitis not compensable: R. Burke---------- 33
Carpenter was employee: L. Fridley---------- 73
Claim allowed where also another injury: A. Gafford---------- 218
Coming and going; on way back from lunch: R. O'Conner---------- 220
Coming and going; death by heart attack: R. Ristau---------- 268
Coming and going stipulation approved: F. Marvel---------- 51
Coming and going; Professor fell between parking lot and office: D. Willis-- 69
Coming and going; Car salesman: K. Housley---------- 93
Compensable sprain found where no specific date of injury: C. Brooks------- 206
Cystic degeneration of knee related to accident: L. Beberger---------- 115
Delayed report on back injury: H. Maxwell---------- 5
Delayed claim ordered accepted: B. Logan---------- 31
Driver in car ferrying operation: P. Allen---------- 64
Employee-tenant injured on rented property, held compensable: J. Little---- 9
Gunshot wound to motel clerk: R. Morgan---------- 128
Heart attack not compensable: L. Hodgson---------- 45
Inhalation of unknown fumes: G. Goslin---------- 166
Kidney stone movement not related to trauma: W. Miller---------- 207
Knee injury proven: L. Gooding---------- 142
Laryngitis claim allowed: R. Krueger---------- 106
Lettuce leaf fall claim allowed: A. Olson---------- 92
Nervous reaction to working in state hospital: W. Barry---------- 120
Paranoid and schizophrenic problems not related to eye injury: J. White---- 237
Rebroken arm still old accident: T. James---------- 102
Self-employed claimant hurt on first day of coverage: N. Davis---------- 174
Symptoms after trauma may not be related: G. Davis---------- 143

Symptoms not connected to ankle injury: D. Hicks---- 228
Tenosynovitis not compensable: A. West---- 22
Thrombophlebitis denial affirmed: J. Smith---- 16
Two successive injuries: D. Jolley---- 28
Unreasonable denial: R. Foster---- 158

Vol. 4

Back injury after sneeze: R. Tompkins---- 81
Blackouts not related to blow to head in voluminous split opinion: H. Kahl-- 244
Brain damage: H. Kahl---- 244
Breast swelling: M. Evans---- 157
Cancer death not contributed to by ankle injury: R. Grosjacques---- 104
Claim not proven: S. Henthorne---- 85
Claim settled: R. Bennett---- 224
Coming and going: Allowed for crossing street during working hours to move private car: C. Seacat---- 91
Coming and going: Accident involving crummy on company road within employment: R. Brookey---- 121
Coming and going: Construction worker with one-way travel allowance: A. Fenn---- 125
Coming and going: While riding back to civilization after truck disabled: J. Johnson---- 204
Decreased sexual functions: A. Magnuson---- 83
Disc removal of 1968 related to 1964 claim of $28: G. McLarney---- 177
Driver proved bump caused neck injury: O. Parker---- 3
Faint and fall: W. Payne---- 195
Hernia claim proven: L. Crispin---- 113
Hernia claim allowed: B. Sisson---- 271
Injury proven despite history: W. Weber---- 278
Liability for additional medicals: R. Munnerlyn---- 210
Neck symptoms not related to low back injury: J. Dawson---- 146
Positional risk doctrine: W. Payne---- 195
Surgery necessitated by bump to shin: V. Burgermeister---- 230
Unproven where unwitnessed and story always changing: J. McDermott---- 276
Self employed--no corroborative evidence: T. Boyer---- 8
Split decision: F. Csergei---- 302
Suicide connected to back claim: W. Tolbert---- 13

Vol. 5

Accident not proven: M. Langehennig---- 230
Attack of angina not compensable: R. Smith---- 69
Back claim allowed where immediate report to doctor where claim otherwise doubtful: A. Baker---- 112
Back incident not proven: D. McLain---- 235
Back injury first day of employment: A. Irby---- 10
Broken leg attributed to a 1954 accident: J. Roth---- 188
Cerebral Vascular insufficiency not related to spleen injury: W. Walruff---- 231
Claim allowed where long back history: H. Warrington---- 277
Claim allowed where apple picker got drunk and fell off ladder: R. Littlefield 45
Claim denied where non-complying employer: V. Crawford---- 136

Claim disallowed where first made after great delay: R. Bicknell---- 79
Claim not proven: C. Reed---- 146
Claim proved: J. Shellenbarger---- 33
Claim proven: E. Marten---- 162
Current problem not related to accident 4 years ago: D. Hankel---- 204
Denial affirmed: L. Richardson---- 221
Denial affirmed where claim that kicked in posterior by foreman: C. Debnam 48
Denial affirmed for wrist fracture: R. Miller---- 39
Denial affirmed for back claim where delayed reporting: E. DeWitt---- 40
Diverticulitis not related: L. Maples---- 226
Dual purpose trip: R. Hatch---- 221
Employee drunk and fell: M. Puckett---- 98
Emphysema not from broken ribs: D. Fox---- 207
Employee injured when stopped at scene of auto accident: R. Allen---- 216
Eye examination not related to neck injury: A. Barnes---- 276
Fight with son-in-law: J. Reeves---- 100
Fracture not related to previous strain: E. Littlejohn---- 165
Going and coming: R. Barker---- 87
Going and coming in employer's vehicle: C. Hunt---- 232
Gunshot death not employment related: I. McNeale---- 268
Heart attack: L. Mossman---- 30
Heart attack: D. Hobbs---- 78
Heart attack: A. Stanford---- 102
Heart attack denied: E. Fields---- 89
Heart claim allowed: H. Patrick---- 125
Hematoma not related to work: P. Lara---- 262
Hernia claim allowed: R. Gent---- 94
No new back injury by majority: E. Manning---- 76
Psychiatric problem: G. Linde---- 7
Radial nerve palsy after pressing thumb on burner: E. Shaw---- 22
Respiratory problem not related to inhalation of insect spray: M. Wilcoxen-- 147
Ruptured disc not related to stress and fatigue: H. Kurre---- 111
Skin lesions not related to bean handling: A. Westgarth---- 239
Spastic torticollis related to neck injury: L. Romans---- 257
Tumor not related to bump to elbow: W. Pope---- 252
Two heart attacks: M. Waymire---- 199
Ventricular fibrillation: J. Sweeten---- 19

Vol. 6

Attorney fees in secondary compensable injury case: J. Rockow---- 264
Back claim not proven: J. Reill---- 186
Back claim not related to knee injury: E. Ferguson---- 68
Back claim allowance affirmed: D. Cossitt---- 141
Breakdown of skin graft attributed to ankle sprain: D. Berry---- 50
Bowel and prostate problem not related to back injury: G. Burgess---- 41
Car agency car case settled: H. Brown---- 157
Cardiac arrest from near injury: R. Vaughn---- 237
Cardiac arrest 6 days after accident: H. Maruhn---- 262
Cerebral hemorrhage claim allowed: O. Olsen---- 237
Claim allowed where prior back problems: A. Beagle---- 71
Claim allowed despite some reservations: M. Nordahl---- 160

Claim denied after 15 months: K. Applegate---- 1
Claim denied where first made an off the job claim: A. Ping---- 97
Death while loading a wrecked car: S. Harris---- 215
Denial upheld where no notice of injury several months and no particular incident: K. Goodwin---- 53
Denial affirmed of knee complaints where was acknowledged back injury: V. DeChand---- 92
Denial of back claim affirmed: E. Tincknell---- 122
Denial affirmed for knee injury by majority: H. Bright---- 256
Denial upheld to self-employed: J. Smith---- 245
Denial affirmed where credibility impeached: W. Minnichiello---- 279
Dupuytren's contracture not shown to be related: T. Countess---- 38
Fatty Necrosis not related to typhoid shot: B. Standridge---- 183
Foot infection not related to shin bump: E. Nelson---- 167
Football injury at company picnic: W. O'Key---- 231
Frolic and detour with auto: C. Stinger---- 235
Going and coming; injury to bartender in loading zone in front of hotel while going home: G. Lee---- 40
Hernia diagnosed 6 months later not related: A. Davis---- 115
Hearing officer should view premises: M. Palodichuk---- 113
Heart attack claim defeated: F. Robertson---- 122
Heart attack claim: P. McConaughy---- 200
Heart attack not related to chlorine gas inhalation 6 days before: J. Welch-- 288
Live-in nurse subject to domestic servant exemption: C. Gunter---- 138
Monday morning back claim allowed: R. Mills---- 191
Moving personal workbench from store to home is not in line of employment: J. Etchison---- 174
Multiple sclerosis claim: W. Pettit---- 296
Neck problem found to be work related by majority: J. Staudenmaier---- 165
New injury found: G. Spills---- 109
Res adjudicata as applied to beneficiaries: J. Peters---- 285
School teacher fell off student's bicycle: F. Kemnitzer---- 197
Six-year-old boy not subject workman on father's farm: B. Gehring---- 77
Symptoms not related to minor accident: R. Allen---- 28
Symptoms not related: O. Andre---- 5
Tinnitus not related where no complaints for two years: G. Garrett---- 135
Two-page dissent would allow: R. Fenwick---- 208
Torn rotator cuff not related to work incident: R. Fenwick---- 208
Vascular insufficiency not related to not existant carbon monoxide exposure: J. Montgomery---- 121

Vol. 7

Accident not proven where delayed notice of injury: J. Reed---- 60
Afterthought claim allowed: R. Kephart---- 74
Allowance reversed: S. Lockler---- 230
Ankle sprain superimposed on previous injury creates liability for surgery which would have been needed anyway: M. James---- 204
Auto salesman hurt while fixing mother's car: J. Nelson---- 271
Back claim allowed despite alcohol problem: W. Wood---- 116
Back claim allowed although back predisposed to injury: P. Martin---- 125
Back claim denied: E. Nelson---- 108
Back claim denial affirmed: M. Johnson---- 7

Back claim where hobby is ferrier: J. Ott---- 215
Back complaints not made for a year not related to fall: C. Wellings---- 257
Back denial affirmed: N. Williamson---- 115
Back problem not related to elbow injury: L. Oliver---- 56
"Bunkhouse rule": H. Watson---- 67
Bursitis attributed to fall by majority: M. Vosburg---- 17
Cervical nerve root compression not related to Jitney operation: R. Schwerbel 219
Claimant need not know what movement caused injury: A. Buchanan---- 123
Corroboration where self-insured: J. Nolte---- 136
Credibility is the issue: F. Nelson---- 256
Delayed report: A. Palmer---- 194
Denial affirmed after remand for further evidence: M. Palodichuk---- 108
Denial affirmed where testimony about unwitnessed accident contradictory: P. Court---- 20
Denial affirmed where long series of claims: F. Lockhart---- 150
Denial affirmed where delay: E. Davis---- 162
Denial where not impressed: F. Krevanko---- 236
Disability preexisting: W. Gregory---- 266
Dissent would allow: R. Schwerbel---- 219
Don't believe it: J. Willcutt---- 192
Frolic of his own: W. Schuett---- 190
Heart attack: B. Giese---- 212
Hernia claim allowed: C. Neumann---- 261
Hernia claim denied: H. Simanovicki---- 198
Injury not nonexistent merely because doctors do not agree on what it is: M. Marshall---- 47
Jaundice not caused by tubercular treatment and tuberculosis not employment related: G. Meaker---- 159
Knee difficulty not related to back: L. Johnson---- 202
Knee injury compensible although knee was accident waiting to happen: D. Debilzen---- 277
Lack of report for 2 days important in unwitnessed accident claim: C. Hale-- 72
Murder: Denial affirmed where body found 30 miles from place of employment: L. Freeman---- 6
Need more than conjecture: G. Pannell---- 152
No compensible trauma imposed on bronchegenic neoplasm: E. Maffit---- 51
No injury to barmaid with long back history: L. Moore---- 65
No proof: A. Beagle---- 235
Off job cough ruins back: D. Edwards---- 213
Operating table death after chlorine exposure: D. Wolfe---- 131
Parkinson's disease related to fall: N. Hansen---- 43
Penitentiary injury: J. McNulty---- 27
Record ought to show that either employer or workman was subject to act: C. Giltner---- 144
Rib fracture settled for $1,500: N. Hamilton---- 199
Thumb sprain not employment related: C. Peterson---- 242
Trace injury to employment: A. Buchanan---- 123
Tumor reappearance may be aggravation: N. Major---- 98
Ulcer condition not related to back: H. Davison---- 192
Vascular accident in 76 year old man: F. Wayne---- 184

Vol. 8

Affirm where credibility issue: C. Reed---- 214
Allowed after circuit court remand: J. Reed---- 144
Allowed for unwitnessed accident: J. Crowden---- 121
Allowed on second time around: R. Kephart---- 146
Attorney died of heart attack in Court: T. Chaburn---- 112
Auto crash after company party: R. Greenwood---- 44
Back claim denied: E. Alvarez---- 54
Back claim allowed where lst claim to off job insurance: C. Galusha---- 148
Back claim allowed: N. Kendall---- 52
Back claim allowed: W. Michael---- 13
Back claim allowed: G. Davis---- 226
Back claim allowed with dissent: F. Fredrickson---- 272
Back claim allowed where no particular injury: M. Davis---- 37
Blind fistula related to fall: A. Wilbur---- 248
Claimant not believed: J. Monroe---- 152
Claim disallowed: J. Snider---- 122
Congenital hip claim refused: P. Hohman---- 7
Credibility decided by hearing officer: D. McGee---- 179
Credibility is the issue: A. Landry---- 200
Credibility is the issue: G. Hagnas---- 206
Credibility is the issue: J. Gourley---- 205
Denial too phoney: W. Clarke---- 32
Denied second time around: T. Elmore---- 154
Disc not related to broken leg: G. Hopper---- 112
Disputed claim settled for $500: E. Hathaway---- 162
Disputed settlement of $5,000: J. McBride---- 169
Drunken crash on Sunday of company pickup not compensible because claimant was hauling transmission: P. Cooper---- 80
Drunken salesman (.37%) still in course of employment: F. Boyd---- 89
Drycleaning deliveryman: R. Dougan---- 45
Eye retinopathy result of trauma: C. Kelley---- 16
Going and coming rule construced: M. Bryant---- 22
Going and coming: travel after kept late at work for safety meeting: J. Davis 242
Going and coming: denial affirmed: B. Casper---- 254
Head claim denied: J. Reid---- 240
Heart claim after carrying load up 4 flights of stairs: C. Melick---- 12
Heart attack 8 months after back injury: A. Jefferis---- 32
Heart attack - Milkman: J. Rieck---- 31
Heart claim allowed: M. Culp---- 257
Heart - Coronary insufficiency evidence insufficient: C. Alvarez---- 20
Heart claim allowed: T. Rutledge---- 253
Heart attack to truck driver: E. Frey---- 103
Hernia relationship may be proven without expert medical testimony: M. Blum 233
Hernia: C. Nemchick---- 278
Hypertension claim denied: M. Blum---- 238
Infection not related to back injury: C. Ward---- 177
Itinerant scrapman not employe of customer: B. Manker---- 88
Knee denial affirmed as to one leg: R. Almeria---- 258
Lack of credibility: H. Crabb---- 138
Lung infection is occupational disease: G. Graham---- 262
Nebraska trucker: C. Giltner---- 276

Neck complaints denied: J. Welcome---------- 107
New injury after fall: C. Ring---------- 226
Nursing student not employe of hospital: N. Bresnehan---------- 16
Psychiatric treatment ordered pursuant to ORS 656.245: D. Manley---------- 245
Psychological problems not related: A. Seeber---------- 203
Psychopathology claim settle d for $12,000 on disputed claim basis: V. Leroy 5
Safety meeting: Claimant injured on way home after: J. Davis---------- 242
Stroke occurring during chiropractic treatment for head injury is compensible: J. Williams---------- 25
Toilet seat strain: E. Pickett---------- 172
Two heart attacks: J. Coulter---------- 202
Ulcer not related to broken back: R. Jones---------- 78
Vagotomy, hemigastrectomy and hiatal hernia not related: R. Richards---------- 20

Vol. 9

Affirmed on Memo: R. Graham---------- 167
Aggravation claim denied: F. Wheatley---------- 195
Allowance affirmed: A. Jaatinen---------- 197
Auto accident on way to vocational rehabilitation: M. Lahmers---------- 189
Back claim allowed: P. Hirst---------- 60
Back paid where gradual onset: V. Hoffman---------- 98
Back claim allowed on delayed report: D. Crownover---------- 124
Back claim of 1958 reopened: J. Robertson---------- 138
Back claim denied where weak medical testimony: B. Jones---------- 289
Back disease where only muscle spasm at work: M. Starr---------- 232
Black-out a year later is related to back injury: D. Nordstrom---------- 39
Claim denied: G. Buhrle---------- 85
Claim allowed: J. Logsdon---------- 125
Claim denied: L. Cooke---------- 201
Claim allowed over dissent: R. Kline---------- 205
Coming and Going rule in worthless opinion: L. Todd---------- 32
Coming and Going case: F. Dickey---------- 68
Coming and Going of farm worker: W. Klann---------- 177
Denial affirmed where inconsistent story: J. Etchison---------- 294
Denied: F. Craig---------- 67
Denied: J. Jackson---------- 199
Drunk driver had purchased some repair parts: E. Patterson---------- 33
Employee relationship ratified: C. Heile---------- 67
Employee status absent: M. Sabolish---------- 141
Going and Coming rule: E. Carter---------- 72
Heart attack: B. Coghill---------- 71
Heart attack: R. Brannon---------- 80
Heart attack to lawyer: R. Burns---------- 88
Heart attack: C. Bogart---------- 120
Heart attack: A. Reed---------- 228
Heart attack: R. Buchanan---------- 252
Hepatitis from washroom: D. Heath---------- 193
Hernia claim: W. Woolf---------- 92
Hernia which reoccurs: J. Prewitt---------- 155
Hysterectomy not related: E. Yarbor---------- 262
Itinerant manager killed in drunken auto accident: L. Fowers---------- 243

Knee surgery where intervening injury: S. Baszler---- 50
Medical evidence necessary to related Psychopathology: J. Ackerman---- 265
Miscarriage: T. Tacker---- 216
Muscular dystrophy claim: R. Billings---- 179
Neck complaints 6 months after wrist injury unrelated: J. VanDolah---- 234
Noise: K. Snyder---- 46
Noise: S. Pruitt---- 52
Narcolepsy: M. Nelson---- 77
Nosebleed not related: A. Delay---- 142
Employee/independent contractor not employee: M. Sabolish---- 141
Off job benefit application considered: H. Calhoun---- 66
Osteomyelitis claim okay: W. Griffin---- 17
Partial denial of left arm: M. Lahmers---- 189
Psychopathology: C. Horton---- 198
Settlement over internal injuries: J. Crable---- 257
Smoke inhalation on lung cancer: L. Skirvin---- 187
Sore back after lifting at home not employment related: R. Stolley---- 27
Tooth injury didn't happen: H. Kyrk---- 176
Thrombosis claim allowed: D. Gibson---- 208
Ulcer: R. Bush---- 45
Ulcer claim: E. Cottom---- 179
Unwitnessed back claim allowed: R. Sterritt---- 245
Vein treatment not related to abrasion of knee: E. Wood---- 6

Vol.10

Accident not faked as claimed: G. Burkholder---- 219
Additional compensation denied: D. Reese---- 79
Allowance reversed: E. Schmidt---- 216
Allowed over SAIF appeal: W. Smith---- 104
Auto death on way home where family business: W. Edgar---- 23
Back claim for refusion: K. Clymer---- 94
Back injury where no particular incident: M. Livingston---- 128
Back claim denied: K. Nestman---- 129
Back claim denied: C. Gillespie---- 145
Baker with long back history: J. Lee---- 124
Claim denied where confusing evidence: C. Wallen---- 97
Claim denied: J. Boone---- 166
Claimant attempts to collect from his brother for injury on family errand: L. Gibbs---- 158
Cutter who ran to avoid falling tree: J. Coleman---- 281
Death claim allowed: E. Stocker---- 112
Delayed claim allowed: B. Prater---- 146
Denial reversed: W. Sadoski---- 39
Denial affirmed on death case: W. Trudeau---- 86
Denial affirmed: A. Tryon---- 153
Denial affirmed: I. Baker---- 169
Denied claim dismissed on appeal where attorney quit: E. Adams---- 214
Denial affirmed on confusing record: F. Hanna---- 283
Denied claim: J. Neill---- 68
Disputed claim allowed: M. Silva---- 140
Disputed claim attributed to old injury: J. Bray---- 147
Drunken car salesman killed: D. Schuler---- 26

Fall while contemplating buying house from prospective employer: E. Nolte- 210
Firman's nervousness related: R. Cook---------- 119
Girl at riding academy: J. Buckner---------- 198
Heart claim disallowed: D. Schwehn---------- 71
Heart claim: K. Breese---------- 87
Heart claim denied: R. Breeding---------- 119
Heart claim where no medically significant precipitating event: T. Helmer-- 149
Heart attack: A. Franklin---------- 209
Heart claim allowed on majority vote: E. Schartner---------- 230
Heart attack denied: W. Riback---------- 240
Heart by-pass surgery: H. Moore---------- 286
Hernia not related: H. Adams---------- 75
Hyperventilation reaction to noise: C. Mellen---------- 226
Knee injury not compensable: G. Allen---------- 242
Light bulb changer at apartment: J. Ivie---------- 259
Medical connection needed for knee injury: G. Hill---------- 43
Mental breakdown: T. Duffy---------- 262
New injury found: C. McCarty---------- 48
New injury vs. aggravation on rapid sequence of events: E. Sailer---------- 203
Newspaper boy case: H. Bradbury---------- 3
Phoney settlement gets opportunity to pay again: H. Douglas---------- 35
Psychiatric care compensible: D. Durbin---------- 29
Psychopathology: A. West---------- 84
Pulmonary embolism after several surgeries: F. Dieu---------- 66
Refracture of limb: M. Stovall---------- 114
Remand refused for investigation of "tissue mass": S. Kilburn---------- 113
Resident husband whose wife is apartment manager: J. Ivie---------- 259
Resident employee: N. Hoselton---------- 260
Settled: H. Lingo---------- 14
Settled for $13,750: J. Morava---------- 15
Should not hurt: B. Means---------- 218
Surgery not related: J. Hendricks---------- 74
Uveities claim denied: R. Volk---------- 78

Vol. 11

Back claim denied: W. Bidegary---------- 179
Back benefits claimed: W. Lillard---------- 197
Back claim no good: V. McKinnon---------- 236
Back claim didn't go: T. Hopson---------- 226
Back injury where multiple employers: D. Kimbro---------- 74
Back strain denial upheld: P. Bell---------- 50
Barmaid lifted beer keg: F. Johnston---------- 97
Belated report of back injury: J. Lewis---------- 89
Belly ache not related to wrist injury: H. Stoner---------- 83
Chiropractor's bill denied: C. Matheny---------- 78
Coughing due to inhaling fibreglass: P. Blank---------- 192
Board and Room ranch hand: R. Butler---------- 278
Business motives in trip incidental where drunk at beach: K. O'Connell----- 152
Denial reversed by Board: J. Locke---------- 268
Diagnostic expense to determine woman nutty and not hurt should be paid by employer: V. Johnson---------- 98
Diagnosis: D. Neilsen---------- 239

Employee for Workmen's Comp even though not vor vicarious tort liability: S. Bebout---- 133
Eye injury in fall during convalescence: C. Wilson---- 16
Fall injury where phoney denial: J. Dozier---- 23
Headache: R. Tennant---- 176
Heart pain on weekend at home: D. Pugsley---- 42
Heart and ulcer: A. Hanson---- 88
Heart attack: just standing: A. Albano---- 144
Heart fatal: C. Fredrickson---- 154
Heart attack: by-pass surgery: G. Moore---- 162
Heart attack: line haul trucker: A. Edwards---- 158
Heart attack not related to back injury: G. Schultz---- 187
Heart attack: E. Johnson---- 190
Heart attack: B. Seal---- 235
Heart attack to log trucker: A. Holst---- 253
Heart claim: W. Snyder---- 226
High blood pressure: E. Miller---- 269
Insanity claim settled: J. Brosseau---- 219
Knee dispute settled for $7,500: L. Beaver---- 241
Leg injury and multiple coverage: D. Virell---- 227
Lung cancer not aggravated by leg injury: W. Leaming---- 103
Multiple complaints in all parts of body: D. Rodabaugh---- 174
Multiple carriers: E. Simmons---- 282
Neck claim where prior whiplash: J. Ballweber---- 246
Neck injury: I. King---- 105
Pancreatitis after blow to stomach: D. Lewis---- 225
Partial denial of back condition: A. Verment---- 160
Psychiatric problem after head injury: J. Cook---- 22
Psychological diagnosis: D. Neilsen---- 239
Ruptured pectoralis not related to shoulder injury: B. Smedley---- 152
Salesman in car wreck: S. Bebout---- 133
Sore back no go: L. Marsh---- 200
Suicide: M. Jones---- 244
Thrombophelbitis: W. Leaming---- 103
Ulcer: W. McCoy---- 47
Unwitnessed accident: R. Jones---- 33
Wife broke hand slugging husband: A. Elmore---- 274

Vol. 12

Allowance affirmed: D. Davis---- 201
Alzheimer's Pick's disease: H. Connaughy---- 58
Aneurysm, abdominal where back claim: R. Vester---- 135
Arthritis claim successful: G. Downey---- 150
Attorney has claim for phlebitis: D. Lentz---- 278
Auto accident: L. Wicklund---- 163
Back claim where gradual onset: O. Fitzgibbons---- 23
Back claim allowance affirmed: C. Davis---- 68
Back claim where six recent auto accidents: E. Mosley---- 68
Back and hernia claim allowance affirmed where credibility is issue: R. Horwedel---- 114
Back denial overturned: M. Kane---- 146

Back claim where no traumatic injury: M. Manousos---------- 178
Back claim not related to eye injury: S. Wallis---------- 183
Back claim to log truck driver: L. Silvey---------- 190
Back claim fails: L. Bachmann---------- 195
Back claimant disbelieved: R. Martin---------- 270
Bad leg caused fall which hurt back: M. Lapin---------- 118
Cardiovascular disease: D. Herman---------- 158
Chest pains related: C. Pedigo---------- 70
Chiropractic treatments: S. Nelson---------- 128
Consequental fall hurt head and neck: R. Davis---------- 132
Corroboration not necessary: V. Harris---------- 85
Credibility main issue: H. Casey---------- 92
Credibility left to hearing officer: L George---------- 120
Denial unreasonable: C. Yancey---------- 159
Denial affirmed: J. Pike---------- 161
Denial unreasonable: G. Howard---------- 175
Denial affirmed: G. Poirier---------- 207
Eleven year delay in filing claim excessive: D. Nelson---------- 217
Employee or independant contractor: D. Perry---------- 186
Fainting spells: R. Russell---------- 57
Fall at home: R. Crandall---------- 85
Foot denial affirmed: J. Blumberg---------- 169
Ganglion cyst on wrist: J. Nelson---------- 95
Going and coming: G. Gumbrecht---------- 162
Greek painter: N. Seriganis---------- 44
Headache not related to arm: D. Gore---------- 116
Hearing loss where successive employers: R. Flick---------- 107
Hearing loss claim fails: R. Wright---------- 134
Hearing claim wins: C. Mack---------- 266
Hearing loss claim for 21 years in paper mill: T. Kerr---------- 283
Heart seizures: A. Davis---------- 46
Heart/lung condition to fireman: R. Wirkkunen---------- 65
Heart attack at city council meeting: H. Karns---------- 133
Heart attack to truck driver: W. Ganong---------- 167
Heart claim allowed: A. Bock---------- 169
Heart claim: M. Allen---------- 178
Heart claim of traveling salesman: D. Johnson---------- 189
Heart claim to fireman: H. Davis---------- 209
Heart attack while installing tire chains: E. Herrmann---------- 213
Heart claim where died on job: H. Brown---------- 242
Heart denial unreasonable: O. Burster---------- 245
Heart allowance affirmed: L. Cole---------- 261
Hernia claim allowed: G. Rogers---------- 103
Incidental back complaint appearing 30 days later: H. Kelley---------- 259
Liver trouble associated to hernia: H. Gouldin---------- 252
Logger's heart attack: E. Fields---------- 8
Lung disease by dirt and smoke: W. Prideaux---------- 96
Medical testimony of positive nature not required: J. Nelson---------- 95
Mononucleosis claim to deputy sheriff: G. Muncy---------- 9
Neck & Head: 48° for headache: C. Burress---------- 134
Osteoporosis claim: J. Reinarz---------- 66
Own motion on 1959 back claim: W. Lish---------- 127

Paroxysmal Atrial Tachycardia not stress related: J. Morley---------- 286
Parking lot fall: B. Rivera---------- 144
Partial denial affirmed: O. Johnston---------- 91
Partial denial of surgery overturned: K. Wolcott---------- 273
Progressive back disease: J. Lundberg---------- 138
Psychological problems not related: M. Webster---------- 174
Phelonephritis: C. Schwert---------- 289
Recurring back injuries over many years: F. Radie---------- 216
Six versions of dermatitis claim are too many: L. Elkin---------- 53
Sore knees on ex-athlete: K. Eisenlohr---------- 40
Sore testicle: M. Desmond---------- 49
Sore feet: L. Terrell---------- 275
Stroke seven hours after excitement: E. Mackey---------- 155
Suicide: G. Puckett---------- 20
Tennis elbow: T. Warren---------- 18
Thrombophlebitis of left knee: H. Zearing---------- 24
Ulcer after back injury: R. Longhofer---------- 156
Washington work exempt: B. Howard---------- 259

Vol. 13

Aggravation not new injury: D. Calder---------- 69
Aggravation not new injury: C. Reynolds---------- 92
Aggravation of 1937 back claim: M. Barackman---------- 226
Allowance reversed on appeal: R. Davenport---------- 245
Arthritis in right knee after left knee injury: G. Christian---------- 152
Arthritis claim: G. Bender---------- 263
Auto fatality to janitor: R. Telfer---------- 186
Back claim denied: H. Farmer---------- 246
Back claim allowed: G. Mollers---------- 258
Back denial overturned: T. Pitt---------- 96
Back denial affirmed: R. Crenshaw---------- 202
Back surgery on 1962 injury: A. Kube---------- 61
Bellyache: C. Lough---------- 44
Bunion claim: I. Grisham---------- 38
Cancer claim allowed: L. Fish---------- 125
Car salesman hit in crosswalk: E. Wadley---------- 45
Car wreck clouded case: L. Ziebarth---------- 129
Carrier disputes will generate double penalties and fees: D. Virell---------- 230
Casual employee exception inapplicable: M. Zandbergen---------- 233
Denial where movie: D. Hendrix---------- 265
Denial affirmed: J. Secor---------- 300
Denied claim settled for 72° or $5,040: F. Shinn---------- 51
Doctors don't relate back symptoms: F. Clemens---------- 257
Drunken brawl: R. Yarbrough---------- 196
Expert testimony needed to connect left knee injury to right knee treatment:
D. Baker---------- 71
Father not employer: L. Angell---------- 251
Frolic of his own: L. Angell---------- 251
Frolic where skiing accident: D. Frosty---------- 256
Full claim allowed: J. Shuey---------- 57
Hearing loss claim: R. Stark---------- 47
Hearing claim: I. Williams---------- 120

Hearing request late: M. Reed 245
Hearing claim: W. Post 259
Heart attack allowed: L. Mortensen 142
Heart claim denied: A. Zouvelos 166
Heart claim to beer truck driver: S. Ratty 275
Hernia allowed and back denied: J. Barcheck 250
Horseplay on job: J. Pearson 115
Horseplay on job: R. Reel 116
Joint adventure: J. Sells 170
Knee denial where already limping: W. Shimfessel 76
Late request for hearing: J. Conaway 252
Leg muscle strain: M. O'Neal 90
Long haul truck driver dispatched from Portland: W. Long 58
Lumbar facet syndrome: M. Sweeten 285
Lung cancer in hospital employee: A. Matthews 155
Masseuse killing in fire bombing after hours: L. Carson 283
Muscular dystrophy claim allowed: R. Billings 114
Neck claim on medical only case: A. Mason 36
Neck kink from fork lift truck: R. Geenty 143
Neck claim denied: D. Chidester 248
New injury not proven: M. Barackman 226
Occupational disease, which carrier: C. Yost 284
Penalty on denied claim: M. Boehmer 179
Phlebitis: A. Joy 9
Pro-rate where injury during recovery: S. Armstrong 255
Psychiatric problem: G. Stauber 45
Psychopathology latent: L. Plane 87
Pulmonary embolus after broken arm: G. Stone 7
Rheumatoid arthritis: E. Guinn 136
Settled for $3,000: K. Kelsey 54
Settled for $4,000: W. Bowser 198
Settlement for $7,500: J. McCullom 117
Sneeze in 1973 reopens 1961 back claim: C. Williams 113
Sneeze on the job wrecked back: J. Davis 118
Stale claim viewed with caution: J. Woodcock 225
State nurse: E. Charon 133
Stroke while driving car: A. Pollard 25
Stroke to furnace man: E. Buerke 276
Student fell in Portland Metro steering work program: V. Carter 88
Subsequent injury which is inseparable from industrial injury: G. Wolf 184
Teacher joy riding: L. Lincoln 108
Thoracic outlet syndrome: F. Estabrook 131
Thrombosis to eye: L. Noble 236
Trick shoulder: J. Smith 13
Varicose veins in maid: M. O'Neal 90
Varicose veins: C. Low 268
Vision loss after concussion: R. Schreeck 181
Waitress murdered by boyfriend: I. Robinson 105

Vol. 14

Allowed where no brief opposing: D. Olson---- 260
Angina pectoris: W. Scheese---- 264
Arthritis claim to elbow: L. Johnson---- 56
Asbestosis: G. Gronquist---- 166
Back claim denied: P. Griffin---- 101
Back claim not proven: M. McGuckin---- 6
Back claim not reported immediately: J. Lais---- 41
Back denial affirmed: W. Lovelace---- 289
Back denial where credibility issue: J. Polaschek---- 105
Back symptoms six months later: C. Boyd---- 296
Back symptoms six months later not related: F. Miles---- 39
Bizarre symptoms denied: D. Kibbons---- 281
Brain cancer compensable: E. Miller---- 40
Copy machine toner offensive: W. Tegge---- 155
Denial affirmed where credibility issue: L. Bennett---- 76
Denial affirmed where credibility issue: B. Nelson---- 59
Denial affirmed where credibility issue: O. Nelson---- 111
Denial of disc surgery in 19-year-old: M. Parkes---- 94
Denial on contradictory evidence: K. Swanson---- 219
Denial on credibility issue: R. Sears---- 109
Disc four years after strain: D. Rush---- 144
Disc surgery: W. Transue---- 50
Drug overdose: D. Biggs---- 248
Emotional breakdown: D. Knippel---- 30
Emotional problems: B. Haas---- 234
Employer's identity confused: J. Rouske---- 10
Evidence quantum needed in mental case: J. White---- 128
Eye tear from lifting oil barrel: O. Sauls---- 155
Fainting claim allowed: G. Welch---- 113
Farm wife not subject employee: M. Lyon---- 190
First day injury: J. Logsdon---- 172
Glaucoma and cataracts: J. Barry---- 288
Going and coming rule: D. Rice---- 177
Going and coming rule: D. Simons---- 176
Going and coming rule: M. Walker---- 284
Gyppo log trucker not employee: W. Atwood---- 161
Hearing loss: R. Marsh---- 189
Heart attack: D. Hamilton---- 120
Heart attack: O. Kunkel---- 118
Heart attack; cook who can't get along with boss: D. Workinger---- 238
Heart attack in fireman denied: W. Pflughaupt---- 287
Heart attack; funeral worker: H. Stewart---- 205
Interesting procedure: A. Joy---- 298
Knee complaints: D. Dopfer---- 91
Knee denied: E. Shafer---- 37
Laminectomy related to 1965 injury: W. Zunck---- 89
Neck not related to finger: W. Porter---- 248
Occupational disease claim allowed: P. Bowen---- 15
Own motion won't set aside denial: B. Bruns---- 149
Partial denial affirmed: W. Cox---- 289

Phony settlement where multiple carriers: J. Barratt---- 249
Proof short: K. Cox---- 162
Psychiatric problems: R. Vaughn---- 79
Repeated trauma doctrine: J. LaDelle---- 297
Repetitive trauma to elbow: R. Imel---- 239
Rheumatoid arthritis in knee: E. Hair---- 236
Rinehart Clinic disregarded: R. McGarry---- 175
Scuffle: R. Babcock---- 203
Secondary injury: C. Fitch---- 226
Settlement for $8,500: C. Eddington---- 200
Severe back pain while working insufficient: E. Puschel---- 2
Sneezed while reaching for tool: D. Accuradi---- 133
Sternum after fall: J. Riggs---- 180
Ulcer: J. Lovrien---- 192
Unwitnessed fall: L. Anderson---- 52

Vol. 15

Aggravation of back claim: R. Lingenfelter---- 46
Back claim denied: A. Justice---- 140
Back claim allowed: D. Bettelyoun---- 144
Back claim allowed over employer appeal: M. Murch---- 228
Back symptoms allowed: M. Walker---- 298
Cancer claim allowed: R. Williams---- 288
Carpal tunnel syndrome: C. Zehr---- 203
Carpal tunnel syndrome: T. Pattee---- 222
Chest pain became heart attack: M. Paulson---- 44
Congestive heart failure: B. Brounstein---- 178
Delayed request dismissed: W. Wamsher---- 189
Denial affirmed: G. Myers---- 88
Denial affirmed: L. Tabor---- 145
Denied over dissent: R. Webster---- 3
Denied after six months: C. Cochran---- 282
Disbelief prevails: D. Collins---- 97
Disbelief prevails: K. Barrow---- 105
Disputed back claim settled: L. Pilger---- 100
Disputed back claim allowed: D. May---- 103
Eardrum not related to arm fracture: W. Porterfield---- 165
Employee or contractor (car repair): S. Karakassis---- 238
Fight on job not compensable: M. Bell---- 303
Football player (college): S. Prosser---- 10
Frolic of his own: J. Johnson---- 64
Fume claim denied: A. King---- 295
Hearing claim denied: R. Holden---- 50
Hearing claim: D. Burnett---- 98
Heart attack denied: C. Vermeer---- 5
Heart claim: M. Paulson---- 44
Heart bypass surgery: A. Summit---- 122
Heart death claim: W. Mullen---- 149
Heart problem related to knee surgery: W. Miller---- 155
Heart attack in policeman: B. Lattin---- 187
Heart claim in fireman: K. Harmon---- 203
Heart attack allowance reversed: H. Paynter---- 224

Heart claim denial: R. Palmer---- 226
Heart attack allowed: E. Driesel---- 235
Heart claim allowed: K. King---- 308
In consistancies prevail: M. Olney---- 37
Incredible testimony everywhere: R. Gangler---- 28
Incredible testimony: A. Aranda---- 38
Joint mouse: C. Barry---- 118
Last employer responsible: P. Buyas---- 94
Log trucker killed in California..not Oregon employee: R. Croxton---- 242
Lung condition denied over dissent: D. Edwards---- 12
Meningitis: H. Mackey---- 41
Neck symptoms related: R. Rubert---- 163
Neck out while exercising to recover from prior injury: R. Ingouf---- 265
Neck claim allowed: H. Goble---- 294
Partial denial set aside: P. Makinson---- 126
Rinehart treatments not compensable: L. Knox---- 54
Safety work rule violation no defense: P. Carver---- 135
Shoulder claim allowed (tendinitis): W. Bozarth---- 236
Successive injuries - different carriers: C. Smith---- 56
Surgery not related: F. Coleman---- 65
Toxic labyrinthitis: J. Jackson---- 218
Trailerhouse mover killed: J. Mattus---- 11

Vol. 16

Aggravation or new injury: H. Prince---- 256
Back allowance reversed where no medical records in evidence:
D. Ehrmantrout---- 3
Back claim as occupational disease: J. Thompson---- 125
Back claim on own motion application denied: A. Cave---- 134
Back denial reversed: D. Paddock---- 140
Bathroom fall denied: D. Brecht---- 228
Bleeding not related to lifting: G. Heden---- 30
Carpal tunnel syndrome: N. Woods---- 61
Compliance: log trucker: J. Webb---- 173
Corporate officer still employee and subject: J. Webb---- 173
Delayed claim on day laborer: A. Templeton---- 265
Delayed claim allowed for shoulder: D. Roberts---- 284
Employee OR: berry picker not contractor: M. Cardoso---- 180
Employment ratified: J. Webb---- 173
Fall without witnesses: W. Miller---- 271
Fireman has heart claim: W. Norris---- 243
Frostbite claim denied: L. Wade---- 36
Glasses after face injury: V. Bodunov---- 298
"Going and coming" rule applied to sheriff's matron: B. Walker---- 5
"Going and coming" rule applied to waitress: J. Rohrs---- 32
"Going and coming" rule applied to airport employee: N. Kringen---- 232
Gradual back symptoms not employment related: A. Sorber---- 273
Hearing loss to truck driver denied: R. Meader---- 22
Hearing claim: H. Mitchell---- 201
Heart attack allowed to giant tire repairman: J. Jones---- 90
Heart claim to mill worker: C. Hughes---- 163

Heart attack not caused by paint fumes: H. Rohde---------- 165
Heart claim in log trucker denied: E. Bonner---------- 179
Heart surgery: N. Gillander---------- 209
Heart attack: general contractor: T. Rogoway---------- 216
Heart attack in salesman: D. Peterson---------- 239
Heart attack while drinking coffee: J. Greenawald---------- 293
Hemorrhoids caused by lifting: N. Winters---------- 286
Hernia claim not proven: M. Cardoso---------- 180
Hysterectomy: W. Stinson---------- 95
Independent contractor OR: trucker with written agreement: H. Long---------- 111
Injury doctor not even told of: C. Wilkerson---------- 302
Intervening injury no defense: W. Ferdig---------- 29
Knee not smashed in elevator: C. Davis---------- 196
Late claim denied: M. Wilson---------- 276
Noise claim: P. Young---------- 108
Noncomplying motel in middle of rescission suit: D. Mills---------- 156
Off-job claim first: G. Cunningham---------- 46
Proprietor coverage: R. Montgomery---------- 42
Psychiatric care ordered: S. Webster---------- 110
Repeated trauma theory: J. Ladelle---------- 80
Repetitive trauma applied to knee injury: J. Prettyman---------- 253
Reserve policeman hurt while training: C. Tlusty---------- 53
Roustabout at race track paid $10 for odd jobs is employee: P. Geidl---------- 207
Sandwich hawker: V. Haugen---------- 93
School official going to meeting: A. Nishimura---------- 264
Sore feet without specific injury: M. Jones---------- 152
Student on work study hurt playing baseball: M. Guischer---------- 147
Vascular disease in policeman: S. Zarbano---------- 205
Welding fumes claim allowed: R. James---------- 105
Wood allergy: M. Bugge---------- 26

Vol. 17

After-hours party: G. Schmeltzer---------- 160
Back not occupational disease: P. Morrison---------- 44
Back denial where credibility problem: L. Miller---------- 146
Back claim after vacation allowed: B. Barnes---------- 213
Back history revised: J. Turner---------- 225
Back denial in three pages: P. Pritchard---------- 272
Bicycle riding on lunch hour: C. Olsen---------- 205
Bronchitis claim: D. Lanier---------- 264
Carrier dispute: R. Neeley---------- 71
Consequential injury at home after hand surgery: S. Dansca---------- 95
Coronary bypass surgery: W. Leach---------- 293
Denial where off job insurance claim: J. Turner---------- 87
Denial where credibility issue: R. Odom---------- 181
Dust allergy: R. Jones---------- 148
Employee or contractor: real estate salesman: L. Beazizo---------- 48
Employee's son helping out: S. Kellum---------- 295
Fight with employer: L. Bleyhl---------- 191
Frolic of his own: R. Harris---------- 186
Heart claim settled for $20,000: L. Beebe---------- 27

Heart claim - car salesman: J. Beeler---- 33
Heart attack claim in salesman: J. Scott---- 291
Heart attack while drilling hole in ceiling of jail: R. Anderson---- 302
Injury not on job: J. Taylor---- 46
Intestinal disorder not related to back: R. Lakham---- 67
Knee problem denied in tile setter: W. Babbel---- 138
Late claim allowed: G. Creager---- 21
Late filed back injury: J. George---- 64
Leg fracture causes pulmonary emboli: W. Murphy---- 2
Neck denial affirmed: L. McKinney---- 85
Occupational disease of arm muscles: A. Johnson---- 196
Off-duty gas attendant pushed boss's daughter's car: R. Harris---- 186
Pneumonia death claim: A. Minor---- 145
Psychological problems: K. Duggan---- 261
Real estate salesman is employee: L. Beazizo---- 48
Rinehart medical opinion not followed: R. Iverson---- 103
Rinehart medical opinion on arthritis disregarded: E. Ritz---- 122
Secondary injury: R. Neeley---- 71
Self-inflicted reinfection: W. Clemo---- 31
Tax man with pain in rear: A. Wilson---- 230

Vol. 18

Allergy claim: V. Grover---- 7
Asbestosis: D. Jangala---- 67
Auto accident on way to physical therapy: J. Skophammer---- 18
Auto crash after drinking: R. Andersen ---- 127
Back aggravation not proven: P. Middleton---- 288
Back claim allowed over strong dispute: S. Krous---- 35
Back claim denied: M. Schaeffer---- 93
Back condition unrelated: R. Davis---- 40
Back denial reversed: H. Lewis---- 41
Carpal tunnel syndrome: K. Maier---- 108
Corroboration important on late claim: M. Mosko---- 46
Denial may be made at any time: S. Anderson---- 110
Denial proper where won't tell who is responsible for injuries: J. Ament---- 210
Denied over credibility: K. Binette---- 61
Dermatitis after taking antibiotics: H. Olson---- 232
Employee or contractor: carpenter: R. Motta---- 206
Employee or contractor: fertilizing job using employer's truck: D. Riggs---- 216
Exophoria eye problem after slap to face: E. Moore---- 276
Exploratory surgery which didn't find anything: G. Troyer---- 304
Fall shown on doctor's chart as fall at home: L. Lung---- 214
Female problems after fall: J. Edwards---- 56
Fibromyositis: R. McCown---- 16
Fight between two employees: P. McKee---- 55
"Going and coming rule" where on way home to lunch: K. Allen---- 32
Headaches from strain: A. McManus---- 238
Hearing loss denied: W. Short---- 291
Heart attack to millwright where high blood pressure: F. Foley---- 146
Heart attack death three months after on-job fall: J. Brunick---- 149
Heart attack: mechanic: R. Costello---- 160

Heart claim: fell 25 feet to concrete - heart ruptured: B. Manning---------- 226
Hemorrhoids: J. St. John---------- 280
Hepatitis: R. Corbell---------- 39
Housekeeping services: J. Skophammer---------- 18
Logger trimming trees at $25 per tree is contractor: W. Marcum---------- 174
Medical services unnecessary: A. Perez---------- 85
Multiple claims over knee injury: L. Neilan---------- 82
Multiple insurers point at each other: R. Shaw---------- 184
Occupational disease - lead poisoning in welder: L. Remington---------- 266
Neck pain after back injury: V. McClain---------- 204
Preacher had heart attack: G. Simon---------- 177
Proof of injury absent: J. Russ---------- 5
Psychiatric condition is related: R. Koch---------- 8
Psychological claim settled for $10,151: G. Linn---------- 254
Psychological disability: H. Scott---------- 305
Pulmonary embolism: J. Childers---------- 123
Revised medical records suspect: B. Siewell---------- 224
Settled for $6,500: C. Chaney---------- 60
Settlement on denied claim basis: S. Packer---------- 59
Settlement of $15,000 on 1968 injury: D. Grassl---------- 158
Ski instructor in ski contest: K. Hansen---------- 101
Ulcer claim allowed: D. Ward---------- 106
Unrelated medical opinion sufficient: A. Marker---------- 74
Vasomotor rhinitis: I. Harpole---------- 130
Vocational rehabilitation injury: A. Wood---------- 245

Vol. 19

Allowance reversed where credibility issue: K. Rolfe---------- 145
Allowed where conflicting testimony: M. Whitesides---------- 233
Allowed where credibility issue: E. Boothe---------- 156
Back claim paid over dissent: S. Bettencourt---------- 36
Bronchopulmonary disease: R. Robinson---------- 74
Codein addiction: B. Swetland---------- 193
Coverage after cancelation where fund retained money from prior overpayment:
P. Kelly---------- 60
Denial after eight years overturned: J. Fritz---------- 259
Denial of back claim affirmed: B. Oliver---------- 239
Denial on conflicting stories: N. Isaacs---------- 268
Denied on disbelief: D. Nicol---------- 269
Denial permissable even after acceptance: S. Stamm---------- 232
Denied where contradictions: E. Sevier---------- 231
Denied where only doctor helpful is suspended: D. Danielson---------- 289
Doughnut shop fall during civil service exam: H. Behrendsen---------- 95
Employee or contractor: R. Atkinson---------- 51
Heart attack on job: C. Sneed---------- 148
Heart attack where two employers: E. Gay---------- 58
Heart surgery settled for $12,000: J. McAmis---------- 159
Hormone imbalance: J. Armstrong---------- 176
Incident not proven: J. Badoni---------- 34
Insurance carriers in dispute: M. Fritz---------- 133
Lung disease to welder: D. Miller---------- 301

Lung problem denied: J. Cioch ---- 219
Nervous breakdown settled for $10,000: A. Booth ---- 196
New injury OR: tendonitis: E. Barney ---- 215
Phlebitis allowed: F. Case ---- 203
Quasi-course of employment: F. Lugviel ---- 56
Reversed and denied where alcohol problem: J. Steiner ---- 248
Secondary injury: Fall at home because of weak arm: J. Maloney ---- 218
Secondary injury: Fell out of tree at home: S. Robson ---- 84
Settled for $300.00: E. Beal ---- 262
Student in chemistry class: M. Shifton ---- 208
Training program prior to employment: R. Olson ---- 29
Tumor in leg: P. Digiorgio ---- 22

Vol. 20

Apartment manager: T. Grund ---- 147
Back claim allowed: L. Wofford ---- 28
Back surgery unrelated: P. David ---- 152
Belated claim denied: C. Shepard ---- 120
Belated claim denied: W. Ashburn ---- 262
Bronchitis due to industrial fumes: H. Moyer ---- 74
Carpal tunnel syndrome: G. Hobson ---- 276
Casual worker exception: S. Pollard ---- 52
Consequential injury claimed: V. Hamilton ---- 278
Denial affirmed: M. Burton ---- 84
Denial upheld on reversal: R. Wilshire ---- 87
Denied for lack of prompt report: C. Davis ---- 20
Denied claim settled for $8,000: T. Wilber ---- 58
Denied for gradual onset of symptoms: T. Sundin ---- 70
Denied where medical notes have no history: F. Wilkinson ---- 73
Denied arm claim where many previous injuries: R. Mayes ---- 144
Emphysema: A. Mueller ---- 158
Fall did not occur: R. Logan ---- 148
False job application no defense: G. Watson ---- 295
Fight with employer: J. Scott ---- 68
Football claim settled: T. Stark ---- 168
Frisbee throwing on break: M. McMain ---- 179
Fumes taken in by welder: J. Mabry ---- 90
Gradual onset of symptoms: M. Lamkey ---- 207
Hand problem compensable for grocery checker: S. Fox ---- 99
Heart attack 5 days after work: V. Napier ---- 49
Heart attack in grounds keeper allowed on reversal: L. Arnold ---- 101
Heart attack denied: W. Fullen ---- 116
Heart attack in mechanic: R. McCuskey ---- 181
Hernia as aggravation: I. Morales ---- 266
Horseplay in locker room: J. Collins ---- 141
Hospital bill allowed: D. Velasquez ---- 1
Implied employment contract: J. Fagnand ---- 111
Independent contractor OR: truck driver: R. Edens ---- 45
Independent contractor OR: sheet rocker loses: J. Makinson ---- 89
Independent contractor OR: handyman: L. Adams ---- 155
Insurance - which carrier: R. Smith ---- 291

Laryngitis: L. Morrison ---------- 217
Late filed claim allowed: O. Walton ---------- 250
Multiple employers: responsibility reversed: D. Brandt ---------- 97
Multiple claims mostly denied: H. Lefever ---------- 196
Oral denial at hearing caused problem: M. Koonce ---------- 91
Phlebitis: A. Scott ---------- 156
Psychiatric care: M. Baker ---------- 93
Psychiatric case denied: G. Johanesen ---------- 190
Raynaud's phenomena: R. Kiger ---------- 245
Two days is fatal delay: N. Harris ---------- 255

BURDEN OF PROOF

Vol. 1

Claimant must prove employer's subjectivity: B. Westfall ---------- 126
Claimant must prove any award to which he is entitled beyond amount of determination: J. Byers ---------- 25
Claimant must prove case: C. Butcher ---------- 66
Claimant must justify late notice of injury: G. Levesque ---------- 158
Claimant must justify late notice of injury: C. Satterfield ---------- 72
Claimant's testimony of AOE/COE does not shift burden: J. Sahli ---------- 117
Injury must be substantial contributing factor: J. Mayes ---------- 82
Head injuries claim not proven: R. Turvey ---------- 55
Prima facie case for claimant: R. Brown ---------- 150

Vol. 2

No presumption of job connection where on job death from heart attack: C. Larson ---------- 127

COMPLIANCE

Vol. 8

Default compliance order set aside: D. Bartlett ---------- 21
Homebuilding company is subject employer: D. Dishner ---------- 4
Non-complying employer: D. Bartlett ---------- 266
Nebraska trucker: C. Giltner ---------- 276

Vol. 9

Coach with no pay yet: J. Robertson ---------- 211
Subjectivity: H. Mack ---------- 165
Theatrical agency: C. Wiles ---------- 117

Vol. 11

Apartment manager: J. Palmer ---------- 196
Bar was non-complying: F. Johnston ---------- 97
Board and room ranch hand: R. Butler ---------- 278
Death claim filed two years late: S. Bebout ---------- 133

Employer made some payments before going broke: S. Bebout ---------- 133
New age mission non-complying: W. Anderson ---------- 163

Vol. 12

Application in the mail: N. Reiling ---------- 139
Painting contractor stuck: N. Seriganis ---------- 44
Washington employer at Trojan: W. Reynolds ---------- 177
Washington workman: B. Howard ---------- 259
Written subcontract stood up: J. Houston ---------- 33

Vol. 13

Coverage confused by many "dba's": J. Sells ---------- 170
Non-compliance found: M. Zandbergen ---------- 233

Vol. 14

Farmer working out hay purchase: R. Lenning ---------- 146

Vol. 15

Effect of Washington denial: H. Cline ---------- 133
Employer not charged with SAIF misconduct: R. Miles ---------- 164
Shaklee employee: J. Wishart ---------- 92
Washington company: H. Cline ---------- 133

Vol. 16

Assumed business name filing binds all named parties liable: J. Milks ---------- 260
Roustabout at race track: P. Geidl ---------- 207
Sandwich hawker: V. Haugen ---------- 93
Second injury fund not available to non-complying employer: C. Crouse ---------- 99

Vol. 18

Partnership policy doesn't cover individual employees: R. Motta ---------- 206

COSMETIC DEFECT

Vol. 1

Burns, extent of compensation: R. Rhode ---------- 37
Impotency not compensable: H. Alexander ---------- 28
Loss of taste or smell not compensable: T. Ayers ---------- 30
Red nose not compensable: H. Sminia ---------- 10
Scars compensable where limit mechanical function and damage psychologically:
R. Rhode ---------- 37

Vol. 5

Nothing for scar on woman's leg: G. Miller ---------- 144

DEATH BENEFITS

Vol. 4

Allowed where suicide: W. Tolbert ---------- 13
Foot injury combined with cancer, then death: R. Grosjacques ---------- 104
Mother not dependent: R. Bolt ---------- 191
Remarriage void: D. Victory ---------- 206
Stepchildren of 10 days are beneficiaries: R. Housley ---------- 29

Vol. 6

Effect of finding prior to death: J. Peters ---------- 285
Not available to abandoned widow: S. Harris ---------- 215
Proof of total disability after death: R. Buhrle ---------- 256
Woman not qualified for benefits where not married to decedent: D. Thomas- 49

Vol. 7

Claimant died pending review: E. Maffit ---------- 87
Claimant died while claim pending: D. Wolfe ---------- 131
Deceased penitentiary inmate: C. Marshall ---------- 160
Survival of benefits due: C. Ward ---------- 24

Vol. 8

Claim untimely: E. Hathaway ---------- 27
Girlfriend is not wife: L. Johnson ---------- 125

Vol. 10

Claim defeated: T. Dubell ---------- 47
Settled for $13,750: J. Morava ---------- 18
Settled for $17,520: C. Fergel ---------- 52

Vol. 14

Widow; which one: M. Leisure ---------- 3

Vol. 15

Meningitis death: H. Mackey ---------- 41
Stepchildren: B. Meyers ---------- 159

Vol. 16

Claim allowed for death after gall bladder operation: C. Cronin ---------- 88

DENIAL

Vol. 6

Defects in non-complying case: S. Harris ---------- 215
Denial after claim barred doesn't give claim new vitality: H. Trump ------ 33
Denial upheld where issued after 15 months of paying benefits: K. Applegate 1
Denial gives no greater rights where claim already barred for want of notice: M. Evans ---------- 8
Denial reasonable when plane missing: W. Gale ---------- 95
Denial of further responsibility reversed: A. Jackson ---------- 270
Effect where denial made after hearing on extent of disability but before order: J. Gourley ---------- 294

Vol. 7

Denial doesn't grant rights that didn't otherwise exist: W. Brashnyk ------- 132
Employer need not prove denial served on employee: M. Frazee ---------- 275
Motion to dismiss may be partial denial: R. Richards ---------- 45

Vol. 8

Defective mailing: G. Burkholder ---------- 8
Not received by workman: R. Pursel ---------- 230

Vol. 9

De Facto denial: R. Lewis ---------- 81
Permissible after determination: R. Lewis ---------- 81

DEPENDENTS

Vol. 5

Claim by parents in death case: J. Rhodes ---------- 108
Grandchildren qualify as children: M. Webb ---------- 244

DOMESTIC RELATIONS

Vol. 1

Common-law marriage not found: R. Reischel ---------- 35

Vol. 2

Illegitimate twins also beneficiaries where surviving widow: L. Thornton -- 203

Vol. 5

Voidable remarriage: C. Peters ---------- 259

DOUBLE EMPLOYERS

Vol. 1

Fact that paid by one employer doesn't bar finding that general employee of another: L. Freeman ---------- 5
Trading services: T. Smith ---------- 66

Vol. 2

Log truck driver is truck owner's employee not shipper's employee: W. Franklin 106
Washington injury to Idaho employee: D. Wilson ---------- 158

DUAL PURPOSE TRIP

Vol. 1

Bird hunting and cattle buying in Eastern Oregon: P. and G. Medford --- 46

Vol. 2

Beauty operator who takes towels home to wash, not covered while traveling: J. Berg ---------- 59
Gas station workman moving own engine: R. Pierce ---------- 8
Insurance agent going to nightclub to collect insurance premium and see girl friend, hit by car crossing street: R. Rosencrantz ---------- 137
Salaried employee on way home from mill with firewood which mill needed to get rid of: M. Throop ---------- 1

Vol. 3

Car salesman who used bar as sales office killed on way home: Kay Housley- 93

Vol. 5

Trip to Nevada: R. Hatch ---------- 221

DUAL PURPOSE DOCTRINE

Vol. 6

Movement of work bench all personal: J. Etchison ---------- 174

Vol. 7

"Bunkhouse rule": H. Watson ---------- 67
Auto salesman hurt while fixing mother's car: J. Nelson ---------- 271

EARNING CAPACITY

Vol. 4

Additional 28 degrees allowed: A. Magnuson ---------- 83
Award increased 54 degrees for loss earnings: F. Wright ---------- 289

Increase of 19.2 degrees for loss earning capacity: C. Pimentel ---------- 296
Loss earnings, basis for 75 degrees: D. Underhill ---------- 256
Rehearing on earnings case denied: A. Grumbles ---------- 79
Remand for evidence in case of choker setter: L. Fuller ---------- 186
Remand for evidence: A. Willhite ---------- 265
Remand for evidence: D. Carr ---------- 288
Remand for evidence: F. Abeln ---------- 243
Remand for consideration of Ryf impact: A. Grumbles ---------- 99
Ryf applied boldly: A. Grumbles ---------- 34
Ryf not applicable to 66-year-old man: F. Rue ---------- 174

EARNINGS LOSS

Vol. 5

Allowed to logger for leg injury: G. Costa ---------- 251
Award of 12.35° for 3.86% earnings loss: A. Magnuson ---------- 82
Award of 60° disallowed: S. Bittner ---------- 65
Award of 71° for 22% wage loss: S. Hills ---------- 73
None where medical evidence insufficient to support necessity for change in employment: C. Green ---------- 106
Not allowed where speculative: J. Ballweber ---------- 234
Not applied: R. L. Kautz ---------- 6
Not applied where motivated to retire: H. Burgeson ---------- 117
Rationale for large award: F. Ederra ---------- 248
Remanded for evidence on earnings loss: C. Hines ---------- 261
Self-employed person: J. McCrorey ---------- 227

ELECTION OF REMEDIES

Vol. 1

New procedure obligates payment of benefits pending appeal, even though injury occurred under prior law: L. Larson ---------- 122

Vol. 2

Abatement ordered where also making tort claim for damages: R. Pacheco — 150
If no remedy under prior law for 1963 injury—still no remedy: H. Eveland - 117
Choice between non-complying employer and third party: J. Williams ---- 30
Penalties on pre-1965 Act injury: C. Mumpower ---------- 178

Vol. 3

Aggravation claim: G. Lee ---------- 259
Necessity of election to get 5-year period to make aggravation claim: R. Gault ---------- 163
No hearing of right here: V. Sims ---------- 131
Prior election now binding: L. Richart ---------- 198

Vol. 4

Cannot pursue both remedies: S. Huff ---------- 264

Vol. 5

None made: J. Petty ---------- 193

EMPLOYEE OR INDEPENDENT CONTRACTOR

Vol. 1

Carpenter is independent contractor: J. Cox ---------- 103
Carpenter not subject workman under prior law: J. Bowman ---------- 29
Moonlighting steamfitter found employee: A. Wright ---------- 54
Newspaper boy employee of wholesale dealer: D. Oremus ---------- 161
Vacuum cleaner salesman is employee: Electra Enterprises, employer ---------- 49

Vol. 2

Carpenter is employee: C. Winchester ---------- 18
Roofer is not either partner or subcontractor: R. Barrett ---------- 35
Salesman employee despite writing to contrary: G. Klinski ---------- 3

Vol. 3

Carpenter who had assistant is employee: L. Fridley ---------- 73
Claimant was subject employee: J. Pennoyer ---------- 115
Driver in car ferrying operation is employee: P. Allen ---------- 64
Farmer hired electrician: L. Bauer ---------- 239

Vol. 4

Homeowner and painter: J. Briery ---------- 293
Landscaper and carpenter: F. Csergei ---------- 302

Vol. 7

Gypo log trucker: E. Parren ---------- 207

Vol. 8

Disputed claim settled for $12,500: R. Reimann ---------- 215
Drycleaning deliveryman is employe: R. Dougan ---------- 45
Interstate trucker: C. Giltner ---------- 276

Vol. 12

Written agreement providing contractor status upheld: R. Ward ---------- 11

Vol. 14

Gyppo log trucker: W. Atwood ---------- 161

EMPLOYER OR INDEPENDENT CONTRACTOR

Vol. 6

Death while loading a wrecked car: S. Harris ---- 215
Oregonian newsboy case on remand: D. Oremus ---- 129

EVIDENCE

Vol. 1

Audiogram does not prove hearing loss: O. Reames ---- 92
Circumstantial evidence may be considered in establishing medical-causal relationship where medical evidence is confusing and conflicting: L. George ---- 2
Criminal record casts doubt on claimant's veracity: M. Brudana ---- 90
Department cannot force claimant to produce doctor for X-ray exam at claimant's expense: S. Dalton ---- 148
Judicial notice taken of Official Board records: J. Langsdorf ---- 170
Medical evidence found insufficient to establish permanent disability: W. Hayden ---- 19
Medical evidence, necessity thereof: R. Lunsford ---- 118
Medical evidence must be used to establish medical-causal relationship: B. Sisson ---- 18
Medical evidence not necessary to relate illness to natural gas fumes: D. Baker ---- 146
Medical-causal relationship exclusively medical question for expert opinion: M. Kelley ---- 16
Medical evidence of anticipated degenerative changes may not be considered in present award: L. Carr ---- 28
Use of texts not in evidence: O. Reames ---- 92
Where medical testimony of no probative value, Hearing Officer should have claimant examined by more doctors: C. Dobson ---- 15

Vol. 2

Medical reports are prima facie evidence pursuant to Rule 5.05D: R. Tatum ---- 71
No presumption of job connection where on job death from heart attack: C. Larson ---- 127
Substantial evidence rule applied: W. Hedrick ---- 72

Vol. 6

Attorney's letters of inquiry should be produce on demand: H. Patterson ---- 124

Vol. 7

Dismissal for no corroboration where self-insured: J. Nolte ---- 136
Employer can't withdraw exhibits: D. Kraft ---- 111
Scope of doctor cross examination properly limited: D. Englund ---- 153

EXTRA-TERRITORIAL COVERAGE

Vol. 2

Oregon Law applied when accidental result on dam project on Snake River: F. Hilton ---- 2
Washington injury to Idaho employee: D. Wilson ---- 158

FALLS

Vol. 1

A fall of a doubtful or unknown cause may be compensable, if it occurred at a time and place so as to be a positional risk: S. Smith ---- 6

HEARING OFFICER DECISION

Vol. 1

Cross request required, if determination to be reduced: J. Byers ---- 25
Failure to issue order within statutory time under ORS 656.289(1) does not make the order void: D. Bridge ---- 33
Insufficiently developed: B. Williamson ---- 79
Late issued order does not go to jurisdiction: B. Johnson ---- 35
Permanent disability award inconsistent with order of curative surgery: J. Bonner ---- 40
Record must reflect gainful and suitable employment available if permanent and total disability is denied: F. Simmons ---- 41
Record must explain denial of award allowed on determination: F. Simmons - 41
Remanded for further medical reports: K. Franklin ---- 111
Sufficient notice to parties if counsel notified: M. Benjamin ---- 54
Unscheduled disabilities should be stated in terms of loss of arm by separation: F. Hodgson ---- 42
Void order, effect of: P. Lauber ---- 73
Weight of evidence disregarded by Hearing Officer: E. Stephens ---- 39

Vol. 2

Hearing officer missed real issue: I. Sedergren ---- 48
Incompletely developed as to medical causal relationship: C. Brooks ---- 108
Incompletely tried: M. Stainbrook ---- 11
May order stay of compensation pending appeal: L. Kappert ---- 78
May reduce stay of compensation even if only claimant requested hearing: H. Place ---- 10
Previous omission corrected: F. Simmons ---- 14

Vol. 3

Order recites that hearing was held but in fact none was held--remanded: H. Crocker ---- 273
Remand to perform mandate of Circuit Court: R. Frank ---- 265

Vol. 4

Final orders only appealable: J. Nicholas ---- 181
Ninety percent wrong: M. Glover ---- 235
Remand where ill considered: C. Staiger ---- 166
Remand for inclusion of medical report: W. Wahner ---- 271

Vol. 5

Cannot do that: J. Watts ---- 180
Order set aside where refused 48 hour continuance after surprise at hearing: G. Thurber ---- 155
Remand where causes for terminated employment not explored: P. Mabe ---- 236
Remand where previously unavailable witness is now located: E. Meyer ---- 35
Remanded for further medical evidence: D. Ranger ---- 58
Remand for hearing on merits: M. Pearson ---- 84

Vol. 6

Board defers to where heavy question of fact: K. Applegate ---- 1
Hearing Officer may vacate an order prior to expiration of appeal time: T. Whalen ---- 24
Remand for view of premises: M. Polodichuk ---- 113

Vol. 8

Remand for hearing where confusing notice of appeal: S. Hammond ---- 152

Vol. 9

Adopted: R. Bartusek ---- 62

HEART ATTACK

Vol. 1

Coronary thrombosis compensable: M. Bowles ---- 45
Claim ordered accepted: R. Henrikson ---- 58
Evaluation at 55% loss of arm by separation: E. Kociembra ---- 101
Not compensable by majority vote: E. Mayes ---- 121
Not caused by sulfur dioxide gas: L. Moberg ---- 110

Vol. 2

Back injury plus anxiety not cause: E. Milburn ---- 62
Board reversed and disallowed claim: C. Heckard ---- 182
Cerebral hemorrhage not caused by anxiety: B. Bearss ---- 141
Claim allowed although prior heart trouble: C. Hickey ---- 87
Claim denied: E. Sahnow ---- 32
Claim denied where evidence of some vigorous effort shown: M. Williams ---- 124
Claim denied to office worker: F. Low ---- 164
Claim denied where not witness to activity immediately prior to death: C. Larson ---- 127

Death of restaurant owner not caused by job: C. Fagaly ---------- 117
Exertion 5 days previous not cause: R. Jervis ---------- 5
Hearing Officer reversed, claim denied: N. Simonsen ---------- 130
Majority deny claim: J. Osborn ---------- 11
Non-fatal claim denied by Board: R. Boutillier ---------- 173
Overworked lawyer cannot collect for heart attack: B. Flaxel ---------- 75
Permanent total disability allowed for severe condition: C. Rundel ---------- 174
Weak evidence to support alleged job connection: R. Hanlon ---------- 119

Vol. 3

Allowance of claim reversed: D. Slead ---------- 227
Claim disallowed: C. Anderson ---------- 255
Death while coming and going: R. Ristau ---------- 268
Heart attack claim allowed: N. Bernard ---------- 118
Heart failure case: W. Cardwell ---------- 235
Nonfatal claim denied: L. Hodgson ---------- 45
Nonfatal case: G. Brown ---------- 188

Vol. 4

Attack considered coincidental: H. Hensley ---------- 103
Award fixed at 192 degrees: W. Sharp ---------- 150
Claim allowed by majority: C. Kerins ---------- 183
Claim by telephone installer not allowed: A. Svatos ---------- 51
Claim defeated: W. Deles Dernier ---------- 43
Claim defeated: A. Tomhave ---------- 165
Claim defeated where log truck driver: W. Taylor ---------- 237
Lawyer awarded 77 degrees after reduction: B. Flaxel ---------- 300
Non-fatal heart claim disallowed: D. Williamson ---------- 63
Retail grocer collects: E. Pearson ---------- 132

Vol. 5

Allowed to furnace repairman where death after exposed to extreme heat: H. Patrick ---------- 125
Allowance reversed by majority: A. Stanford ---------- 102
Anginal pain: O. McCamey ---------- 214
Angina: R. Smith ---------- 69
Claim allowed: D. Grabner ---------- 143
Claim denied: D. Allen ---------- 228
Claim denied to 40-year-old salesman: D. Hobbs ---------- 78
Claim denied: E. Fields ---------- 89
Claim settled: C. Hoke ---------- 163
Fibrillation attack allowed: J. Sweeten ---------- 19
Non-fatal where prior angina: K. Youngren ---------- 20
Non-fatal claim disallowed: L. Mossman ---------- 30
Non-fatal claim denied: R. Running ---------- 279
Two attacks allowed: M. Waymire ---------- 199

HEART ATTACK, cont.

Vol. 6

Cardiac arrest 6 days after industrial accident: H. Maruhn ---------- 262
Congestive heart failure: F. Robertson ---------- 122
Heart attack: 32° allowed: R. Pattison ---------- 127
Six days after chlorine gas inhalation: J. Welch ---------- 288

Vol. 7

Award fixed at 80°: B. Riback ---------- 172
Award of 70° where wait 11 months to request hearing: M. Barraclough ---- 146
Claim settled for $10,000 plus medical, hospital and funeral expenses:
J. Smith ---------- 69
Compensability must be approached on case by case basis: B. Giese ---------- 212
Financial stress sufficient: K. Landeen ---------- 225
Mill owners financial worries fatal: R. Kincaid ---------- 218
Myocardial infarction not related to back injury and hospitalization:
H. Roberts ---------- 34
Operating table death: D. Wolfe ---------- 131
Salesman died in Alaska: R. Klumph ---------- 222
Steamfitter's disability fixed at 160°: V.Bird ---------- 42
Vascular accident not related: F. Wayne ---------- 184

Vol. 8

Allowed: M. Culp ---------- 257
Attorney died in court: T. Chaburn ---------- 112
Claim allowed: B. Carpenter ---------- 212
Claim allowed: T. Rutledge ---------- 253
Claim allowed: L. McInnis ---------- 232
Claim allowed: R. Pursel ---------- 230
Denied where death by occlusion: C. Alvarez ---------- 20
Milkman with angina: J. Rieck ---------- 31
Myocardial infarction: R. Kiene ---------- 23
One of two attacks accepted: J. Coulter ---------- 202
Some time loss related: H. Moore ---------- 38
Settled: E. Pozza ---------- 288
Truck driver claim allowed: E. Frey ---------- 103

Vol. 9

Allowed: R. Brannon ---------- 80
Allowed: A. Reed ---------- 228
Award of 208° affirmed: D. Hickman ---------- 162
Claim filed 4 years after incident: F. Mendenhall ---------- 134
Claim allowed: R. Buchanan ---------- 252
Lawyer: R. Burns ---------- 88
Truck driver: C. Bogart ---------- 120

Vol. 10

Allowed reluctantly: L. Atkinson ---- 79
By-pass surgery: H. Moore ---- 286
Cutter who ran to avoid falling tree: J. Coleman ---- 281
Denied: Keith Breese ---- 87
Heart claim allowed: D. O'Connor ---- 8
Heart claim where totally disabled at death: E. Williams ---- 33
Heart claim disallowed: D. Schwehn ---- 71
Heart claim denied for death while dancing on vacation: W. Riback ---- 240
Logger: A. Franklin ---- 209
No particular event case: T. Helmer ---- 149
Partial denial affirmed: E. Riutta ---- 275
Two separate heart claims 6 months apart: E. Stockham ---- 109

Vol. 11

Aoe/coe problem: E. Johnson ---- 190
Aortic aneurysm claim settled for $10,000: R. Zornes ---- 15
Allowed to truck driver: H. Benge ---- 82
Award of 224° increased to Total: R. Jaime ---- 59
By-pass surgery: G. Moore ---- 162
Cannery worker: S. Beeson ---- 96
Claim allowed: F. Davidson ---- 20
Claim allowed: A. Cristofaro ---- 76
Denied where claim related to back injury: G. Schultz ---- 187
Fatal heart attack not compensible: R. Geer ---- 93
Flour mill: B. Seal ---- 235
Heart fatal to logger: C. Fredrickson ---- 154
Heart and ulcer: A. Hanson ---- 88
"Just standing there" and died: A. Albano ---- 144
Log trucker fatal: A. Holst ---- 253
Non-fatal claim: A. Stephens ---- 269
Permanent disability denied where returned to work in 30 days: W. Bryan ---- 93
Total disability: W. Kern ---- 281
Total disability where died: L. McInnis ---- 112
Truck driver on the road: A. Edwards ---- 158
Two prior attacks: W. Snyder ---- 226

Vol. 12

City Council meeting: H. Karns ---- 133
Logger age 64: E. Fields ---- 8

Vol. 14

Bunkhouse rule: L. Flinn ---- 17
Heart: 65% where want total: F. Schmunk ---- 51
Fall sufficient cause: O. Kunkel ---- 118
Bus driver's claim fails: D. Hamilton ---- 120
Allowance reversed: H. Cochenour ---- 233

HEART ATTACK, cont.

Vol. 15

Ranch worker: W. Mullen ---------- 149

Vol. 19

Allowance reversed: W. Conner ---------- 166
Claim filed six years late: L. Rak ---------- 171
Coronary insufficiency: R. Clark ---------- 191
Denial affirmed: F. Ocello ---------- 300
Lab tests given first consideration: K. Biehler ---------- 255
Settled for $2500: W. Paxton ---------- 197
Waiter with stress claim: F. Hendry ---------- 168

HERNIA

Vol. 10

Ventral Hernia: G. Dalthorp ---------- 82

INSURANCE

Vol. 5

Coverage where buy insurance with rubber check: W. Gates ---------- 28
Which carrier responsible for Occupational Disease: C. Moore ---------- 119
Which carrier responsible: F. Bennet ---------- 241

Vol. 15

Coverage by oral contract: B. Dunn ---------- 109
Self-employed election messed up: B. Dunn ---------- 109

INSURANCE, WHICH CARRIER RESPONSIBLE

Vol. 2

Dispute between carriers over responsibility: M. Stockel ---------- 169
Which carrier liable for occupational disease: I. Sedergren ---------- 48

Vol. 3

Date of knee injury in question: F. McDaniel ---------- 203
Claim records inadequate: C. Beck ---------- 94
New injury carrier stuck: A. Zacher ---------- 66

Vol. 4

Back: Which of two possible incidents: R. Cutright ---------- 248
Procedure where doubt as to who employer is: J. Greer ---------- 211

Vol. 6

New injury found: J. Rockow ---- 264
Heart attack claim: K. Payton ---- 299

Vol. 7

Five successive back claims: J. Davis ---- 202
New injury if substantial portion of disability traceable to that event: J. Wight ---- 124
Mere litigation of question of which carrier liable doesn't carry attorney's fees where no temporary total disability due: P. Mabe ---- 14
Two injuries a year apart: M. Johns ---- 109
SAIF on both ends: E. DeWitt ---- 118

Vol. 8

Aggravation portion allowed: R. Collins ---- 241
Aggravation here: T. Kern ---- 234
New injury after fall: C. Ring ---- 226
Old claim reopened on own motion: C. Smith ---- 102
Payroll records not conclusive as to employment: P. Cooper ---- 80

Vol. 9

New injury or aggravation: J. Barratt ---- 100

Vol. 12

Interlocutory decision sought: J. Barrett ---- 112

INSURANCE, WHICH EMPLOYER

Vol. 9

Procedure where one insurance carrier desires to shift responsibility to another carrier of same employer: I. Winterstein ---- 273

INTERVENING INJURY

Vol. 1

Assault while going home from doctor: W. Coleman ---- 64
Laminectomy result of intervening car accident: V. Johnson ---- 173
Only makes evaluation more difficult: J. Williamson ---- 63

Vol. 2

Award attached to second of successive injuries: R. Saul ---- 92
Back injury from sneezing is new injury: B. McKinney ---- 15
Employment as cowboy between injury and low back symptoms makes difficulty in proving no intervening injury: J. Wheeler ---- 85

Intervening motorcycle accident cause of low back injury: R. Melius ---- 17
Latent symptoms attributed to intervening fall: M. Glover ---- 17
New injury found, although no incident to which to attribute it: G. Ross - 139
None here: R. Jackman ---- 47
Not a new injury: L. Blackmore ---- 98
Passage of time implies new injury to back: D. Conner ---- 114
Successive injuries to back: C. Bryan ---- 100
Successive injuries with different insurers: L. Kappert ---- 78

Vol. 3

Auto accident and industrial injury: D. Norris ---- 149
Incident was new injury and not aggravation: A. Zacher ---- 66
Rebroken arm still old accident: T. James ---- 102

Vol. 4

Back complaints after violent non-employment truck crash not related to prior industrial injury: W. Rowland ---- 140
Fall where bad knee: T. Fried ---- 306
Not proven: E. Barison ---- 15
Slip is new injury: C. Railey ---- 72
Sore back after lifting refrigerator is new injury: B. Hopkins ---- 109

Vol. 5

Fractured ankle not related to compensable sprain: E. Littlejohn ---- 165
Doubt as to whether new injury: F. Bennett ---- 241
Remand where procedure confused: D. Rayburn ---- 140
SAIF responsible for both: D. Downing ---- 150

JURISDICTION

(See Request for Hearing, Request for Review, Procedure, Scope of WCA, Election of Remedies)

Vol. 3

Own Motion: G. Lee ---- 259

Vol. 4

Own motion procedure explained: M. Thomas ---- 26
Own motion exercised to increase award: H. Smith ---- 98
Nothing after own motion consideration: J. Nelson ---- 100
Nothing after own motion consideration: F. Snell ---- 133
Own motion refused: E. Mackey ---- 184

Vol. 5

Facts inadequate for exercise of own motion: E. Grogan ---- 266
Nothing on own motion claim: W. Carnagey ---- 170
Own motion proceedings: A. Kinion ---- 5

Own motion refused: H. Bodeman ---- 17
Own motion exercised where petition by SAIF: C. McDowell ---- 58
Own motion remand for hearing: E. Grogan ---- 89
Own motion exercised relating to 1964 back injury: H. Fairbairn ---- 102
Own motion matter referred for hearing: S. Gardner ---- 108
Set for hearing on own motion: D. Rickman ---- 47

Vol. 6

Award made on own motion: G. McLarney ---- 2
Claim of 1964 not reopened: H. Fairbairn ---- 171
Own motion not taken: W. Glendenning ---- 10
Own motion only on 1961 injury: D. Chamberlin ---- 155
SAIF recommendation followed in own motion case: G. Queener ---- 272

Vol. 7

Board has jurisdiction to segregate funds to children under ORS 656.228:
D. Stutzman ---- 49
Finger award reduced on own motion: E. Hulme ---- 97
Medical examination allowed: S. Gardner ---- 201
Own motion declined where medical connection with 1957 injury questionable:
A. Polso ---- 18
Own motion on 1960 injury: C. Best ---- 77
Own motion reduction: A. Smith ---- 119
Own motion reduction: W. McAllister ---- 120
Own motion reduction: L. Kaser ---- 121
Own motion reduction: E. Hudman ---- 121
Own motion - earnings of $8,000 conclusive that not totally disabled:
C. McDowell ---- 137
Own motion declined: L. Crone ---- 146
Own motion consideration found not to warrant reopening: C. Best ---- 154
Own motion to reconsider past decision: E. Fields ---- 267
Own motion: D. Chamberlin ---- 274
Reduction on own motion in light of Surratt H. Hoxworth ---- 95
Reduction on own motion in light of Surratt decision: E. Silvey ---- 94
Reduction on own motion in light of reversal of Trent vs. SAIF: T. Stines ---- 119
Set down for own motion hearing: A. Polso ---- 80

Vol. 8

Back award on 1964 injury: P. Gillenwater ---- 98
Claim reopened on own motion where prima facie showing: H. Hall ---- 72
Fired for filing a claim: D. McGee ---- 30
Hearing ordered on termination of total disability award: F. Pense ---- 111
Invitation for own motion application: C. Mars ---- 132
Nebraska trucker: C. Giltner ---- 276
Own motion declined: H. Hall ---- 19
Own motion declined: J. Croghan ---- 24
Own motion declined: A. Polso ---- 43
Own motion matter referred for hearing: M. Garman ---- 72
Own motion reference for hearing where hearing time had elapsed due to hospitalization: W. Blackman ---- 73

Own motion relief granted on 1941 injury: J. Croghan ---- 73
Own motion reopening where SAIF proved old claim was cause: C. Smith--- 102
Own motion coupled with hearing concerning condition: J. Lawrence ---- 109
Own motion reopening: B. Jackson ---- 168
Own motion hearing on 1964 injury: M. Farmer ---- 195
Own motion reopening: G. Hanks ---- 222
Own motion declined: F. Dalton ---- 230
Own motion request denied: E. Mackey ---- 261
Own motion order entered: R. Gault ---- 270
Own motion declined: A. Ransom ---- 286
Own motion: back claim reopened: D. Kimbro ---- 287
Total disability award termination on own motion: E. May ---- 110

Vol. 9

Back claim of 1958 reopened: J. Robertson ---- 138
Own motion of 1955 bursitis claim: D. Hiebert ---- 63
Own motion Narcolepsy claim: N. Nelson---- 77
Own motion on 1957 elbow claim: L. Ludwick ---- 78
Own motion taken on 1964 back claim: M. Farmer ---- 127
Own motion on 1957 ankle: C. Frydendall ---- 137
Own motion declined where direct appeal would have been appropriate remedy: D. Bellinger ---- 151
Own motion two page opinion on back claim: P. Martin ---- 190
Own motion 9 months time loss: R. Pangle ---- 206
Own motion on 1961 back injury: J. Green ---- 227
Own motion on 1961 skull fracture: C. Hampton ---- 247

Vol. 10

Error in taxing attorney's fees corrected on own motion: W. Huckins ---- 148
Own motion: F. Dalton ---- 20
Own motion proceeding: A. Kinion ---- 25
Own motion: M. Farmer---- 27
Own motion request dismissed: W. Stuart ---- 28
Own motion declined: A. Currie ---- 32
Own motion reopening: M. Dardis ---- 50
Own motion declined: J. Calhoun ---- 60
Own motion award of total disability: B. Clayborn ---- 61
Own motion award of total disability: R. Allman ---- 117
Own motion on 1949 foot injury: E. Haab ---- 118
Own motion reopening: R. Schwab ---- 170
Own motion declined: E. Tincknell ---- 227
Refused where claimant can't find job: E. Nixon ---- 137
Reopening on own motion: K. Bent ---- 123
Travel expense to hearing discretionary: G. Glenn ---- 22

Vol. 11

Hearing officer attempt to retain: E. Taylor ---- 207
Hip failure from 1941 injury: J. Croghan ---- 263
Own motion relief denied: S. Graves ---- 33

Own motion dismissed: R. Day ---- 43
Own motion on 1951 injury: K. Murrell ---- 68
Own motion remand for advisory hearing: W. Lish ---- 111
Own motion on 1963 injury: O. Gaffney ---- 111
Own motion referred for hearing: C. McCarty ---- 125
Own motion does not extend to hearing where denial has been entered: J. Conaway ---- 165
Own motion order to pay medical bill: L. Sullivan ---- 170
Own motion reopening for foot amputation: G. Holsheimer ---- 203
Own motion referred for hearing: G. Ellis ---- 223
Own motion reference for hearing: C. Williams ---- 242
Own motion doesn't extend to denied claims: E. Fields ---- 288
Reopened on own motion: R. Pettengill ---- 189
Reopened on own motion: L. Ervin ---- 190
Snotty denial of own motion: O. Gaffney ---- 264

Vol. 12

Back claim reopened on own motion: D. Fulton ---- 255
Own motion denied on 1959 injury: E. Tincknell ---- 20
Own motion termination of total disability: G. Roth ---- 26
Own motion denied: F. Smith ---- 90
Own motion back claim: F. Dalton ---- 191
Own motion refused: K. Murrell ---- 232
Own motion reopening: H. Strong ---- 271
Reconsideration of own motion: W. Puzio ---- 233
Shoulder injury of 1959: W. Puzio ---- 42
Surgery for 1961 knee injury: G. Ellis ---- 191

Vol. 13

Disability increase denied as was not working anyway: O. Zeigler ---- 22
Heart claim on own motion: R. Pattison ---- 158
Motion to vacate in lieu of request for review fatal: F. Radie ---- 185
Nothing on own motion: B. Farley ---- 296
Old claim finally ready for closing: L. Nicholson ---- 243
Own motion denied: W. Porter ---- 65
Own motion denied: B. Robuck ---- 66
Own motion dismissed without prejudice where claimant out of state: B. Farley ---- 100
Own motion vs. new injury: J. LaDelle ---- 106
Own motion referred for hearing: J. Farah ---- 137
Own motion reopening: D. Clyde ---- 197
Own motion reopening: H. Kaspar ---- 197
Own motion considered where attorney botched appeal: K. Lange ---- 234
Own motion reconsideration in nature of appeal: I. Egan ---- 238
Referred for own motion hearing: W. Zunck ---- 138
Remand for hearing on own motion: R. Phillips ---- 267
Reopened for examination: H. Blakeney ---- 29
Reopened for a myelogram: C. Flynn ---- 230
35% on own motion: K. Brent ---- 21
Voluntary reopening: A. Ekin ---- 39

JURISDICTION, cont.

Vol. 14

Own motion procedure: W. Lish ---------- 153

Vol. 15

Court of Appeals decision may be clarified: H. Vicars ---------- 27
Own motion reopening: K. Black ---------- 133
SIAC claim: W. Patterson ---------- 23

LIBERALLY CONSTRUED

Vol. 1

Not applied to facts: E. Goldberg ---------- 78

MEDICAL EVIDENCE

Vol. 14

Psychologist not needed to prove mental problem: J. White ---------- 128

MEDICAL REPORTS

Vol. 1

Admissible even if undertaken to assume ultimate decision of extent of permanent disability: D. Bridge ---------- 33
Claimant's report prima facie: S. Dalton ---------- 148
Cooperation--effect of claimant's failure: K. Makela ---------- 104
Discourage conversion of physical findings into percentage awards: D. Cole 61
Insufficient if couched in terms of "could have": E. Kilgore ---------- 45
Interpretation of visual loss: I. Boorman ---------- 97
Necessity of showing permanence: R. Lunsford ---------- 118

Vol. 2

Discussion of "proper" contents: A. Cole ---------- 115
Insufficient to support aggravation: E. Murray ---------- 48
Reports are prima facie evidence pursuant to Rule 5.05D: R. Tatum ---------- 71

Vol. 3

Importance: J. Russell ---------- 14
Insufficient for aggravation claim: L. Moe ---------- 36
Sample reprinted in back case: M. Clover ---------- 269

Vol. 4

Foreign doctor adequate: I. Martin ---------- 218
Insufficient for aggravation: H. Pickar ---------- 279
Insufficient for aggravation claim: M. Brudana ---------- 310

None allowed after hearing for consideration on review: L. Sauvola ---- 274
Remand for additional: G. Meyer ---- 301
Washington doctor: J. Koch ---- 182

Vol. 5

Board not impressed by report of Ph.D.: E. Neufeld ---- 34

Vol. 6

Copies of letters of inquiry should be produced with medical reports: H. Patterson ---- 124
Psychologists report should have been admitted: E. Monen ---- 212
Refusal to submit to medical examination: R. Benway ---- 245

Vol. 8

Claimant's attorney used deposition of his own doctor as fishing expedition to expense of SAIF: M. Payne ---- 90
Employer withheld medical report in requesting closing: G. Flawn ---- 198

Vol. 9

Dept. of Medical Correspondence of Univ. of Ore. Med. School wrote opinion: E. Ornbaun ---- 270
Fund must pay x-exam if offer report: S. Ellis ---- 25
Improper for attorney to withold medical report: S. Ellis ---- 25
Medicals for aggravation claim not general review of all medicals available: J. Frank ---- 146

Vol. 11

Claimant's refusal to make medical report available grounds to dismiss hearing: J. Combs ---- 30

Vol. 12

Aggravation claim: H. Liggett ---- 143
Day of hearing report admitted where employer knew it was coming and had agreed to pay for it: G. Downey ---- 150
Mail order medical from California doctor should not have been admitted: G. Downey ---- 150
Not necessary for consequential injury: R. Davis ---- 132
Psychologist is not physician: E. Grace ---- 206

Vol. 19

Insurance company altered report: M. Johnstad ---- 119

MEDICAL SERVICES

Vol. 1

Additional disability therefrom compensable: F. Koch ---- 44
Claimant has right to refuse surgery, but such refusal must be considered in evaluation of disability: K. Seratt ---- 1
Custom and usage dictate payment for reasonable transportation expenses incident to medical treatment: G. Shannon ---- 18
If unnecessary surgery must pay compensation and bills anyway, but may proceed against doctor in malpractice: S. Elliott ---- 9
Need of curative services indicate not medically stationary: L. Andrews ---- 87
No further payment: J. McDaniel ---- 73
Palliative treatment not compensable: D. Hutchison ---- 147
Palliative treatment not compensable: T. Guy ---- 35
Payment not to be reduced by attorney's lien: R. Truax ---- 152
Refusal not unreasonable: W. Haney ---- 115
Surgery postponed on account of pregnancy: C. Hayward ---- 96
When proper: R. Burns ---- 143

Vol. 2

Knee injury attributed to old football knee: D. Adams ---- 186
Palliative treatment not compensable: R. Carter ---- 20
Refused myelogram: E. Jones ---- 142
Surgery fraudulently obtained: C. Giltner ---- 5
Weight reduction program not compensable: D. Lanham ---- 15

Vol. 3

Carrier not responsible for litigation examinations: U. Asher ---- 275
Claim order reopened for eye surgery: R. Hamness ---- 173
Not needed: B. Hopper ---- 278
Surgery unreasonably refused on knee: G. Walker ---- 249

Vol. 4

Back surgery refused: P. Jackson ---- 292
Need unrelated to accident: C. Tippie ---- 269
Surgery necessary after bump to shin: V. Burgermeister ---- 230

Vol. 5

Elbow surgery: L. Ortiz ---- 175
Eye examination not needed for neck injury: A. Barnes ---- 276
No more needed: R. Griffith ---- 168
Payment of rehabilitation ordered: W. Hargrove ---- 157
Payment ordered: L. Balcom ---- 271
Refusal to be examined by employer's doctor improper: R. Story ---- 182

Vol. 6

Back surgery refused: E. Biros ---- 18
Back surgery failed: A. Paquin ---- 266

Refusal of back surgery is invariably reasonable: C. Schefter ---------- 87
Refusal of surgery not unreasonable: E. Walty ---------- 126

Vol. 7

Back surgery if claimant wants it: L. Rawlings ---------- 186
Back surgery refused: L. Martin ---------- 243
Hernia: refusal of surgery for 2 years too long: L. Mitchell ---------- 75
Medical services: don't always require reopening: C. Ray ---------- 142
Medicals need not be paid pending appeal: W. Wood ---------- 116
Pallative: R. McFarland ---------- 55
Pallative, not in this case: A. Magee ---------- 41
Payment required for post-closure medicals: M. Riswick ---------- 26
Right to choose a doctor doesn't include right to have all the surgery recommended by him in face of evidence that not needed: J. Nacoste ---------- 21

Vol. 8

Approval for treatment in advance: M. Meeler ---------- 128
Pallative: D. Britton ---------- 252

Vol. 9

Compensation for ORS 656.313: B. Giese ---------- 259
Employer liable for adequate diagnosis following injury: H. Shirley ---------- 254
RE: Heart attack: J. Francoeur ---------- 130
Hernia and ORS 656.245: T. Choate ---------- 48
No reopening, rather ORS 656.245: D. Peterson ---------- 10
Nursing services: D. Himelwright ---------- 197
Payment settled: N. Major ---------- 106
Psychopathology treatment refused: H. Hall ---------- 118
Refused myelography: S. Waldroup ---------- 145

Vol. 10

Additional Chiropractic denied: A. Howton ---------- 144
Additional allowed: L. VanDamme ---------- 213
Additional refused: Z. Baxter ---------- 255
Additional refused: N. Marshall ---------- 258
Dr. Rinehart's view discounted: F. Spargur ---------- 95
Partial denial affirmed: M. Janssen ---------- 279
Psychological counseling: M. Weir ---------- 40
Psychological counseling: F. Spargur ---------- 95
Psychological counseling allowed: J. Lockard ---------- 131

Vol. 11

Diagnostic services: R. Selander ---------- 250
Litigation report to claimant's attorney: R. Selander ---------- 250
Payable even if result is to prove problem is unrelated: V. Johnson ---------- 98

MEDICAL SERVICES, cont.

Vol. 12

Chiropractic treatments: S. Nelson ---------- 128
Fee for ORS 656.245 medical: H. Unger ---------- 164
Treatment or evidence creating: P. Edwards ---------- 211

Vol. 13

Acupuncture treatment paid: S. Barker ---------- 271
Myelogram refusal unreasonable: J. Doyle ---------- 224
Payment ordered: G. Marchioro ---------- 302
Psychological services ordered: W. Smith ---------- 121
Refusal of laminectomy unreasonable: E. Pruitt ---------- 216
Travel to Missouri not allowed: O. Parker ---------- 290

Vol. 15

Child care found payable: P. Roberts ---------- 76
Litigation report not payable: D. Conant ---------- 191

Vol. 16

Medical mileage claim unreasonable: D. Schultz ---------- 39

Vol. 17

Mattress and springs: M. Witt ---------- 57
Out-of -state doctor gets paid: J. Hunting ---------- 8
Rinehart Clinic bills disputed: C. Goeres ---------- 143
Travel to Rinehart Clinic not reasonable: E. Bartron ---------- 242

Vol. 18

Litigation report not compensable: J. Pledger ---------- 209
Orthopedic mattress allowed: L. Flowers ---------- 258
Unnecessary so payment denied: A. Perez ---------- 85

Vol. 19

Arthritis treatment not paid: M. Larvick ---------- 206
Home nursing care: M. Johnstad ---------- 119
Litigation examinations not compensable: K. Casey ---------- 294
Operation without notice to employer: A. Merritt ---------- 183
Orthopedic shoes ordered to be furnished forever: H. Wilson ---------- 165
Work boots to be provided: B. Rumsby ---------- 146

MEMORANDUM OPINION

Vol. 9

J. Brennan ---------- 165
H. Roberts ---------- 16

D. Withrow ---- 166
N. Muir ---- 174
Reversed on memo: P. Deaton ---- 194
W. Bradley ---- 209
A. Medlock ---- 209
D. Morgan ---- 221
H. Robbins ---- 222
L. Morgan ---- 269

Vol. 10

Affirmed: M. Smith ---- 136
Affirmed: W. Huey ---- 249
Affirmed: M. Mitchell ---- 252
Affirmed in result: C. Thompson ---- 263
Back claim affirmed: D. Burgess ---- 244
Remanded in accord with mandate: G. Nicholas ---- 37

Vol. 11

Affirmed: T. Dickerson ---- 78
Affirmed: G. Rios ---- 91
Affirmed: J. Newman ---- 106

MENTAL SERVICES

Vol. 14

Payment may be excused pending appeal: B. Rivera ---- 37
Rinehart Clinic's services unnecessary: R. McGarry ---- 175

NOTICE OF INJURY

Vol. 1

Abuse of discretion is extent of review under ORS 655.520 (3): D. Bias ---- 53
Claimant must justify late notice: C. Satterfield ---- 72
Claimant must justify late notice: G. Levesque ---- 158
Delay excusable where employer has actual knowledge but Department is prejudiced: J. Clem ---- 56
Delay excused when late appearing complications from minor burn: H. Davis 171
Delay in reporting permissible if circumstances justify: S. Smith ---- 6
Delay prejudicial: P. Lauber ---- 73
Eight-month delay prejudicial: P. Bentley ---- 107
Great delay in attributing injury to accident raises problem of causality: E. Mace ---- 7
Month delay on shoulder strain explained: N. Allen ---- 86
Notice not timely: T. Williams ---- 42
Sixteen-day delay explained: F. Voigt ---- 3

Vol. 2

Claim ordered accepted where some delay in notice: N. Jelks ---------- 58
Delay okay where gradual onset of symptoms: T. Shaver ---------- 105
Delay in reporting back claim justified: B. Logan ---------- 94
Excuse for late claim insufficient: F. Carroll ---------- 24
Notice defined as more than casual conversation: M. Barnes ---------- 80
Prejudicial where prior history of similar back problem: D. Wilson ---------- 158
Sole proprietor must comply with notice of injury requirements: W. Martes - 65
Too late here (14 months): O. Spenst ---------- 107
Wrong self-diagnosis of injury not bar to claim: E. Lewis ---------- 95

Vol. 3

Claim barred for late notice: E. Owens ---------- 234
Excuse for late notice inadequate: H. Moore ---------- 188
Good excuse for delayed notice: L. Leeth ---------- 48
Good excuse for delayed claim: J. Eller ---------- 56
Good excuse for delay: E. Ward ---------- 110
Good excuse for delay: L. Gooding ---------- 142

Vol. 4

Burden of prejudice on employer: B. Logan ---------- 227
Five days late not prejudicial: O. Parker ---------- 3
No prejudice where claimant illiterate: B. Sisson ---------- 271
None: Q. Frazier ---------- 164
None after auto accident: D. Washtok ---------- 202
Too late to raise issue: R. Nichols ---------- 198

Vol. 5

Delay in reporting fatal to claim: C. Blisserd ---------- 183
Delay not justified: M. Langehennig ---------- 230
Too late: R. Gray ---------- 126

Vol. 6

Claim allowed despite 10-month delay: M. Nordahl ---------- 160
Claim defeated where none given for 3 months and long history of back problems: W. Fitzmorris ---------- 94
Delayed notice justified: L. Riddel ---------- 244
Delay prejudicial: C. Gaffney ---------- 110
Oral notice only is insufficient: M. Evans ---------- 8
Self-employed person: J. Smith ---------- 245

Vol. 7

Acceptance may be waiver of right to raise question of timely notice: J. Reed ---------- 60
Delayed claim needs more than conjecture to support it: G. Pannell ---------- 152
Delay held prejudicial: W. O'Donnell ---------- 268

Delay of 57 days considered: E. Maffit ---- 51
Denial of belated notice doesn't waive anything: A. Richmond ---- 38
Fifteen months too late to make claim: R. Dahlstrom ---- 13
Two year delay too much: W. Rector ---- 58

Vol. 8

Death claim untimely: E. Hathaway ---- 27
Four months too late: H. Crabb ---- 138
Heart case: R. Kiene ---- 23
Notice over a year after the accident: A. Johnson ---- 60
Payment waives defense of untimely filing: J. Snider ---- 122

Vol. 9

Heart claim filed 4 years after event: F. Mendenhall ---- 134
Heart attack: A. Reed ---- 228
Hernia claim with year delay: S. Thomas ---- 286

Vol. 10

Deaf mute claimant excuse from prompt notice where foreman saw accident:
N. Cameron ---- 268

Vol. 12

Claim filed two years late by doctor's employee: B. Rivera ---- 144
Hearing claim: R. Flick ---- 107
Late filing allowed: R. Horwedel ---- 114
Notice of heart attack but not claim : H. Sherman ---- 173
Occupational disease claim: W. Hurst ---- 147
Occupational disease claim timely: D. Herman ---- 158
Thirty-four day claim: G. Rogers ---- 103

Vol. 13

Knew facts but not claim: C. Low ---- 268
Oral notice only: R. Wear ---- 37
Stale claim viewed with caution: J. Woodcock ---- 225
Statute construed: J. McKenzie ---- 273

Vol. 14

Report nine months after incident: O. Nelson ---- 111

Vol. 15

Actual knowledge: E. Driesel ---- 235
Delay not fatal: L. Tabor ---- 145
Delayed heart claim: C. Vermeer ---- 5
Excuse adequate: E. Contreras ---- 113
Heart claim: A. Summit ---- 122
Prejudice lacking: B. Brounstein ---- 178

NOTICE OF INJURY, cont.

Vol. 16

Back injury as occupational disease: J. Thompson ---- 125
Claim filed two years late but allowed: I. Brown ---- 177
Claim form year late: A. Templeton ---- 265
Delayed: G. Cunningham ---- 46
Late filing fatal: M. Mosko ---- 49
Late filing: M. Wilson ---- 276
Late claim: D. Roberts ---- 284

Vol. 17

Bronchitis called occupational disease: D. Lanier ---- 264
Late back claim: J. George ---- 64
Late filing fatal: F. Jackson ---- 255
Late notice excused: G. Creager ---- 21
Late to both employers: V. Snethen ---- 254

Vol. 18

Hearing claim 10 days late: R. Young ---- 22
Knowledge of SAIF in defending one claim applied to other claim: F. Miles 168
Late filing: H. Lewis ---- 41
Prejudice not shown: R. Costello ---- 160
Slowly developing syndrome: K. Maier ---- 108

Vol. 19

Belated: D. Widener ---- 40
Denied as untimely: L. Such ---- 152

Vol. 20

Belated: R. Smith ---- 291
Delay fatal to claim: S. Tyler ---- 41
Late notice excused: R. Edens ---- 45
Late claim: C. Shepard ---- 120
Late notice excused: M. Lamkey ---- 207
Late filing excused: O. Walton ---- 250
Occupational disease: A. Mueller ---- 158

OCCUPATIONAL DISEASE

Vol. 1

Asbestosis found 50% contributing factor to permanent and total disability: F. Moffet ---- 13
Asthma condition and chlorine gas: R. Haak ---- 128
Chronic subdeltoid bursitis evaluated at 100% loss function of arm: M. Wershey ---- 138
Contact dermatitis of fry cook basis for award: E. Wasson ---- 11

General hearing loss and tinnitus appearing after operation of noisy cat, compensable even though some prior symptoms of acoustic trauma: M. McBride ---- 5
Leukoplakia not occupational origin: T. Van Arsdale ---- 68
Lung condition caused by dust exposure compensable: E. Gray ---- 27
Presence thereof should be reviewed by Medical Board and not WCB: J. Lescard ---- 36
Pneumonitis claim denied relating to paint fumes: E. Shadduck ---- 17

Vol. 2

Allergy to Douglas fir dust equals 15% loss arm: N. Laknes ---- 69
Asthma claim denied: O. Loudon ---- 197
Chlorine gas did not aggravate asthma: R. Haak ---- 66
Contact dermatitis: G. Thibodeaux ---- 196
Contact dermatitis claim defeated: W. Jederberg ---- 198
Inhalation of paint fumes accident: R. Williams ---- 54
Nurse contracted tuberculosis: I. Bennett ---- 144
Procedural confusion, which carrier liable: I. Sedergren ---- 48
Review dismissed for failure to appoint a doctor: G. Thibodeaux ---- 196
Various ailments not occupational disease: W. Barry ---- 199
Vocal nodules of larynx compensable to radio announcer: L. Hoover ---- 69

Vol. 3

Chronic bronchitis: L. Hubbard ---- 168
Appeal procedure not followed: R. Krueger ---- 106
Bronchitis not related: Austinson ---- 87
Bronchitis not compensable: F. Linton ---- 23
Chronic asthmatic bronchitis not related: P. Brauer ---- 83
Chronic bronchitis and emphysema not related: J. Leafgreen ---- 86
Nervous reaction to working in State Hospital: W. Barry ---- 120
Obstructive lung disease not related: D. North ---- 87
Pulmonary disease not related to air pollution: B. Windust ---- 82
Skin condition: D. Huebner ---- 181
Tenosynovitis not connected: A. West ---- 22

Vol. 4

Aluminum plant respiratory disease: I. Hunter ---- 189
Asbestosis: R. Campbell ---- 313
Bronchial asthma from wood dust: H. Throop ---- 20
Bronchial asthma: 64 degrees allowed: J. Collins ---- 41
Contact dermatitis: J. Gibson ---- 229
Hay dust disease not permanent: F. Corradini ---- 162
Hearing loss from acoustical trauma allowed: L. Stallings ---- 142
Intervertebral disc disease: G. Bergeron ---- 268
Liver failure after exposure to lead and carbon tetrachloride: C. Vanderkelen 214
None for arm and shoulder problems: E. Bathke ---- 67
Procedural mess in attempt to get earning capacity issue before Board: S. Jones ---- 290
Rheumatoid arthritis: E. Brown ---- 260

Shigella intercolitis and hepatic dysfunction: W. Prater ---- 61
Subsequent procedural problems: F. Barron ---- 32

Vol. 5

Allowed attorney fee: F. Corradini ---- 41
Chronic obstructive pulmonary disease: S. McDowell ---- 71
Claim allowed for Siderosis and silicosis: L. Parker ---- 116
Contact dermatitis: C. Moore ---- 119
Procedure where refuse to appoint a doctor: S. Jones ---- 225
Remand where improper answer: C. Moore ---- 207

Vol. 6

Allergy: 16° for allergic reaction to epoxy resin: S. Jones ---- 146
Anxiety neurosis claim allowed to social worker: L. Goold ---- 272
Arthritis related to dermatitis: F. Hickman ---- 17
Dermatitis claim unsuccessful: B. Thinnes ---- 104
Dermatitis: 10% loss fingers of both hands: C. Moore ---- 134
Findings filed: H. Thurston ---- 120
Fireman with smoke inhalation: F. O'Sullivan ---- 103
Insurance adjuster claiming for back difficulty from long distance auto driving: O. Nielsen ---- 43
Lead poisoning: C. Spriggs ---- 106
None found: O. Nielsen ---- 62

Vol. 7

Asbestosis: D. Mathis ---- 227
Attorney's fees allowed on denied claim: R. Parr ---- 21
Dermatitis: no permanent disability: R. Petersen ---- 209
Dermatitis: J. Faught ---- 269
Mandamus judgment: E. Brown ---- 129
Medical board found none: W. Beaudry ---- 187
Respiratory symptoms not work connected: C. Ware ---- 195
Review withdrawn: A. Frey ---- 122

Vol. 8

Asthma not aggravated: W. Allen ---- 193
Bilateral tenosynovitis: J. Melhorn ---- 24
Citrus fruit contact claim settled: L. Elkin ---- 266
Degenerative hip accepted as occupation disease: C. Marsh ---- 116
Forearm award for undisclosed disease: J. Melhorn ---- 261
Hearing loss attributed to 10 years of chain saw use: A. Lundin ---- 49
Hearing loss: Obscure decision: A. Bennett ---- 99
Issue of extent of disability appealed to Workmen's Compensation Board: W. Capparelli ---- 236
Lead poisoning case referred to Medical Board: H. Court ---- 148
Lung infection allowed: G. Graham ---- 262
Procedure perplexing: C. Marsh ---- 116
Procedure: J. Melhorn ---- 261

Remand to Board in hearing loss case: A. Lundin ---- 36
Raynauds Phenomenon: V. Hayes ---- 265
Varicose Veins: B. Hallman ---- 64

Vol. 9

Allowed after going to Court of Appeals: H. Thurston ---- 36
Board withdrew award of partial disability: M. Cook ---- 294
Ear Tinnitus allowed: J. Jones ---- 31
Hearing claim allowed: G. Gerber ---- 161
Hepatitis: D. Heath ---- 193
Lead poisoning: J. Ruark ---- 147
'Legg-Calve-Perthes' disease: P. Hohman ---- 210
Lung disease: C. Howe ---- 103
Neuropathy: N. Armstrong ---- 177
Noise: Kaye Snyder ---- 46
Noise: S. Pruitt ---- 52
Permanent total affirmed by Board: M. Carey ---- 154
Scheduled disability award for contact dermatitis: M. Cook ---- 282
Ulcer: R. Bush ---- 45

Vol. 10

Accident in this case: E. Bergh ---- 265
Appeal procedure: A. Kilgore ---- 169
Claim allowed: A. Dahlstrom ---- 253
Contact dermatitis claim: M. Cook ---- 213
Fee of $300: F. Kelley ---- 102
Fee on motion: M. Larson ---- 186
Foot ache from walking on concrete: M. Larson ---- 186
Malodorous fumes: C. Willhoit ---- 63
Mental breakdown: T. Duffy ---- 262
Nervous tension related on Firman's case: R. Cook ---- 119
Pulmonary disease: F. Kelley ---- 100

Vol. 11

Award of 8° affirmed: G. Graham ---- 61
Bronchitis for working in Reynolds plant: P. Brauer ---- 58
Contact dermatitis: D. Bailey ---- 39
Dermatitis claim hit paydirt: D. Bailey ---- 64
Dermatitis claim successful: D. Allee ---- 80
Dermatitis for 12 years: E. Simmons ---- 282
Fee for work before Medical Board: M. Carey ---- 138
Fee where review did not reduce: A. Kilgore ---- 171
Hearing claim increase by Medical Board on SAIF appeal: A. Kilgore ---- 131
Hearing loss: A. Kilgore ---- 131
High blood pressure: E. Miller ---- 269
Hypertension after 48 years in sawmill: A. Frey ---- 92
Insanity: H. Worrall ---- 212
Order rearranged for 3rd time: D. Bailey ---- 79
Partial disability: E. Murdock ---- 251

Salmonellosis from working in turkey plant: V. Sturzinger ---- 62
Settlement where stormy procedure: W. McCoy ---- 113
Ulcer: W. McCoy ---- 47

Vol. 12

Amputation because of diabetes: D. Johnson ---- 267
Hearing loss: Read this one: O. Privette ---- 253
Hearing claim wins: C. Mack ---- 266
Heart disease: D. Herman ---- 158
Lung problem of heavy smoker: Buchanan ---- 55
Lungs in plywood worker: C. Morgan ---- 117
Medical Board misinstructed: P. Brauer ---- 109
Mononucleosis: G. Muncy ---- 9
Thrombophlebitis of left knee: H. Zearing ---- 24
Penalty allowed: J. Lundberg ---- 138
Progressive back condition: J. Lundberg ---- 138
Pyelonephritis: C. Schwert ---- 289
Vertebral Epiphysitis: R. Williams ---- 73

Vol. 13

Asthmatic bronchitis: W. Tolle ---- 72
Hearing loss claim timely: D. Conger ---- 146
Hearing loss claim timely: R. Callerman ---- 147
Last insurer is liable: C. Yost ---- 284
Tenosynovitis: L. Vincent ---- 82

Vol. 14

Late filed: J. Utti ---- 45

Vol. 15

Arthritis claim: P. Adams ---- 180
Congestive heart failure: B. Brounstein ---- 178
Lung condition: D. Edwards ---- 12
Old law bronchitis claim: L. Skirvin ---- 239
Systemic lupus erythematosus: K. Myers ---- 251

Vol. 16

Back claim: J. Thompson ---- 125
Hearing claim: H. Mitchell ---- 201
Knee injury: J. Prettyman ---- 253
Lead poisoning: C. Spriggs ---- 211

Vol. 17

Back claim: P. Morrison ---- 44
Bronchitis: D. Lanier ---- 264
Elevator operator with arm problem: A. Johnson ---- 196

OCCUPATIONAL DISEASE, cont. Vol. 17, cont.

Knee in tile setter: W. Babbel ---- 138
Muscle spasm of leg: M. O'Neal ---- 174
Rheumatoid spondylitis: R. Iverson ---- 103

Vol. 18

Allergy to clothes: V. Grover ---- 7
Moss allergy: J. Seibert ---- 3

Vol. 20

Degenerative neck condition: R. Gitch ---- 27
Emphysema denied: A. Mueller ---- 158
Procedural question: L. Terrell ---- 129

OWN MOTION JURISDICTION

Vol. 13

Remanded for hearing: L. Janz ---- 201
Reopened: L. Jacobson ---- 15

Vol. 14

Aggravation denied: L. Janz ---- 267
Appeal rights added: H. Ellerbroek ---- 282
Denial can't be set aside: B. Bruns ---- 149
Determination: R. Biggs ---- 112
Determination: D. Clyde ---- 74
Determination: W. Flues ---- 82
Determination: L. Forester ---- 272
Determination: L. Garrett ---- 222
Determination: A. Gonzales ---- 268
Determination: D. Hiebert ---- 96
Determination: V. Jenks ---- 127
Determination: V. Jones ---- 126
Determination: J. Moorer ---- 148
Determination: R. Phillips ---- 240
Determination: E. Putnam ---- 126
Determination: E. Riggs ---- 207
Determination: H. Strong ---- 87
Determination: C. Williams ---- 87
Determination entered: A. Quinn ---- 82
Exhaustion of other remedies required: G. Roth ---- 202
Laminectomy: D. Fulton ---- 1
Nothing: R. Ruiz ---- 10
Procedural trap: G. Richards ---- 1
Referred for hearing: H. Boutin ---- 137
Referred for hearing: M. Ruggiero ---- 112
Remand for hearing: R. Carter ---- 259
Remanded for hearing: V. Hinz ---- 276
Remanded for hearing: J. Nations ---- 24

Remanded for hearing: R. Plymale ---- 274
Remanded for hearing: R. Rolo ---- 275
Remanded for hearing: M. Schallberger ---- 263
Reopened: H. Ellerbroek ---- 274
Reopened: A. Sanders ---- 214
Reopened 1965 claim: K. Mathers ---- 125
Reopened for surgery: D. Jones ---- 287
Voluntary reopening: L. Haron ---- 26

Vol. 15

Aggravation type claim: J. Small ---- 161
Aggravation type reopening: R. Inman ---- 162
Back claim reopened: L. Lovel ---- 54
Claim from 1942 reopened: L. Kellogg ---- 108
Denied: G. Collins ---- 264
Determination: A. Jenson ---- 33
Determination: H. Nelson ---- 33
Determination of total: R. Rolo ---- 73
Determination: P. Fletcher ---- 119
Determination: G. Bochsler ---- 141
Determination on laminectomy: C Flynn ---- 168
Determination: D. Tadlock ---- 192
Determination: G. Ellis ---- 193
Determination: J. Small ---- 242
Determination: F. Steinhauser ---- 259
Determination: J. Green ---- 260
Fee allowed of $75: H. Palmer ---- 71
Forearm claim reopened where already paid 100%: G. Reynolds ---- 226
Medical benefits allowed: F. Giltner ---- 160
Nothing: L. Carpenter ---- 51
ORS 656.245 benefits ordered: R. Carter ---- 74
Procedural order: L. Carpenter ---- 7
Remand: M. Clinton ---- 69
Remanded for hearing: T. Taylor ---- 171
Remanded for hearing: E. Seitz ---- 234
Reopened: W. McFarland ---- 88
Reopened: R. Collins ---- 89
Reopened: A. Graves ---- 170
Reopened claim: W. Fetter ---- 179
Reopening ordered: A. Warr ---- 34
Reopening: M. Schallberger ---- 158
Repeated request successful: L. Carpenter ---- 227

Vol. 16

Aggravation problem rejected: H. Strong ---- 224
Allowance reversed on reconsideration: G. Reynolds ---- 57
Determination of 10% foot: S. Bozak ---- 6
Determination: J. Planck ---- 51
Determination on eye: R. Vraspir ---- 124
Determination: H. Van Dolah ---- 167

Determination: K. Smith ---- 187
Determination: J. Davis ---- 219
Determination: S. Gudmundson ---- 227
Determination: L. Robuck ---- 241
Determination: L. Jacobson ---- 274
Prior insurer joined: K. McRay ---- 187
Referred for hearing: W. Waits ---- 4
Refused on 1948 claim: E. Holste ---- 191
Relief denied: J. Anderson ---- 278
Remanded for hearing: C. Peck ---- 23
Remanded for hearing: H. Short ---- 120
Remanded for hearing: E. Alley ---- 121
Remanded for hearing: G. Cleys ---- 133
Remanded for hearing: D. Croy ---- 150
Remanded for hearing: F. Lengele ---- 151
Reopened where fund doesn't object formally: G. Mendoza ---- 56
Rinehart report not followed: J. Barbur ---- 222

Vol. 17

Denied: S. Jones ---- 117
Denied on 1965 claim: A. Wicks ---- 122
Denied on 1966 claim: T. Wann ---- 172
Determination: F. Estabrook ---- 16
Determination: J. Pyles ---- 17
Determination: L. Ward ---- 17
Determination: H. Nihart ---- 59
Determination: L. Jones ---- 81
Determination: D. Jones ---- 170
Determination: S. Edwards ---- 172
Determination on back claim: E. Blanco ---- 224
Determination--hand: L. Hackett ---- 142
Determination on leg claim: A. Joy ---- 190
Determination on 1966 back claim: D. Graven ---- 225
Determination on 1967 back claim: E. Sparks ---- 200
Determination on 1968 back claim: B. McKinney ---- 233
Determination of 1969 leg: T. Rodriguez ---- 268
Determination on degenerative back: M. Schallberger ---- 270
Knees repaired on 1958 claim: C. Christy ---- 112
Leg claim from 1969: R. Inman ---- 116
Leg hurt in 1942: L. Kellogg ---- 267
Not until aggravation expires: B. Rattay ---- 171
Procedural question: F. Estabrook ---- 66
Referred for hearing: R. Baird ---- 32
Remanded for hearing: K. Scramstad ---- 68
Remanded for hearing: G. Reynolds ---- 121
Remanded for hearing: D. Grassl ---- 139
Remanded for hearing: E. Aniszewski ---- 144
Remanded for hearing: W. Christiani ---- 195
Remanded for hearing: W. Puzio ---- 199
Reopened: E. Seitz ---- 49
Reopened on 1957 back claim: J. Nations ---- 173

Reopened 1968 claim: K. Gilmore ---- 128
Reopened 1968 claim: J. Rutherford ---- 303
Reopening denied: B. Elliott ---- 196
Subjective testimony insufficient for reopening: E. Weedeman ---- 208
Total denied on 1963 injury where large leg and back awards: M. Ruggiero - 119

Vol. 18

Aggravation of 1965 arm claim allowed: L. Carpenter ---- 131
Back surgery on 1961 claim: R. Bennett ---- 132
Denied: J. Brenchley ---- 12
Determination: R. Gerlitz ---- 6
Determination: G. Graves ---- 10
Determination: W. Grossnickle ---- 11
Determination: F. Ross ---- 12
Determination: M. Barackman ---- 15
Determination: C. Peck ---- 23
Determination: J. Keif ---- 41
Determination: E. Seitz ---- 45
Determination: D. Marinelle ---- 88
Determination: E. Reynolds ---- 94
Determination: L. Beman ---- 109
Determination: I. Guyer ---- 160
Determination: M. Freed ---- 183
Determination: A. Brugato ---- 184
Determination: K. Kutsev ---- 190
Determination: T. Kovach ---- 191
Determination: R. Collins ---- 195
Determination: R. Collins ---- 217
Determination: R. Burns ---- 229
Determination: D. Rush ---- 239
Determination: G. Phelan ---- 251
Determination: K. Black ---- 264
Determination: V. Foster ---- 270
Determination: A. Phillips ---- 279
Determination: C. Chambers ---- 287
Dismissed for want of prosecution: R. Cheney ---- 32
Medical allowed: G. Reynolds ---- 249
Nothing except ORS 656.245: D. Croy ---- 6
Relief denied after hearing: P. Petite ---- 302
Remanded for hearing on 1955 injury: R. Olson ---- 31
Remanded for hearing: A. Kephart ---- 173
Remanded for hearing: W. Patterson ---- 222
Remanded for hearing: R. Wilson ---- 269
Reopened voluntarily after some delay: C. Hacking ---- 139
Reopened where employer doesn't respond: D. Tofflemire ---- 140
Reopened on 1969 claim: V. Schnell ---- 252
Reopened on 1966 claim: J. Bleth ---- 253
Reopening denied: K. McRay ---- 14
Reopening denied on 1932 amputation but medical accepted: G. Spear ---- 254
Reopening refused on 1962 injury: E. Grogan ---- 128
Settled for $8,800: E. Aniszewski ---- 24

Settled for $500: L. Jacobson ---- 26
Stay of compensation pending appeal not available: L. Kellogg ---- 87
Time loss paid for pain clinic: W. Grossnickle ---- 250
Voluntary reopening: H. Schelske ---- 51

Vol. 19

Amended determination: W. Puzio ---- 226
Amended order: F. Lengele ---- 93
Board rejects C&E suggestion: J. Butler ---- 136
Denied: E. Pfister ---- 40
Denied: W. Waits ---- 65
Denied on 1958 ankle claim: R. Webb ---- 198
Denied on 1964 back claim: B. Foss ---- 128
Denied on 1965 claim: F. Baney ---- 75
Denied on 1967 leg claim: O. Middleton ---- 83
Denied on 1968 claim: M. Oxendine ---- 89
Denied on 1967 claim: H. Green ---- 114
Denied on 1968 back claim: T. Williams ---- 127
Denied on 1968 back fusion: H. Curry ---- 107
Denied for retirement: J. Farah ---- 270
Denied reopening: J. Dyer ---- 252
Determination: J. Stephens ---- 59
Determination: I. Walker ---- 62
Determination: J. Davis ---- 70
Determination: A. Cheatham ---- 86
Determination of nothing: G. Reynolds ---- 264
Determination of total disability on 1961 claim: B. Hopper ---- 273
Determination on 1956 back claim: J. Nations ---- 143
Determination on 1957 leg claims: J. Newton ---- 270
Determination on 1958 back claim: B. King ---- 118
Determination on 1959 back claim: W. Puzio ---- 162
Determination on 1959 claim: P. Fletcher ---- 129
Determination on 1961 back claim: J. Burks ---- 177
Determination on 1965 back claim: L. Carpenter ---- 221
Determination on 1966 arm injury: W. Zunck ---- 190
Determination on 1965 leg claim: L. Pence ---- 265
Determination on 1966 knee: D. Penkava ---- 179
Determination on 1967 back claim: A. Doney ---- 160
Determination on 1968 back injury: N. Roth ---- 196
Determination on 1968 fall: F. Jones ---- 220
Determination on 1968 leg claim: N. Crane ---- 149
Determination on 1968 toe claim: L. Myers ---- 127
Determination on 1969 back claim: J. Mitchell ---- 106
Determination on 1969 back claim: T. Kenison ---- 113
Determination on 1969 back claim: R. O'Conner ---- 302
Determination on 1969 finger: B. Holt ---- 104
Order corrected: L. Myers ---- 179
Order rescinded: F. Lengele ---- 216
Remanded for hearing on 1970 claim: N. Hux ---- 11
Remanded for hearing: R. Schwab ---- 85
Remanded for hearing: V. David ---- 86

Remanded for hearing: J. Stacey ---------- 92
Remanded for hearing: C. Thorn ---------- 119
Remanded for hearing: L. Gaither ---------- 126
Remanded for hearing: S. Tadlock ---------- 211
Remanded for hearing: G. Murphy ---------- 240
Remanded 1963 claim for hearing: J. Micek ---------- 13
Reopened: H. Short ---------- 66
Reopened: B. Brooks ---------- 67
Reopened 1949 back claim for drug addiction treatment: C. Brown ---------- 266
Reopened 1966 claim: G. Paynter ---------- 13
Reopened 1963 back claim for psychological care: H. Harvey ---------- 199
Reopened 1966 claim: K. Scramstad ---------- 1
Reopened 1966 claim: T. Wann ---------- 263
Reopened 1967 claim for new hip: R. Rice ---------- 250
Reopened 1968 claim: H. Kelso ---------- 82
Reopened 1968 claim: F. Lengele ---------- 12
Reopened 1969 claim: E. Alley ---------- 1
Reopened 1972 leg claim: W. Patterson ---------- 264
Time loss for days off to visit doctor allowed: W. Perkins ---------- 277

Vol. 20

Denial upheld: E. Fields ---------- 119
Denied in absence of recent medical: J. McCartney ---------- 62
Denied on 1968 claim: H. Strong ---------- 80
Denied on 1971 claim: M. Leith ---------- 140
Denied on 1970 knee claim: W. Erwin ---------- 154
Denied on 1968 claim: G. Cleys ---------- 226
Denied for second time this year: R. White ---------- 229
Denied in weak case: E. Midwood ---------- 258
Determination: L. Perrigan ---------- 12
Determination on 1967 claim: A. Warr ---------- 18
Determination on 1969 claim: H. Burt ---------- 32
Determination on 1967 claim: W. Grossnickle ---------- 36
Determination on 1960 back: E. Alley ---------- 44
Determination on 1967 claim: R. Graham ---------- 79
Determination on 1967 back claim: G. Fox ---------- 109
Determination on eye claim: B. Adams ---------- 127
Determination on 1969 knee claim: R. Rogers ---------- 164
Determination: J. Butler ---------- 170
Determination on 1967 claim: J. Fitzgerald ---------- 187
Determination on 1968 knee claim: W. Fetter ---------- 198
Determination on 1966 back: B. Davis ---------- 199
Determination on 1969 foot claim: A. Owens ---------- 206
Determination on 1968 knee claim: J. Tull ---------- 227
Determination on 1967 claim: J. Hutchinson ---------- 238
Determination on 1967 claim: G. Koster ---------- 257
Determination on 1967 eye claim: D. Corbin ---------- 264
Determination on 1968 claim: H. Kelso ---------- 281
Determination on 1967 claim: R. Murray ---------- 285
Determination on 1967 claim: C. Owen ---------- 285
Determination on 1970 injury: M. Spencer ---------- 293
Disc surgery on 1971 claim: L. Giltner ---------- 226

Employer motion for hearing denied: T. Grund ---- 229
Heart claim allowed where denied 7 years earlier: E. Fields ---- 210
Neck: 35% allowed on 1967 claim: W. Grossnickle ---- 230
No to 1967 back claim: R. Uhing ---- 10
Old denied claim stays denied: B. McBride ---- 223
Penalties and Fees for defiance: W. McFarland ---- 232
Recommendation not followed: R. Wilson ---- 113
Reconsideration denied: G. Fox ---- 197
Referred for hearing: M. Johnson ---- 66
Referred for hearing: J. Christian ---- 117
Referred for hearing: C. Adams ---- 118
Referred for hearing: J. Hunter ---- 280
Remanded for hearing: J. Phipps ---- 77
Remanded for hearing: A. Cox ---- 78
Remanded for hearing: B. Terry ---- 147
Remanded for hearing: L. Albertson ---- 162
Remanded for hearing: W. Myers ---- 163
Remanded for hearing: L. Hartung ---- 165
Remanded for hearing: K. Larson ---- 251
Remanded for hearing: W. Sorenson ---- 268
Remanded for hearing: R. White ---- 277
Remanded for hearing: R. Self ---- 290
Reopen 1955 claim: R. Olson ---- 13
Reopened 1968 claim: M. York ---- 21
Reopened 1967 claim: R. Baird ---- 66
Reopened 1966 claim: T. Dickerson ---- 71
Reopened 1967 leg claim: F. Vasbinder ---- 78
Reopened: A. Kephart ---- 115
Reopened 1968 claim: W. Christiani ---- 128
Reopened 1969 claim: N. Hux ---- 140
Reopened 1968 claim: R. Uhing ---- 201
Reopened 1971 back claim: R. Presnell ---- 228
Reopening nix on 1967 claim: R. White ---- 9
Reopening denied: J. Stacey ---- 216
Repeated request denied: H. Curry ---- 277
Second injury benefits stopped: J. Curl ---- 296
Total disability award upheld although in vocational rehabilitation program:
C. Quenelle ---- 76

PENALTIES AND FEES

Vol. 1

Acceptance of claim on eve of hearing won't bar fees: C. Hooper ---- 160
Allowed after denial reversed: D. Baker ---- 146
Attorney's fees allowed after claimant prevailed in subjectivity hearing:
Beaver Sports Properties, Inc., Employer ---- 48
Board reversed award of penalties after taking judicial notice of record:
J. Langsdorf ---- 170
Claimant's Attorney gets $31.00: W. Swink ---- 59
Confusion: G. Delaney ---- 53
Continued payment of wages not unreasonable resistance: M. Walsh ---- 1
Denial defective: J. Loper ---- 34

Department may not unilaterally suspend SIAC award of total disability: J. Rawls ---- 155
Disallowed on review for insufficient basis: F. Kufner ---- 132
Double penalties not allowed under ORS 656.262(8): M. Desgrange ---- 56
Double penalty award not reversed on review: K. Makela ---- 104
Erroneous retroactive determination does not ratify otherwise unreasonable non-payment of temporary total disability: T. Cheek ---- 120
Falsified medical history and employment application unreasonable basis for denial of claim: M. Phillips ---- 182
New procedure obligates payment of benefits pending appeal: L. Larson ---- 122
Non-payment of temporary partial disability: C. Adams ---- 140
None for late payment unless specifically plead which payment late: W. Benedict ---- 38
None where payment stoppage subsequently sustained by determination: W. Benedict ---- 38
Pair of injuries, one of which insurer is uninformed, makes liability for attorney's fees: S. King ---- 169
Penalties allowed on reversal of denial, although Hearing Officer had affirmed: M. Phillips ---- 182
Penalty allowed for late time loss but no fee: W. Aarnio ---- 2
Premature suspension of time loss where pregnancy: C. Hayward ---- 96
Prevailing on legal issue not enough; compensation must be disallowed or reduced on review to avoid fee: S. Finley ---- 55
Sight draft is not permissible form of payment: L. Antoine ---- 62
Termination of time loss payments before records justify basis for penalties: E. Wasson ---- 11
Various: allowed for great delay in getting determination, etc.: E. Sager ---- 174
"Unreasonable resistance" to be determined on a case by case basis and distinguised from "unreasonable delay": L. Hallin ---- 143
Withdrawal of request for review; claimant's attorney entitled to reasonable fees for work already done: G. Shannon ---- 18

Vol. 2

Allowed for improper termination of temporary disability: W. Arnold ---- 170
Allowed for improper handling of an aggravation claim: H. Jones ---- 132
Allowed for nonpayment pending appeal: C. Lucas ---- 89
Allowed for nonpayment pursuant to order: G. Robinson ---- 96
Allowed for violation of ORS 656.313: P. Brauer, et. al. ---- 161
Allowed for pre-1965 Act injury: C. Mumpower ---- 178
Allowed over $52 medical bill: M. Buck ---- 176
Allowed where no payment pending review: B. Logan ---- 94
Allowed where nonconformance to determination: W. Morris ---- 131
Allowed where stop payment before stationary: M. George ---- 90
Applied where improper termination of time loss payments: R. Perryman ---- 157
Assessed with comment: H. Kleeman ---- 179
Attorney's fees should be paid pending review as well as compensation due: I. Davidson ---- 106
Board increased fee allowed by Hearing Officer and attached 25% penalty where no denial within 60 days: C. Hickey ---- 87
Carrier confused because there had been change of carriers: G. Linville ---- 1
Delay partially attributable to frequent moves by employee: A. Johnson ---- 171

Denial not unreasonable: D. Ramberg ---- 34
Fee allowed for denial of aggravation claim: L. Blackmore ---- 98
Full discussion of propriety of assessment for delayed payments: D. Sampson- 201
Not allowed for claim where no chance to accept: W. Gill ---- 49
Penalties limited to 10% for delayed payment: L. Ballance ---- 83
Second rate defenses attempted to avoid penalties: J. Eng ---- 185

Vol. 3

Allowed: C. Shelley ---- 44
Allowed where claim denied: B. Logan ---- 31
Denied for minor medical bills: W. Snider ---- 65
Fee allowed: A. Gafford ---- 218, 232
Fee assessed where claim improperly processed: R. Buhrle ---- 72
Fees for refusal to voluntarily reopen claim?: F. Siller ---- 37
Fee of $500 found reasonable: A. Zacher ---- 77
Fee issue belongs in Circuit Court: D. Hodgin ---- 157
Fee issue belongs in Circuit Court: P. Espeseth ---- 157
Improper assessment of fees against Department modified, but fees assessed against Department for appealing anyway: S. Sedergren ---- 46
Penalty disallowed: J. McLinn ---- 238
Restricted where computation of temporary disability unclear: N. Crane ---- 136

Vol. 4

Allowed where delay because of employer's failure to report: R. Blake ---- 151
Denial not unreasonable: R. Roberts ---- 153
Denied in belabored opinion: T. Dean ---- 252
Dissent would allow: I . Billings ---- 241
Fee not allowed where delayed submission for determination: B. Huston---- 94
Fee not allowed where claimant contributed to denial: R. Munnerlyn ---- 210
Fee where denial of prior law claim: A. Smith ---- 12
Not allowed in reopening case: W. Deadmond ---- 304
Not allowed: B. Hopkins ---- 109
Not allowed subsequent to court remand: J. Darby ---- 90
Not unreasonable to agree with Circuit Judge on whether penalties are payable: L. Larson ---- 107
No penalties where claim insufficient: J. Ward ---- 70
Old injury opted under new law: J. Fisher ---- 44

Vol. 5

Allowed $120 on occupational disease claim: F. Corradini ---- 41
Allowed where employee fired upon allowance of claim : O. Brown ---- 70
Assessment set aside: G. Linde ---- 7
Fee allowed: M. Webb ---- 267
Fee contingent on Supreme Court case: G. Emerson ---- 197
Fee denied in confusing situation: M. Pearson ---- 115
Fee omitted from stipulated re-opening of claim: C. Wheeler ---- 99
Fee reduced where unnecessarily prolonged hearing: M. Thomas ---- 38
Not allowed: J. McVay ---- 5

Not allowed where claimant's counsel is contentious: J. Johnson ---------- 96
Not allowed in 3-page opinion: W. Woods ---------- 273

Vol. 6

Allowed for delays in accepting claim: M. Guinn ---------- 20
Attorney fee dispute settled: C. Matsler ---------- 296
Denied where delay when decedent was missing in aircraft: W. Gale ---------- 95
Dereliction of duty by SAIF: F. Dexter ---------- 195
Fee allowed on occupational disease claim: F. Hickman ---------- 17
Fee of $250 allowed: E. Ashford ---------- 241
Fees allowed in secondary injury case: J. Rockow ---------- 264
Fee may be allowable in own motion proceeding where sought by employer: E. May ---------- 211
Fee not applicable where employer only cross-requests review: K. Behrens - 300
Fee of $150 allowed in own motion proceeding: C. Cole ---------- 138
Fee of $600 allowed for hearing and review on denied aggravation claim: B. Workman ---------- 276
Fee of $750 allowed concerning denied claim: G. Lee ---------- 61
Mandamus to enforce payment pending appeal: E. Brown ---------- 145
None where delayed reopening of claim but was advance payment: N. Wingfield ---------- 25
Penalties denied in aggravation claim: M. Hibbard ---------- 151
Regarding hernia claim: W. Miller ---------- 6

Vol. 7

Attorney should not receive less merely because employer required to pay fee: R. Howard ---------- 126
Awarded on aggravation claim: C. Rooker ---------- 212
Board may go beyond record in determining whether fee allowable: C. Vanderzanden ---------- 157
Delay alone is not enough: D. Caves ---------- 164
Denied over disputed TTD allowance: J. Hash ---------- 53
Fee denied in aggravation claim when don't first submit claim to carrier: C. Vanderzanden ---------- 128
Fee of $162 allowed in own motion proceeding: P. Gillenwater ---------- 246
Fee of $1,500 in heart case: R. Kincaid ---------- 223
For 3 month delay in accepting aggravation claim: B. Schellhammer ---------- 272
Majority declined where SAIF doubted claimant had 4 children: M. McCormick 179
Medicals: allowed for long delay for no good reason: R. Howard ---------- 126 or 241
Medicals not subject to requirement of payment pending appeal: W. Wood - 116
Must pay temporary disability pending review even if win on review: G. Aten ---------- 274
No fee where only cross-request for review: V. Linley ---------- 156
None where case for non-payment is lack of information from claimant: E. Archer ---------- 64
Occupational disease claim: T. Parr ---------- 21
ORS 656.313 means what it says: G. Aten ---------- 274
Penalties may not attach to payments not yet due: R. Howard ---------- 126
Penalty of $460 allowed for clerical error but no fee: B. Carter ---------- 115
Resistance means refusal to pay pursuant to an order: P. Mabe ---------- 14

Settled: D. Neibauer ---- 78
Where won't pay pending appeal: C. Blisserd ---- 36

Vol. 8

Aggravation claim, acceptance on production of corroborative medical report defeats fee: J. Hensley ---- 171
Attorney's lien share of compensation must be paid pending appeal: J. Mendoza ---- 97
Constructive denial of aggravation claim: J. Bonner ---- 178
Defacto denial where claimant dies and widow defends appeal: J. Ross ---- 179
Delayed closing after return to work: R. Wetherell ---- 264
Deposition: Must request fee in advance: B. Lisonbee ---- 233
Fee in reopening case: P. Atha ---- 35
Fee of $3,000 allowed in denied case: F. Kirkendall ---- 108
Fee portion paid to claimant: J. Mendoza ---- 109
Fee modified in supplemental order: R. Demaris ---- 172
Fee for deposition denied: B. Lisonbee ---- 227
Fee of $75 for taking deposition of doctor: A. Davis ---- 251
Further fee allowed by supplemental order: T. Horn ---- 147
Medical bills not paid: W. Woods ---- 117
Must pay fee portion of compensation pending appeal: C. Rios ---- 85
None of dispute re: temporary disability: T. Horn ---- 213
Penalties denied on close question of medical services: M. Meeler ---- 128
Penalties for failure to reopen aggravation claim: R. Minugh ---- 259
Temporary disability payments just stopped: C. Deisch ---- 52
Ten percent of increase not to exceed statutory maximum is permissible agreement: L. Lettenbaier ---- 279
Unreasonable stalling: S. Spurlock ---- 196
Withholding of medical reports: G. Flawn ---- 198

Vol. 9

Allowed in hernia case: T. Choate ---- 48
Allowed for non-compliance with Board order: J. Neilsen ---- 217
Defacto denial: R. Lewis ---- 81
Deletion of penalty award is not reduction in compensation for fee purposes on review: J. Reed ---- 107
Fee of $200 on appeal after omission from order: H. Christiansen ---- 14
Fee deleted: S. Baszler ---- 74
Fee where cross appeal: D. Bohn ---- 93
Fee allowed on review: J. Reed ---- 107
Fee limited to $1,500: J. Dillon ---- 128
Fee on supplemental order: D. Fry ---- 149
Fee allowed where cross appeal by employer: E. Workman ---- 158
Fee claim settled: G. Lyness ---- 246
Fee for reopening where no request for hearing: W. dePaola ---- 283
No fee where claim fouled up: K. Wise ---- 102
Penalty imposed on Fund for failure to advise Board of further medical information: D. McGraw ---- 30
Sight draft float: J. Reed ---- 94
Stipulation for increased fee approved: W. Pettit ---- 35

PENALTIES AND FEES, cont.

Vol. 10

Allowed over strong dissent: R. Leers ---- 53
Computation in aggravation case where closing is by-passed: M. Wright ---- 223
Failure to award on denied claim corrected on own motion jurisdiction: W. Huckins ---- 148
Fee on own motion: M. Farmer ---- 27
Fee where resistance: B. Whetstone ---- 40
Fee of $1500 on aggravation claim: B. Whitney ---- 111
Fee on motion in occupational disease claim: M. Larson ---- 229
Fee sprung to $1,000 on reconsideration: D. Johnson ---- 235
Fee added by supplemental order: M. Cameron ---- 272
Motion for fee on own motion order: G. Almond ---- 215
Penalties allowed: C. Rowland ---- 76
Penalties where SAIF mislead claimant about claim rights: D. Johnson ---- 197
Penalty allowed: E. Bergh ---- 265

Vol. 11

Both allowed for denied claim for fibreglass pollution caused by lung condition: P. Blank ---- 192
Double fees to claimant on 3-way case: D. Virell ---- 227
Fee for attendant x-exam of doctor: V. Johnson ---- 98
Fee denied where no claim denial: A. Anderson ---- 101
Fee denied where lawyer messed up file: R. Strausbaugh ---- 108
Fee on occupational disease: M. Carey ---- 138
Fee denied by Board for appeal to Court of Appeals: B. Casper ---- 142
Fee reduced at attorney's request: D. Tadlock ---- 162
Fee of $1,500 fixed summarily by Circuit Judge: W. Anderson ---- 163
Fee but no penalty where unjustified offset claimed: R. Todahl ---- 168
Fee denied where cross request by employer: W. Coen ---- 194
Fee of $1,670: R. Salazar ---- 210
Fee disallowed where fund prevailed on collateral issue: J. Moline ---- 242
Fee of $97.20 approved: L. Sills ---- 274
Medicals are not compensation: R. Kline ---- 64
Multiple carriers, each pointing to other: D. Virell ---- 227
None for requesting closure, even if premature: H. Briggs ---- 289
Occupational disease on review: A. Kilgore ---- 171
Penalty on aggravation claim: S. Keeler ---- 287
Penalties where two employer dispute: J. Westby ---- 165
Penalties over time loss termination: S. Hussey ---- 259

Vol. 12

Affirmed where credibility is issue: L. Hickman ---- 222
Aggravation fee denied where medicals not given to fund until nearly time of hearing: G. Nelson ---- 137
Allowed for illegal offset: R. Hindman ---- 23
Continued denial of heart claim was unreasonable: O. Burster ---- 245
Delay permissible in medical procedure pending consultation but not in time loss: F. Smith ---- 230
Denial unreasonable: C. Yancey ---- 159

Denial until day of hearing when knew for months that should accept claim: G. Howard ---------- 175
Denied where workman unreasonable also: F. Smith ---------- 230
Employer wins appeal but still must pay attorney fee: L. Wicklund ---------- 163
Extra $275.76 allowed by stipulation: F. Dalton ---------- 204
Fees of $500 excessive: V. Johnson ---------- 51
Fee disallowed where cross claim on same issue: L. Doane ---------- 72
Fee allowed in disputed case: M. Corbett ---------- 79
Fee not "compensation" so appeal by fund which only gets fee knocked out will get additional fee imposed: V. Johnson ---------- 90
Fee of $500 for appeal defense: P. Kernan ---------- 112
Fee denied on successful appeal on procedural issue only: H. Liggett---------- 143
Fee of $1,000 excessive for hearing: L. Browder ---------- 172
Fee on reconsideration: C. Greenlee ---------- 43
Fee for establishing ORS 656.245 medical: H. Unger ---------- 164
Fee deleted on reconsideration: S. Nelson ---------- 193
Fee of $125 where employer withdraws appeal: P. Blank ---------- 204
Fee source when medical is only win: P. Edwards ---------- 211
Fee even though SAIF had a small technical victory: A. Matherly ---------- 239
Fee even though compensation reduced: E. Findley ---------- 270
Offset against unemployment prohibited: R. Horwedel ---------- 237
Penalty and no fee correct for late time loss benefits: J. Walter ---------- 100
Penalties and fees affirmed: R. Horwedel ---------- 279
Penalty of 10% for six weeks of slowness: J. Lundberg ---------- 138
Pending appeal payments: V. Johnson ---------- 51
Spear blunted: G. Dalthorp ---------- 228

Vol. 13

Aggravation claim where medical inadequate: P. Morgan ---------- 228
Aggravation: P. Drew ---------- 299
Attorney takes 33%: K. Kelsey ---------- 54
Attorney's fees from claimant on medical only award: A. Kube ---------- 68
Both where employer denied in three states claiming other state responsible: W. Long ---------- 58
Delay not unreasonable: G. Moore ---------- 50
Denied: L. Carrell ---------- 80
Denied claim: M. Boehmer ---------- 179
Double penalties and double fees if don't shape up: D. Virell ---------- 230
Fee payment advanced by stipulation: P. Gatto ---------- 46
Fee where employer's appeal dismissed for want of jurisdiction: C. Nollen - 111
Fee reduced on stipulation: W. Larson ---------- 135
Fee denied: F. Harrison ---------- 177
Fee in own motion proceeding: W. Smith ---------- 206
Fee of 50% approved in disputed case: W. Bowser ---------- 208
Fee of $1,750 from claimant: F. Sandstrom ---------- 222
Fee denied for assistance in getting ORS 656.245 treatment: S. Barker ---- 271
Fee for supplemental order: L. Nicholson ---------- 287
Penalties allowed: D. Monson ---------- 102
Penalties allowed for delay in closing claim: O. Morefield ---------- 292
Penalty and fee for delay over intra-carrier dispute: M. Lawrence ---------- 6
Penalty affirmed: F. McWilliams ---------- 22
Penalty for late payment: A. Moore ---------- 34

Penalty on abdomen claim where employer claimed was hernia claim: G. Dalthorp ---- 104
Penalty for delay in accepting or denying aggravation claim: C. Moshofsky- 112
Penalty of 10% for 6 days late: G. Calhoun ---- 145
Penalty but no fee: J. Humphrey ---- 159
Penalty for delay even though denial upheld: A. Zouvelos ---- 166
Penalty of $41.37 affirmed: R. Jensen ---- 176
Penalty for one month time loss: I. McCleary ---- 180
Penalty for failure to submit for closing after stopping time loss: A. Lopez - 254
Time loss penalty: G. Marchioro ---- 302

Vol. 14

Affirmed per curium: S. Bilyeu ---- 162
Aggravation claim: A. Anderson ---- 293
Aggravation claim: H. Crane ---- 131
Circuit Court is forum to decide fee: W. Wisherd ---- 154
Claim not processed: R. Butler ---- 170
Failure to accept or deny: J. Wahlbrink ---- 209
Fee agreement approved on appeal: J. Poelwijk ---- 57
Fee allowed: W. Lish ---- 203
Fee allowed: W. Rogers ---- 273
Fee by SAIF in ORS 656.245 case: C. Simmons ---- 246
Fee calculation where claim reopened before fee fully paid: M. Jones ---- 72
Fee deleted where tried Circuit Court first and lost: L. Flinn ---- 56
Fee denied on employer appeal where don't file brief: G. Reese ---- 140
Fee for hearing allowed on review: H. Stewart ---- 232
Fee on corrected order: L. Burkhartsmeier ---- 130
Fee of $104.85 allowed: R. Bigelow ---- 85
Fee on reconsideration: D. Chamberlin ---- 106
Fee paid by SAIF on knee claim: R. Staiger ---- 198
Penalty of 75% reversed: H. Stout ---- 212
Penalty for delay in denying claim: L. Anderson ---- 52
Penalty for not paying psychiatrist: A. Bartley ---- 151
Read this one: W. Phillip ---- 261
Refusal on knee claim where no determination: M. Rediske ---- 74
Supplemental order: C. Paxton ---- 134

Vol. 15

Acceptance late where delayed 60 days after the request for hearing: R. Larson ---- 295
Affirmed: W. Hunter ---- 48
Aggravation claim: L. Farnham ---- 15
Aggravation claim not answered: J. Sullivan ---- 124
Allowed on medical claim: M. Clinton ---- 68
Allowed for medicals not paid by hearing: P. Roberts ---- 76
Child care services disputed: P. Roberts ---- 76
Denied for substantial compliance with law: R. Burchell ---- 190
Fee where aggravation denied: D. Magnuson ---- 19
Fee of $1,000 for hearing and review: H. Vicars ---- 27
Fee denied where $10 penalty: K. Wells ---- 72

Fee discretionary in delay case: K. Wells ---------- 72
Fee for failure to accept or deny even though no compensation due:
O. Triano ---------- 127
Fee on employer appeal even though award reduced: B. Bissinger ---------- 198
Fee allowed: D. Tadlock ---------- 211
Fee on supplemental order: A. Graves ---------- 247
Fee disallowed: B. Bissinger ---------- 286
Fees fixed at $850: J. Humphrey ---------- 92
Fees of $2,695 by employer: B. Dunn ---------- 109
Large penalty and fee for failure to honor stipulation: R. Miles ---------- 164
Late time-loss check: L. Anderson ---------- 245
Medical bill of $82: D. McMurty ---------- 289
More fees not allowed: A. Anderson ---------- 55
Nothing for delayed payment of medical bills where didn't go for collection:
L. Medford ---------- 75
Penalty over medical services: B. Bowers ---------- 217
Penalty for 60-day delay: E. Strader ---------- 285
Unreasonable denial: C. Zehr ---------- 203

Vol. 16

Allowed where resistance: H. Roberts ---------- 34
Delayed closure: J. Smith ---------- 127
Double penalties but not penalty on penalty: A. Anderson ---------- 279
Fee denied on unsuccessful cross request: F. Carpenter ---------- 67
Fee of $2,000 on denied neck claim: also penalties: G. Dizick ---------- 161
Fee of $2,000 on denied heart case: C. Hughes ---------- 163
Fee of $1,000 allowed for both levels: S. Webster ---------- 166
Fee reversed: S. Halstead ---------- 191
Fee of $2,000 allowed payable by employer: W. Wisherd ---------- 258
Medical bill: P. Pearson ---------- 292
Penalties for slow payment: W. Rogers ---------- 92
Penalties allowed: W. Stinson ---------- 95
Penalties where deny instead of send in for determination: O. Stilwell ---------- 305
Penalty on denied aggravation claim even though denial upheld: C. Anderson 19
Penalty reversed where allowed because appeal was taken: K. Vanderpool - 122
Penalty for failure to accept or reject: G. Dizick ---------- 161
Penalty for delayed payment of medicals: L. Farnham ---------- 261
Penalty on penalty denied: C. Anderson ---------- 295
Reopening denial not unreasonable: D. Barclay ---------- 249
Retroactive total disability allowed: O. Love ---------- 251
Waiver is legal: T. Murphy ---------- 274

Vol. 17

Aggravation within one year: W. Oswald ---------- 96
Fee for non-payment of medical bill: D. Biggs ---------- 204
Fee issue not properly before the board: S. Malar ---------- 120
Fee lost where claimant's attorney suppressed medical report: E. Dayton ---------- 75
Fee of $400 agreed to: M. Parkerson ---------- 99
Fee of $1,250 for hearing: K. Duggan ---------- 261
Fee only on aggravation where no time loss: G. Chambers ---------- 83

Fee on amendment: T. Yarbrough ---- 257
Fee on medicals after five years: P. Carpenter ---- 89
Fee on own motion: J. Nations ---- 207
Fee on permanent total disability claim of beneficiaries for rejection: E. Galbreath ---- 164
Fee on ORS 656.245 case: J. Hunting ---- 8
Medical need not be paid pending appeal: W. Miller ---- 227
Nuisance appeal for fee frowned on: W. Collins ---- 236
Penalties denied because of confusion: G. Creager ---- 21
Penalties on penalties: M. Witt ---- 57
Penalty for late time loss: A. Flynn ---- 14
Penalty claimed on unpaid fee: M. Palodichuk ---- 161
Penalty on late denial: P. Pritchard ---- 272
Remand where denied without findings: J. Datz ---- 290
Some allowed where drafts: R. Dudding ---- 69
Waiver by cooperating with employer: W. Higginbotham ---- 300

Vol. 18

Denied claim--penalty even though denial affirmed: K. Hansen ---- 101
Double penalty but no penalty on penalties: W. Wisherd ---- 125
Employer refused to forward aggravation claim to insurer - may be expensive: F. Miles ---- 168
Fee of $100 on $61.35 claim: D. Skidmore ---- 43
Fee by supplemental order: C. Peck ---- 58
Fee of $600 on $50 case somewhat high: M. Hopkins ---- 169
Fee of $300 for review: R. Motta ---- 228
Fee where file not sent to C. & E. but time loss stopped: M. O'Malley ---- 277
Fee of $1,900 where time loss stopped because claimant moved to Czechoslovakia: A. Bilovsky ---- 281
Fee denied on review where don't file brief: W. Young ---- 295
Fees of $3,350 set by circuit judge: R. Milton ---- 221
Medical need not be paid pending appeal: D. Ward ---- 248
None on denial after determination: S. Anderson ---- 110
Penalties on penalties denied: L. Anderson ---- 116
Penalty for delayed denial: J. Childers ---- 123
Penalty denied where delay partly fault of claimant and his doctor and lawyer: F. Smith ---- 52
Penalty denied where late filing of 801: V. Ritter ---- 181
Procedure unusual: L. Anderson ---- 119
Refusal to pay pending appeal: F. Smith ---- 90
Reopening delayed: D. McMullen ---- 13

Vol. 19

Allowed for belated processing and denial: E. Stewart ---- 149
Allowed for delayed acceptance: R. Bennison ---- 190
Claimant pays fee on own motion: F. Lengele ---- 71
Denied where belated denial explained: M. Williams ---- 153
Employer gets fee from SAIF on denied coverage matter: P. Kelly ---- 60
Fee allowed by supplemental order: G. Paynter ---- 61
Fee allowed on reconsideration where brief not actually received: W. Young 67

Fee by supplemental order: P. Dimmick ---- 70
Fee from both claimant and employer: L. Martin ---- 207
Fee of $400: C. Sneed ---- 163
Fee of $1,500: E. Helmer ---- 244
Fee on own motion must come out of compensation: E. Alley ---- 64
Fee on ORS 656.245: D. Chastain ---- 7
Fee over termination of time loss benefits: L. Martin ---- 111
Fee reduced to $300 where employer protests: A. McManus ---- 5
None for C&E error unless withheld medical reports: E. Robinson ---- 144
Penalties denied for slow production of medical reports: D. Easton ---- 298
Penalties on penalties where still won't pay: W. Wisherd ---- 279
Penalty and fee for late payment and belated denial: A. Cunningham ---- 108
Penalty for late denial of aggravation claim: F. Reese ---- 261
Settled: N. David ---- 277
Sock it to them where still won't pay: W. Wisherd ---- 279

Vol. 20

Allowed for delayed time loss: W. Slater ---- 81
Allowed in horseplay case: J. Collins ---- 141
Allowed for refusal to comply with own motion order: W. McFarland ---- 232
Denied for nonpayment of medicals: A. Merritt ---- 240
Dissent on this case: E. Miller ---- 281
Excused by evidence tendered to board after review: M. Burton ---- 173
Fee of $350: S. Fay ---- 35
Fee by supplemental order: C. Adams ---- 70
Fee in carrier dispute denied: J. Faulk ---- 125
Fee in noncomplying case: J. Fagnand ---- 145
Fee in supplemental order: L. Scott ---- 187
Fee on supplemental order: H. Lefever ---- 224
Fee not reimbursed on third-party recovery: R. Harding ---- 231
Fee reduced: M. Genz ---- 274
Late denial: M. Genz ---- 274
Oral denial at hearing: M. Koonce ---- 91
Penalty where multiple employers: R. Faulkner ---- 134
Supplemental fee order: A. Kephart ---- 148

PERMANENT PARTIAL DISABILITY

(1) Arm & Shoulder
(2) Back - Lumbar and dorsal
(3) Fingers
(4) Foot
(5) Forearm
(6) Leg
(7) Neck and Head
(8) Hand
(9) Unclassified

Fee on amendment: T. Yarbrough ---- 257
Fee on medicals after five years: P. Carpenter ---- 89
Fee on own motion: J. Nations ---- 207
Fee on permanent total disability claim of beneficiaries for rejection: E. Galbreath ---- 164
Fee on ORS 656.245 case: J. Hunting ---- 8
Medical need not be paid pending appeal: W. Miller ---- 227
Nuisance appeal for fee frowned on: W. Collins ---- 236
Penalties denied because of confusion: G. Creager ---- 21
Penalties on penalties: M. Witt ---- 57
Penalty for late time loss: A. Flynn ---- 14
Penalty claimed on unpaid fee: M. Palodichuk ---- 161
Penalty on late denial: P. Pritchard ---- 272
Remand where denied without findings: J. Datz ---- 290
Some allowed where drafts: R. Dudding ---- 69
Waiver by cooperating with employer: W. Higginbotham ---- 300

Vol. 18

Denied claim--penalty even though denial affirmed: K. Hansen ---- 101
Double penalty but no penalty on penalties: W. Wisherd ---- 125
Employer refused to forward aggravation claim to insurer - may be expensive: F. Miles ---- 168
Fee of $100 on $61.35 claim: D. Skidmore ---- 43
Fee by supplemental order: C. Peck ---- 58
Fee of $600 on $50 case somewhat high: M. Hopkins ---- 169
Fee of $300 for review: R. Motta ---- 228
Fee where file not sent to C. & E. but time loss stopped: M. O'Malley ---- 277
Fee of $1,900 where time loss stopped because claimant moved to Czechoslovakia: A. Bilovsky ---- 281
Fee denied on review where don't file brief: W. Young ---- 295
Fees of $3,350 set by circuit judge: R. Milton ---- 221
Medical need not be paid pending appeal: D. Ward ---- 248
None on denial after determination: S. Anderson ---- 110
Penalties on penalties denied: L. Anderson ---- 116
Penalty for delayed denial: J. Childers ---- 123
Penalty denied where delay partly fault of claimant and his doctor and lawyer: F. Smith ---- 52
Penalty denied where late filing of 801: V. Ritter ---- 181
Procedure unusual: L. Anderson ---- 119
Refusal to pay pending appeal: F. Smith ---- 90
Reopening delayed: D. McMullen ---- 13

Vol. 19

Allowed for belated processing and denial: E. Stewart ---- 149
Allowed for delayed acceptance: R. Bennison ---- 190
Claimant pays fee on own motion: F. Lengele ---- 71
Denied where belated denial explained: M. Williams ---- 153
Employer gets fee from SAIF on denied coverage matter: P. Kelly ---- 60
Fee allowed by supplemental order: G. Paynter ---- 61
Fee allowed on reconsideration where brief not actually received: W. Young 67

Fee by supplemental order: P. Dimmick ---------- 70
Fee from both claimant and employer: L. Martin ---------- 207
Fee of $400: C. Sneed ---------- 163
Fee of $1,500: E. Helmer ---------- 244
Fee on own motion must come out of compensation: E. Alley ---------- 64
Fee on ORS 656.245: D. Chastain ---------- 7
Fee over termination of time loss benefits: L. Martin ---------- 111
Fee reduced to $300 where employer protests: A. McManus ---------- 5
None for C&E error unless withheld medical reports: E. Robinson ---------- 144
Penalties denied for slow production of medical reports: D. Easton ---------- 298
Penalties on penalties where still won't pay: W. Wisherd ---------- 279
Penalty and fee for late payment and belated denial: A. Cunningham ---------- 108
Penalty for late denial of aggravation claim: F. Reese ---------- 261
Settled: N. David ---------- 277
Sock it to them where still won't pay: W. Wisherd ---------- 279

Vol. 20

Allowed for delayed time loss: W. Slater ---------- 81
Allowed in horseplay case: J. Collins ---------- 141
Allowed for refusal to comply with own motion order: W. McFarland ---------- 232
Denied for nonpayment of medicals: A. Merritt ---------- 240
Dissent on this case: E. Miller ---------- 281
Excused by evidence tendered to board after review: M. Burton ---------- 173
Fee of $350: S. Fay ---------- 35
Fee by supplemental order: C. Adams ---------- 70
Fee in carrier dispute denied: J. Faulk ---------- 125
Fee in noncomplying case: J. Fagnand ---------- 145
Fee in supplemental order: L. Scott ---------- 187
Fee on supplemental order: H. Lefever ---------- 224
Fee not reimbursed on third-party recovery: R. Harding ---------- 231
Fee reduced: M. Genz ---------- 274
Late denial: M. Genz ---------- 274
Oral denial at hearing: M. Koonce ---------- 91
Penalty where multiple employers: R. Faulkner ---------- 134
Supplemental fee order: A. Kephart ---------- 148

PERMANENT PARTIAL DISABILITY

(1) Arm & Shoulder
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(9) Unclassified

PERMANENT PARTIAL DISABILITY, cont.

(1) ARM AND SHOULDER

Vol. 1

Arm and leg burns, various: J. Woosley ---------- 11
Arm: Shoulder may be either scheduled or unscheduled: C. Tourville ---- 47
Arm, shoulder and neck determination affirmed: W. Miller ---------- 103
Arm: No unscheduled though source of disability in shoulder: E. Gregory - 179
Arm: 5% each for double fracture of scapula: J. White ---------- 48
Arm: 10% for weakness: H. Brown ---------- 31
Arm: 10% from fall and fracture: F. Schrier ---------- 96
Arm: 10% determination affirmed: C. Timm ---------- 118
Arm: 20% scheduled for shoulder: E. Matson ---------- 67
Arm: 25% for limited abduction: W. Haney ---------- 115
Arm: 25% where crushed: W. Brown ---------- 130
Arm, shoulder, cervical area, 30% scheduled, 5% unscheduled: C. Griffith 127
Arm: 35% for ruptured distal biceps tendon: H. McCarty ---------- 84
Arm: 35% for broken elbow: E. Kershaw ---------- 152
Arm: 50% after shoulder surgery: R. Delamare ---------- 24
Arm: 65% scheduled to old man for shoulder: F. Edmonds ---------- 88
Arm: 75% for loss of strength to old carpenter: M. Funk ---------- 64
Arm: 90% for shoulder where hand and forearm OK: C. Parker ---------- 80
Arm: 100% loss function for chronic subdeltoid bursitis: M. Wershey ---------- 138

Vol. 2

Arm and shoulder: None where claimant not liar but---: J. Lowe ---------- 101
Arm: 10% determination affirmed: D. Richards ---------- 31
Arm and neck: 10% each arm and 10% for neck: L. Harman ---------- 102
Arm: 15% for fracture with slight displacement: N. Nelson ---------- 21
Arm: 15% determination affirmed after fracture: E. Dutton ---------- 44
Arm and shoulder: Scheduled and unscheduled areas distinguished:
W. McCaulley ---------- 123
Shoulder, unscheduled: 15% aggravation allowed for disabling pain:
W. McCaulley ---------- 123
Arm and shoulder: 25% determination affirmed for shoulder: J. Anderson --- 45
Arm and shoulder: 30% where severe fracture: R. Wheeler ---------- 50
Arm and back: 30% and 10% after multiple fractures: W. Morris ---------- 131
Arm and shoulder: 45% scheduled and 30% unscheduled after pulled muscle:
L. Rogers ---------- 109
Shoulder: 50% and 25% allowed: T. Audas ---------- 160
Arm and shoulder: 65% loss arm from fall from shoulder injury: H. Hannan - 84
Arm and shoulder: disability not in excess of prior 65% award: H. Toureen - 87
Arm: 75% loss function for severe limits on use: M. Riswick ---------- 54
Arm: 95% for grievous hand injury: L. Shuey ---------- 105

Vol. 3

None for bump to elbow: J. Montgomery ---------- 134
Arm and back: 10% and 32 degrees where prior back settlement: C. Shelton- 43
Arms: 30% and 10% for elbow injuries: D. Brewer ---------- 75
Arm: 35% for poor recovery after fracture: E. Davis ---------- 23

PERMANENT PARTIAL DISABILITY, cont.

(1) ARM AND SHOULDER, cont. Vol. 3, cont.

Arm: 70% for broken elbow not reviewed: J. Jones ---------- 34
Arm and other: 14.5° and 28.8° after hit by log where prior awards:
D. Gilkison ---------- 250
Arm: 21.75° after auto accident: J. Glubrecht ---------- 277
Arm and body: 28.8 and 32 degrees after ditch cave in: K. Gaittens ---------- 114
Arm: 48 degrees after fall: F. Foster ---------- 112
Arm and leg: 72.5 and 55 degrees after hit by log: C. McNaull ---------- 119
Clavicle: 80° for fracture to safety director: B. Thompson ---------- 177
Arm and leg: 96° and 15° after fall: R. Wildeson ---------- 164
Trapezius muscle: None for strain: J. Pugh ---------- 88

Vol. 4

Shoulder: 10% arm for rotator cuff problem: K. Runnion ---------- 199
Arms: 25% to each for electrical burns: C. Klika ---------- 65
Arm: 95% arm where caught in conveyor: G. Hickman ---------- 118
Arm and back: 14.5° and 19.2° where refused surgery: L. Chapman ---------- 287
Arm: 38.4° to millwright: L. Aplet ---------- 170
Arm: 50.75° after arm trauma: L. Yonkers ---------- 141
Arm: 67.2 degrees after fractures: D. Barry ---------- 89
Arm: 90° for tennis elbow: E. Cooper ---------- 282
Shoulder: 48° for torn tendon: K. Fillingham ---------- 84

Vol. 5

Arm: 10° after reduction: E. Walters ---------- 148
Arm: 10° for elbow: E. Conroy ---------- 196
Arm and back: 22° & 20° to logger for falling tree: C. Poage ---------- 11
Arm, Shoulder, Leg, and Forearm: 38°, 32°, 8°, 53° for multiple fractures:
W. Candee ---------- 124
Arm: 38.4° after fracture: G. Armstrong ---------- 18
Arm: 40° where can still lift 100 pounds: C. Schroeder ---------- 153
Arm and Neck: 40° and 48° after fall: D. Carr ---------- 265
Arm & Shoulder: 48° and 16° to meat cutter for torn rotator cuff: W. Green 9
Arm, leg and other: 76°, 80° and 30° for multiple injuries: C. Weiss ---------- 280
Arm, Shoulder, Back and Leg: Various after fall: F. Frey ---------- 249

Vol. 6

Arm: Nothing for infection in elbow: A. Pepper ---------- 133
Arm: 19.2° on own motion: J. DeBoie ---------- 242
Arm: 20° for fracture: L. Tippery ---------- 15
Arm and Shoulder: 22° and 30° for ruptured biceps: A. Pargon ---------- 292
Arm and Neck: 24° and 16° after auto crash: D. Sackfield ---------- 63
Shoulder: 32° where avoid heavy work: H. McKinley ---------- 265
Arm and Shoulder: 40° and 68° after surgery on the biceps: A. Lee ---------- 13
Arm: 50° for ruptured tendon: L. Pankratz ---------- 39
Arm and Leg: 58° and 8° to logger: C. Sheythe ---------- 253
Arm: 192° to 71-year-old painter: R. Briones ---------- 91

(1) ARM AND SHOULDER, cont.

Vol. 7

32° to each where great psychopathology: A. Phillips ---------- 59
Arm: 32° for mild residuals: C. Meek ---------- 166
Arm: reduced to 38° in light of Surratt V. Gunderson: G. Bradley ---------- 82
40° and 55° where limited motivation: V. Linley ---------- 141
48° to 21-year-old: L. Koroush ---------- 229
Elbows: 48° each for bricklayer who can't lay bricks: R. Heuer ---------- 205
Arms: 67° for each arm: P. Mabe ---------- 14
Shoulder & Neck: 112° where inability to perform heavy manual labor:
D. Moore ---------- 204
144° and 128° where arm broken in 10 places: F. Harper ---------- 145

Vol. 8

Arm and shoulder: 19° and 32° affirmed: J. Staudenmaier ---------- 253
Shoulder: 20° for broken clavicle: W. Grisel ---------- 74
Arm and Shoulder: 22° and 48° to mechanic: J. Johnson ---------- 200
Arm and shoulder: 29° after restorative surgery: H. Yoder ---------- 22
Shoulder: 32° where intervening heart attack: D. Horning ---------- 47
Arm and Shoulder: 38° and 48° after reduction: A. Toste ---------- 133
Shoulder: 48° for intermittent and decreasing symptoms: A. Jensen ---------- 180
Arm and Leg: 48° and 30° after fall and fractures: L. Foley ---------- 285
Arm: 50° for wrist tumor: L. Chopard ---------- 280
Arms: 57° after electric shock and strain: E. Anizewski ---------- 191
Shoulder: 64° reversed: R. Roland ---------- 176
Arm and Shoulder: 76.6° and 29° to woman: H. VanDolah ---------- 259
Arm: 77° for psychological problem causing physical problem: J. Watts ---------- 77
Arm: 77° affirmed: C. Buster ---------- 224
Arm: 77° for numbness: J. Watts ---------- 77
Arm and Leg: 96° and 7° for fractures: R. Wedner ---------- 48
Arm and Shoulder: 106° and 16° affirmed: S. Coffey ---------- 255
Arm and Shoulder: 115° apportioned after fall: D. Buster ---------- 3
Shoulder: 125° for rotator cuff: R. Jonart ---------- 29
Arm and Shoulder: 163° and 32° for crushed and burned arm: H. Parker ---------- 29
Arm: 192° where can use a prosthesis: C. Horton ---------- 173
Arm: 40% where must avoid all heavy work: R. Carson ---------- 194

Vol. 9

Arm: 19° for finger: E. Minor ---------- 86
Arm: 96° affirmed: C. Glazier ---------- 222
Arm: 115° for smashed hand: W. Yeldig ---------- 228

Vol. 10

Arm: Affirmed on state appeal: R. Kyle ---------- 124
Arm: Affirmed on Memo: F. Miller ---------- 138
Arm and neck surgery: 96° and 28.8° after neck surgery: D. Crismon ---------- 196
Arm: 90% increased to total disability for severe fracture: C. Owens ---------- 201

PERMANENT PARTIAL DISABILITY, cont.

(1) ARM AND SHOULDER, cont. Vol. 10, cont.

Arm and Shoulder: 32° and 20° for crushing injury: B. Kinney ---------- 142
Shoulder: 96° where only know heavy work: B. Westberry ---------- 195
Arm and Shoulder: 125° and 64° after reduction: W. Gotcher ---------- 38
Arm and Shoulder: 192° where retired: J. Holifield ---------- 276

Vol. 11

Arm: Permanent pain and worry not enough to increase award: D. Patterson 12
Arm: Award affirmed: A. Anderson ---------- 28
Shoulder: None where credibility problem: B. Smedley ---------- 152
Arm and Back: 38.4° and 32° affirmed: E. Taylor ---------- 207
Shoulder: 80° over SAIF appeal: D. Bailey ---------- 222

Vol. 12

Shoulder: none where won't work: P. Mundell ---------- 279
Arm: 19.2° and 80° for shoulder: O. Hinojosa ---------- 121
Arm: 30° additional on own motion: W. Puzio ---------- 233
Arm: 48° for tennis elbow: D. Gore ---------- 116
Arm: 76.8° for pain: R. McCandless ---------- 221
Shoulder: 80° unscheduled: E. Smith ---------- 129
Arm: 96° affirmed for lost function: W. Starkey ---------- 58
Arm: 96° for tennis elbow: W. Collins ---------- 67
Arm: 96° after increase: T. Young ---------- 87
Arm & Shoulder: 115.2° and 160° allowed: L. Doane ---------- 72
Shoulder: 128° where trenuous use of arm precluded by pain: D. Jansen -- 282

Vol. 13

Shoulder: nothing unscheduled: R. Globe ---------- 140
Shoulder: 10% on own motion: L. Adams ---------- 227
Arm: 20% on own motion where claim history lost: R. Pettengill ---------- 91
Shoulder: 25% unscheduled: J. Mercer ---------- 105
Shoulder and Arms: 40%, 5% and 5% to milker: C. Maine ---------- 84
Shoulder: 50% where prior back award also: J. McCreary ---------- 130
Arm: 75% and 25%: G. Coltrane ---------- 5
Shoulder: 16° for subjective complaints: D. Hamilton ---------- 10
Arm: 48° for tennis elbow: J. McQuaw ---------- 62
Arm and Shoulder: 52.5° and 48° affirmed for fractured wrist: F. Sandstrom 170
Arm and Shoulder: 60° and 96° after surgery: M. Dewald ---------- 203

Vol. 14

Arm: 21% for broken elbow: R. Warnock ---------- 159
Arm: 40% for rotator cuff where large prior award: T. Audas ---------- 102
Arm: 65% after nerve transplant: E. Castoe ---------- 54
Arms: 20% each for tennis elbow: P. Ness ---------- 50
Arm and Shoulder: 30% and 20% for elbow: H. VanDolah ---------- 244
Shoulder: none affirmed: B. Oglesby ---------- 110
Shoulder: 10% for bad credibility: S. Dokey ---------- 164

PERMANENT PARTIAL DISABILITY, cont.

(1) ARM AND SHOULDER, cont. Vol. 14, cont.

Shoulder: 25% to cement finisher: L. Harrison ---- 33
Shoulder: 70% where can't lift: L. Lehman ---- 121

Vol. 15

Arm: 10% affirmed: J. Wayne ---- 30
Arm: 10% arm and 10% shoulder: D. Barnes ---- 267
Shoulder: 10% affirmed: A. Verment ---- 281
Arms: 20% for each for burns: J. DeBord ---- 108
Shoulder: 20% for lifting limitation: D. Stevenson ---- 215
Arm: 25% allowed: D. Bowman ---- 208

Vol. 16

Arm, 20% and shoulder, 30%: D. Smith ---- 55
Arm: 20% for functional overlay claim: R. Rothauge ---- 58
Arm: 20% for elbow: B. Thompson ---- 290
Arm: 20% affirmed: F. Leiser ---- 301
Arm and Shoulder: 25% and 60% where want total: E. Peterson ---- 300
Shoulder: 30% if can't bowl: C. Barreth ---- 85
Arm: 35% for nerve root trouble: K. Dickenson ---- 221
Arm: 50% for broken elbow: E. Hood ---- 66

Vol. 17

Arm: 80% to logger who wants total: G. Brockman ---- 220
Shoulder: 10% on reduction: R. Remington ---- 255
Shoulder: 25% on dull ache: J. Blaha ---- 209
Shoulder: 30% to billing clerk: D. Baker ---- 265
Shoulder: 30% each shoulder: S. Khal ---- 271

Vol. 18

Arm: 30% for poor grip and lack of extension: K. Steinke ---- 268
Arm: 65% where determination reduced: T. Bulthuis ---- 100
Shoulder: 15% unscheduled: E. Newman ---- 49
Shoulder: 20% where return to work: R. Pliska ---- 259
Shoulder: 25% on reduction from 50%: N. Roley ---- 165
Shoulder: 35% where most disabilities are not related: H. Pointer ---- 155

Vol. 19

Arm: 30% with 40% for shoulder: J. Ferdani ---- 87
Arm: 75% on reduction from 90%: D. Lanning ---- 141
Shoulder: 60% on settlement: M. Wallace ---- 235
Shoulder: 60% where on social security: G. Barney ---- 184
Shoulder: 60% where want total: W. Umber ---- 103

(1) ARM AND SHOULDER, cont.

Vol. 20

Arm: 20% on reduction: G. Peterson ---- 44
Shoulder: 5% for bursitis: L. Ford ---- 3
Shoulder: 10% affirmed for separation: D. Stahl ---- 259
Shoulder: 15% to illiterate: M. Salloum ---- 221
Shoulder: 50% increased to total: H. Walker ---- 114

(2) BACK - Lumbar and Dorsal

Vol. 1

Back: Credibility gap: J. Tooms ---- 79
Back: WCB set aside Hearing Officer award: E. Campbell ---- 125
Back: Disability not in excess of prior award: R. Olson ---- 146
Back: None for subjective complaints: M. McGill ---- 7
Back: None for pain and fatigue: E. Thompson ---- 11
Back: None where poor work record and poor motivation: C. Fairchild ---- 18
Back: None where medical evidence insufficient: W. Hayden ---- 19
Back: None for some pain: I. Thomas ---- 75
Back: None after fall three stories to sidewalk: G. Ayres ---- 75
Back: None where claimant disbelieved: J. Krewson ---- 93
Back: None after fall: E. Bergh ---- 94
Back: None to obese woman: B. Barnett ---- 95
Back: None for pain: C. Prodzinski ---- 114
Back: None where subjective complaints without medical evidence: R. Bray 133
Back: None where obese and gouty: D. Foster ---- 168
Back: 5% for minimal dorsal injury: E. Richert ---- 38
Back: 5% for minor injury: J. Capps ---- 76
Back: 5% where no objective findings: J. Hough ---- 84
Back and Leg: 5% and 10%: R. Harper ---- 108
Back: 5% for minor injury to claim conscious: D. Monroe ---- 112
Back: 5% determination affirmed for sprain: P. DeRosier ---- 160
Back: 10% for chronic strain: C. Delamare ---- 24
Back and Leg: 10% each for subjective complaints: G. Baker ---- 32
Back: 10% for aggravation: B. Philibert ---- 109
Back: 10% for sprain where obesity: R. Zirschkey ---- 111
Back: 10% determination affirmed where obesity: P. Husted ---- 115
Back, cervical and lumbar: 15%: C. Hewlett ---- 57
Back: 15% to window dresser: E. Goldberg ---- 78
Back, upper: 15% determination affirmed: R. McGilvra ---- 85
Back: 15% determination affirmed: A. McCarthy ---- 99
Back: 15% generous: J. Walton ---- 106
Back: 15% where intervening problems and no heavy work: L. Burling ---- 116
Back and arm: 15% and 25%: A. Dement ---- 129
Back: 15% after surgery: F. Kufner ---- 132
Back, dorsal: 15% to logger: F. Chaffee ---- 136
Back: 15% where excluded from heavy work: H. Crisler ---- 139
Back: 15% determination affirmed with comment on absence of brief: J. Hill 146
Back: 15% for inability to lift heavy objects: H. Bryant ---- 156

(2) BACK, cont. Vol. 1, cont.

Back: 15% award affirmed on "not strong" evidence: H. Jeffers ---- 166
Back: 20% after compression fracture: T. Ayers ---- 30
Back: 20% for pain: A. Belding ---- 61
Back: 20% for limited lifting: W. Eckert ---- 105
Back and Leg: 20% and 5% after laminectomy: L. Osler ---- 109
Back and Shoulder: 20% and 10%: J. Roberts ---- 123
Back: 20% determination affirmed: N. Washburn ---- 130
Back: 20% after laminectomy at L-5: A. Schafroth ---- 141
Back: 20% after compression fracture of D-12: J. Parsons ---- 172
Back: 25% determination affirmed where large functional overlay: G. Huitt 15
Back: 25% where no heavy lifting: W. Benedict ---- 38
Back: 25% for severe pain: L. Carlson ---- 40
Back: 25% where cannot bend over and lift: W. Dunlap ---- 52
Back: 25% for backache, etc.: V. Hoppus ---- 76
Back, foot and forearm: 25%, 20%, and 15%: D. Holycross ---- 112
Back: 25% determination affirmed: A. Craig ---- 124
Back: 25% for multiple injuries and reduced income: G. Berglund ---- 129
Back: 25% to furniture mover: R. Kreier ---- 137
Back: 30% for disabling pain: N. Mullins ---- 41
Back: 30% instead of total disability: W. Smith ---- 52
Back: 30% for strain imposed on spondylolisthesis: A. Gonsalves ---- 57
Back and Legs: 30% and 10% each after laminectomy: J. Bell ---- 142
Back: 30% determination affirmed where claimant impeached: H. Rand ---- 151
Back and Arm: 35% and 20% to 63-year-old chef: C. Baigert ---- 113
Back: 40% to 65-year-old man: L. Thornbraugh ---- 43
Back: 40% for sprain on preexisting compression fracture: L. Snead ---- 132
Back and Leg: 40% and 20% for slip by high climber: M. Morgan ---- 137
Back: 40% after fusion: R. Fulton ---- 181
Back: 45% to truck driver now TV repairman: C. Perry ---- 82
Back and forearm: 50% and 30% after fractures to old man: J. Beagle ---- 77
Back: 55% from fall: E. Leding ---- 108
Back: 60% for lumbar and dorsal spine: L. Elkins ---- 80
Back and Leg: 60% and 25% after laminectomy: C. Olson ---- 173

Vol. 2

Back: determination reduced to zero on finding of fraud: H. Place ---- 10
Back: None to 60-year-old laborer: F. Blevins ---- 10
Back and Leg: None for subjective symptoms: T. Crouse ---- 35
Back: None where large prior awards: R. Lilly ---- 40
Back: None for totally rigid back from minor injury: D. Ryan ---- 68
Back: None for strain where prior award: B. Hersha ---- 70
Back: None for back strain and hernia: H. Roberts ---- 82
Back: None after fall: E. Powers ---- 109
Back: None for nominal injury: A. Workman ---- 121
Back: No additional where large prior award: E. Creamer ---- 152
Back: None allowed where prior awards of 90%: R. Thomas ---- 189
Back: 5% where functional overlay: B. Williamson ---- 136
Back: 10% determination affirmed to waitress: C. Lisoski ---- 21
Back: 10% determination affirmed for back strain: L. Wright ---- 23

(2) BACK, cont. Vol. 2, cont.

Back: 10% for fracture: J. Koch ---- 27
Back: 10% for strain where now cannot find job: R. Barr ---- 33
Back: 10% determination affirmed where malingering: L. Sills ---- 36
Back: 10% determination affirmed after fall: K. Karlsen ---- 83
Back: 10% for psychological fear of work: J. Garrigus ---- 100
Back: 10% affirmed for sore back: K. Hutson ---- 130
Back: 10% for strain: C. Brothers ---- 182
Back: 10% affirmed: L. Yancey ---- 190
Back: 15% to apple picker: C. Sutton ---- 14
Back: 15% where some restriction on lifting: C. Bradley ---- 52
Back: 15% for ruptured disc where previous 85% award: L. Bealer ---- 56
Back: 15% where large prior award: L. Freitag ---- 74
Back: 15% determination affirmed with good comment: B. Stevens ---- 96
Back: 15% where heavy lifting precluded but no surgery: T. Fake ---- 111
Back: 15% determination affirmed on dubious facts: N. Otto ---- 131
Back: 15% affirmed where phony medical history: J. Butler ---- 148
Back and Leg: 20% each for back strain: F. Masters ---- 55
Back: 20% determination affirmed: V. LaBrec ---- 82
Back: 20% after diagnosed fracture of D-12: G. White ---- 102
Back: 20% stiff back: D. Farley ---- 110
Back: 20% affirmed where cannot climb telephone poles: J. Viles ---- 123
Back: 20% after fusion: S. Elliott ---- 177
Back: 25% where previous laminectomy: D. Montgomery ---- 13
Back: 25% for fall: D. Lanham ---- 15
Back: 25% award reduced for sprain: R. Beazizo ---- 25
Back: 25% where no objective symptoms: J. Wright ---- 36
Back: 25% where large prior award: L. Chambers ---- 51
Back: 25% after broken pelvis and severe degenerative disc disease: F. Baker 52
Back: 25% for disabling pain: E. Green ---- 74
Back and leg: 25% and 20% for ruptured disc: C. Cochran ---- 81
Back: 25% after logging injury: R. Groshong ---- 83
Back: 25% for upper back injury in sad case: M. Boles ---- 115
Back:30% where change to lighter work will be necessary: F. White ---- 13
Back: 35% award by Hearing Officer reversed: E. Gouker ---- 39
Back: 35% where prior war disability: C. Spencer ---- 140
Back: 35% where recovery complicated by heart condition: A. Wright ---- 146
Back: 35% where no more heavy work: J. Arehart ---- 157
Back: 40% to 71-year-old farmer who cannot farm: E. Walter ---- 6
Back: 40% where no heavy lifting: D. Fessler ---- 110
Back: 40% affirmed for back strain: K. Surratt ---- 153
Back: 40% allowed to cherry picker: J. Long ---- 183
Back: 45% determination reduced to 25%: K. Warden ---- 34
Back: 50% to old woman in poor health who now cannot work: N. Weeks ---- 86
Back: 50% after refusion: C. Rogers ---- 113
Back and Leg: 50% and 10% where several large prior awards: L. Faulkner 135
Back: 50% after fusion and difficult recovery: E. Bazer ---- 149
Back: 60% for undescribed back injury: G. Kilwien ---- 89
Back and Leg: 60% and 15% for ruptured disc: J. Snyder ---- 93
Back and Leg: 60% and 10% award reduced by Board: R. Black ---- 159
Back: 65% to logger with severe trauma to low back: C. Lee ---- 103
Back: 65% to disabled carpenter: E. Sommerfelt ---- 129

(2) BACK, cont. Vol. 2, cont.

Back: 35% to truck driver who can still drive: J. Galvin ---------- 103
Back: 65% after fusion: J. Darby ---------- 154
Back: 70% award reduced to 20% where claimant reduced review: H. Skinner ---------- 7
Back: 100% award increased to total disability: W. Williams ---------- 68

Back Awards Evaluated as Percentage Loss of Workman (320 Degrees)

Back: 5% loss workman where large previous disability: F. Fillpot ---------- 50
Back: 5% loss workman reduced from 20%: D. Stewart ---------- 147
Back: 10% workman for sore back: C. Owen ---------- 116
Back: 10% loss workman affirmed where poor motivation: J. Carson ---------- 60
Back: 10% loss workman for strain: W. Johnson ---------- 166
Back: 10% loss workman compared to loss arm: R. Frank ---------- 192
Back: 15% loss workman for strain: R. Dement ---------- 77
Back: 20% loss workman for low back and hip: R. Elizarras ---------- 55
Back: 20% loss workman allowed: L. Berry ---------- 191
Back, etc.: 40% loss workman to 71-year-old saleslady: A. Doan ---------- 36
New formula for unscheduled disability awards explained: L. Berry ---------- 191

Vol. 3

Back: None for workman of 81 IQ: B. Brown ---------- 13
Back: None for thoracic sprain: D. Weber ---------- 63
Back: None where prior award: M. Sullivan ---------- 68
Back: None by majority where pregnancy confuses: M. Waldrip ---------- 90
Back: None for pulled muscle: R. Perryman ---------- 104
Back: None to old man without positive findings: W. Apple ---------- 130
Back: None for bump: E. Silverthorn ---------- 133
Back: Award reversed where prior awards: L. Higgins ---------- 161
Back: None where many prior severe traumas: J. Watson ---------- 192
Back: None where struck with plank: R. Headley ---------- 199
Back: None where all disability found to be preexisting: W. Olmsted ---------- 200
Back: None where hearing officer would have allowed 64 degrees: P. Mendoza ---------- 210
Back: None--award reversed: K. Oltman ---------- 253
Back: 5% to woman: C. Thompson ---------- 78
Back: 10% to hard worker: E. Marchiole ---------- 62
Back: 10% where little objective evidence: J. Martinez ---------- 60
Back: 10% for backache after fracture: S. Gilkey ---------- 29
Back: 15% for strain: J. Gentry ---------- 103
Back: 15% where back history and confused facts with auto accident: J. Cole (Simpson) ---------- 40
Back: 15% affirmed where delayed report: G. Slover ---------- 6, 39
Back: 20% after fusion: D. Moore ---------- 101
Back and leg: 20% and 5% for low back injury: J. Hudson ---------- 47
Back: 30% after laminectomy: W. Peets ---------- 29
Back: 30% for compressed vertebra: R. Weber ---------- 27
Back and leg: 30% and 10% after laminectomy which was helpful: J. Phillips ---------- 18

(2) Back, cont. Vol. 3, cont.

Back: 30% where can operate heavy equipment: W. Thorp ---------- 17
Back: 35% for defective back: G. Dukes ---------- 85
Back: 70% for severe back difficulty: J. Leatham ---------- 97
Back: 100% loss arm for serious injury to both neck and low back: V. Clark 55
Back: 9.6 degrees reinstated where bothersome back: H. Perkins ---------- 262
Back: 16 degrees for strain: D. Wendlandt ---------- 79
Back: 19.2 degrees to neurotic: M. Worley ---------- 113
Back: 19.2 degrees after blow to back: E. Murphey ---------- 191
Back: 19.2 degrees award reinstated; reduced from 36.4 degrees: K. Congdon ---------- 254
Back: 19.2 degrees award reinstated: R. Baker ---------- 257
Back: 19.2 degrees award reinstated: D. Senn ---------- 272
Upper back: 20 degrees after trauma: V. Knack ---------- 189
Back: 20 degrees where numerous problems not related: C. Stone ---------- 261
Back: 27.8 degrees where long history of back injuries: J. Dyer ---------- 216
Back: 32 degrees for incident which is but part of whole back problem: P. Argeris ---------- 147
Back: 32 degrees for strain on degenerative back: C. Larsen ---------- 185
Back: 32 degrees award reinstated: J. Alexander ---------- 257
Back and Leg: 32 degrees and 13.5 degrees after surgery: J. Johnson ---------- 195
Back: 40 degrees allowed where congenital defect: H. Gillaspie ---------- 100
Back: 48 degrees where no objective symptoms: P. Lewis ---------- 21
Back: 48 degrees where prior spondylolysis: D. McKinney ---------- 152
Back: 48 degrees reversed and none allowed where claimant appealed: B. Talbot ---------- 156
Back: 48 degrees where untruths: A. Myers ---------- 160
Back: 48 degrees to claim conscious: W. Houshour ---------- 208
Back and leg: 48 degrees and 22 degrees where 25% reduced wages: V. Johnson ---------- 225
Back: 48 degrees award reinstated: R. Garner ---------- 263
Back: 48 degrees after laminectomy: M. Clover ---------- 269
Back: 57.6 degrees where obesity is issue: W. Baker ---------- 178
Back: 57.6 degrees where prior awards: W. Cook ---------- 217
Back: 57.6 degrees after Circuit Court remand: N. Washburn ---------- 230
Back: 64 degrees where lifting limited to 30 pounds: W. Matthews ---------- 99
Back: 64 degrees after laminectomy: M. Jackson ---------- 140
Back: 64 degrees where claim that cannot work: N. Bray ---------- 251
Back: 65 degrees after fall from fire truck: R. Stilwell ---------- 271
Back: 67.2 degrees for moderate disability: M. Kalin ---------- 213
Back: 76.8 degrees after fusion: R. Dalton ---------- 127
Back: 76.8 degrees where won't go back to work: D. Moser ---------- 245
Back and Legs: 80, 60 and 20 degrees: H. Mangun ---------- 280
Back and Arm: 80 degrees and 25% where logging activities restricted: G. Radford ---------- 89
Back: 80 degrees for progressively worse back: B. Farley ---------- 84
Back and Leg: 96 and 15 degrees after laminectomy: J. Oien ---------- 109
Back: 96 degrees to obese man: R. Robertson ---------- 167
Back: 96 degrees after two-level fusion: H. Weisenbach ---------- 205
Back and Leg: 96 degrees and 15 degrees where can lift to 100 pounds: P. McSweeney ---------- 219

PERMANENT PARTIAL DISABILITY, cont.

(2) Back, cont. Vol. 3, cont.

Back and Leg: 144 degrees and 11.5 degrees after total disability determination reversed: A. Swanson ---- 201
Back: 160 degrees to one who wants to retire: W. Lehman ---- 223
Back: 192 degrees where obese and cannot work: M. Pentecost ---- 19
Back and Leg: 256 degrees and 10% where can still walk: L. Kinsey ---- 71

Vol. 4

Back: None where medical reports don't confirm subjective complaints: S. Crites ---- 16
Back: None where better than before after surgery: J. Zimmer ---- 62
Back: None award reversed: M. Pearson ---- 64
Back: None after reduction: B. Philibert ---- 143
Back: None after reduction: L. Johnson ---- 200
Back: None for vague complaints: M. Moore ---- 205
Back: None where Schmorl's nodes: P. Murphy ---- 259
Back: None for strain pulling on the greenchain: A. Nacoste ---- 294
Back: None where osteoporosis: E. Sager ---- 295
Back: None after reduction where successive pregnancies: A. McCoy ---- 298
Back: 9.6 degrees on stipulation: O. Bates ---- 228
Back: 15 degrees for minimal disability: S. Miller ---- 217
Back: 16 degrees after sprain: T. Staley ---- 96
Back: 16 degrees after reduction: J. Pearson ---- 259
Back and Leg: 16 and 27 degrees for falling log: H. Faler ---- 272
Back: 19.2 degrees for subjective symptoms after twisted ankle: J. Johnson 2
Back: 19.2 degrees where complaints unsupported by doctors: K. Nelson ---- 280
Back: 20 degrees for low back strain: D. Higgins ---- 40
Back: 25 degrees where prior problems: J. Mardis ---- 138
Back: 28.8 degrees after fall: A. Stone ---- 49
Back: 28.8 degrees after court remand of same award: B. Stevens ---- 101
Back: 28.8 degrees where refuse treatment or diagnosis: H. Crowell ---- 266
Back: 30 degrees after wrench slip: H. Butler ---- 130
Back: 32 degrees where resist vocational rehabilitation: D. Wyeth ---- 6
Back: 32 degrees where preexisting disability: R. Smith ---- 25
Back: 32 degrees where preexisting disability: C. Martin ---- 31
Back: 32 degrees where degenerative back: G. Schneider ---- 82
Back: 32 degrees after fall: W. Padrick ---- 102
Back: 32 degrees after reduction: L. Fellon ---- 122
Back: 32 degrees after compression fractures: B. Valian ---- 222
Back and foot: 32 and 6.75 degrees after fall from tree: R. Ovalle ---- 283
Back: 32 degrees where refuse surgery: P. Jackson ---- 292
Back: 32 degrees by stipulation: H. Caylor ---- 303
Back: 38.4 degrees where great disbelief: H. Heathman ---- 36
Back and arm: 38.4 and 14.5 degrees where intervening auto wreck: H. Swerdlik ---- 93
Back: 48 degrees after reduction from total disability: A. Luce ---- 111
Back: 48 degrees after reduction where prior disability: C. Edwards ---- 135
Back: 48 degrees after wooden leg crushed: T. Caward ---- 149
Back: 48 degrees where obese: A. King ---- 218
Back: 48 degrees after reduction where partially ruptured disc: S. Montgomery ---- 233

(2) Back, cont. Vol. 4, cont.

Back: 48 degrees where prior history: C. Huffer ---- 273
Back: 48 degrees after increase: C. Pimentel ---- 296
Back: 64 degrees where precluded from heavy lifting: D. Espeseth ---- 107
Back: 64 degrees to meat cutter: C. Klever ---- 112
Back: 64 degrees to pear picker: R. Borders ---- 114
Back: 64 degrees where no heavy work: E. Weedeman ---- 123
Back and leg: 64 and 30 degrees after ruptured disc: D. Wiese ---- 173
Back: 64 degrees after surgery: R. Nichols ---- 198
Back: 67 degrees to 66 year old man: F. Rue ---- 174
Back: 76 degrees when consider earnings loss: A. Magnuson ---- 83
Back: 80 degrees to polio victim: S. Jones ---- 23
Back: 80 degrees after lifting: C. Henderson ---- 106
Back and leg: 80 and 40 degrees after fall: Z. Garvin ---- 131
Back: 80 degrees after surgery: B. Sizemore ---- 187
Back: 86.4 degrees after fusion: D. Arends ---- 87
Back: 96 degrees after fall: H. Liggett ---- 76
Back: 96 degrees where seeking lighter work: J. Davis ---- 119
Back: 96 degrees where long history: F. Knobloch ---- 194
Back: 115.2 degrees to logger who can now do light work around a tavern: R. Clower ---- 137
Back: 125 degrees where prior injuries: F. Zunck ---- 69
Back: 145 degrees where this was the maximum at date of accident: R. Norris ---- 155
Back: 160 degrees where many other problems: C. Brauckmiller ---- 97
Back: 160 degrees to old carpenter: J. Bailey ---- 207
Back and legs: 163.2, 27.5 and 11 degrees after fall: W. Stegmann ---- 48
Back: 172.8 degrees where fusion failed twice: L. Fontana ---- 3
Back and foot: 192 and 67.2 degrees where could learn new occupation: E. Reynolds ---- 234
Back: 200 degrees where still hope of retraining: J. Matney ---- 74
Back: 203.42 degrees allowed on basis of lost earnings: A. Grumbles ---- 34
Back: 25% to logger where now retired: C. Mumpower ---- 206
Back: Increased to 90% arm on 1959 injury: H. Smith ---- 98

Vol. 5

Back: None after reduction: E. Neufeld ---- 34
Back: None after fall: E. Alvarez ---- 43
Back: None for continuing pain: T. Smith ---- 51
Back: None where prior fusion: C. Overstreet ---- 95
Back: None where multiple accidents: R. Green ---- 127
Back: None for occasional mild symptoms: B. Landers ---- 128
Back: None for temporary exacerbation: M. Toney ---- 153
Back: None to short fat woman: L. Seamster ---- 189
Back: None where already decided to retire: E. Hamilton ---- 201
Back: None where claimant disbelieved: K. Tackett ---- 219
Back: None to taxi driver: R. MacDonald ---- 251
Back: None where prior award: R. Lane ---- 283
Back: 16° where can still run a jackhammer: G. Cleys ---- 16
Back: 16° after reduction: J. Ballweber ---- 234
Back: 16° where films: J. Chopard ---- 243

PERMANENT PARTIAL DISABILITY, cont.

(2) Back, cont. Vol. 5, cont.

Back: 19.2° where claim originally denied: T. Foreman ---------- 264
Back: 21.1° to truck driver who is now Pinkerton: T. Welter ---------- 203
Back and Leg: 30° and 44° to logger hit by widow maker: E. Johnson ---- 9
Back: 32° on much litigated claim: M. Sullivan ---------- 64
Back: 32° where degenerative back: D. Oberman ---------- 66
Back, Upper: 32° where can go back to work: D. Snead ---------- 88
Back and Leg: 32° and 8° where refuse surgery: P. Ormsby ---------- 198
Back: 32° where film: L. Norton ---------- 237
Back: 32° for strain: M. Goddard ---------- 270
Back: 38° where psychopathology: J. Culver ---------- 246
Back: 38.4° where long back history: M. Butler ---------- 179
Back: 38.4° and 19.2° for two injuries: L. Olson ---------- 209
Back and Leg: 48° and 8°: R. Kautz ---------- 6
Back: 48° where can still do moderately heavy chores: S. Bittner ---------- 65
Back: 48° plus 12.35° to catskinner: A. Magnuson ---------- 82
Back: 48° to logger where wanted total disability: J. Anderson ---------- 113
Back and Leg: 48° and 15° where being rehabilitated to more profitable occupation: F. Pieters ---------- 150
Back: 48° where movies: R. Hoagland ---------- 201
Back: 48° for compression: B. Niedermeyer ---------- 212
Back: 48° where prior award and barred from heavy labor: J. Studer ---------- 250
Back: 48° where no brief: J. Skanes ---------- 284
Back: 64° for 2 compression fractures: C. Green ---------- 106
Back: 64° where weight lifting limited to 30 pounds: R. Tate ---------- 110
Back: 64° where movies: C. Kelly ---------- 211
Back: 64° to self-employed: J. McCrorey ---------- 227
Back: 64° for subjective symptoms: E. Smith ---------- 255
Back: 64° for twisted back: D. Frankfother ---------- 284
Back: 65° for strain: F. Sampley ---------- 62
Back: 67° where unrelated ailments: H. Maxwell ---------- 285
Back and Leg: 77° and 15% where prior leg injury: C. Stroh ---------- 272
Back: 80° for chronic strain where must avoid heavier work and go through rehabilitation: C. Hawes ---------- 118
Back: 96° to logger who can't log: E. Krake ---------- 181
Back: 96° reduced where excessively overweight: L. Cummings ---------- 256
Back and Leg: 96 and 15 degrees for sprain and fall: H. McClain ---------- 265
Back: 110° after increase from 16° where office work is now indicated: E. Dedmon ---------- 26
Back: 112° here wants to retire: E. Walls ---------- 122
Back: 115 degrees after reduction: C. Ziebart ---------- 13
Back: 128 plus 71 degrees where precluded from heavy work: S. Hills ---------- 73
Back: 137.6° where large earnings loss: F. Ederra ---------- 248
Back: 150° where compression fractures: T. Villines ---------- 132
Back: 160° after increase from 16° where serious prior disabilities: W. Hall 27
Back: 160° where prior fusion: A. Hough ---------- 202
Back: 220° to man who can't work: D. Nyberg ---------- 192

(2) Back, cont. Vol. 6

Back: Nothing where symptoms not related: O. Andre ---- 5
Back: Nothing more for multiple back claims: W. Hedrick ---- 11
Back: No further award after reopening: D. Steward ---- 19
Back: Nothing where won't return to work: L. Spence ---- 93
Back: Nothing for strain: M. Rowling ---- 111
Back: Nothing where no physiological basis for complaints: J. House ---- 118
Back: Nothing more where prior low back award of 35%: J. Johnson ---- 131
Back: Nothing to dental assistant: R. Bergline ---- 133
Back: Nothing when 6 doctors didn't find anything: C. Roeder ---- 162
Back: Nothing for aggravation where long standing back difficulty: W. Thames ---- 180
Back: Nothing for mild strain where refuse therapy: T. Hankins ---- 181
Back: Nothing after reopening: M. Easley ---- 221
Back: Nothing for bizarre symptoms: R. Cooper ---- 225
Back: Nothing where some discomfort: J. Bitz ---- 250
Back: None where continued to work without observable difficulty: J. Loper 280
Back: None after reversal of 64°: L. Madrid ---- 298
Back: 16° affirmed where other accidents: S. Waldroup ---- 173
Back: 16° to obese fence builder: S. Hicks ---- 36
Back: 19.2° for subjective complaints: L. Green ---- 283
Back: 19.2° where can bowl: G. Thurber ---- 252
Back & Leg: 25° additional where prior award of 87°: L. Ames ---- 196
Back: 28.8° where prior back problems: E. Oe ---- 58
Back: 32° affirmed: D. Knapp ---- 66
Back: 32° where minor objective disability: J. Alexander ---- 102
Back: 32° to psychiatric aide: C. Gee ---- 140
Back: 32° where long back history: R. Dean ---- 141
Back: 32° reinstated where Hearing Officer and ordered reopening: K. Lettenmaier ---- 176
Back: 32° for residual disabling pain: R. Shields ---- 194
Back: 32° where obese: J. Majors ---- 224
Back: 32° where lack of objective symptoms: L. Seavy ---- 248
Back: 38.2° to secretary after fall: J. Patitucci ---- 59
Back: 40° where bending and lifting limited: D. Young ---- 100
Back: 40° where obesity: T. Cavin ---- 114
Back: 40° to logger where other accidents: H. Patterson ---- 124
Back: 40° on one of two back claims: J. Greer ---- 188
Back: 48° after reopening: J. Taylor ---- 3
Back: 48° where compression fracture and return to work: V. Curtis ---- 4
Back: 48° reversed: O. Andre ---- 5
Back: 48° where few objective symptoms: D. Tassin ---- 171
Back: 48° to logger who can work: P. Petite ---- 201
Back: 48° to grocery clerk: E. Monen ---- 212
Back: 48° to roofer who became mechanic: R. Greene ---- 190
Back: 50° where prior award of 99°: L. Parker ---- 229
Back: 52° for sprain where now limited to watchman's job: G. Smith ---- 128
Back: 58° after fusion: L. Alstead ---- 144
Back: 64° reduced to 32° where claimant appealed: F. Ashcraft ---- 55
Back: 64° after 108° earnings factor reversed: W. Grossen ---- 69
Back: 64° after reduction where prior award: J. Phipps ---- 70

PERMANENT PARTIAL DISABILITY, cont.

(2) Back, cont. Vol. 6, cont.

Back: 64° after stipulation: J. Sargent ---------- 73
Back: 64° where refused surgery: C.Schefter ---------- 87
Back: 64° where heavy lifting precluded: J. Middleton ---------- 184
Back: 64° where some basis for avoiding further heavy labor: R. Reed ---------- 189
Back: 64° after reduction: J. Massey ---------- 203
Back: 64° where consider earnings loss: M. Meeler ---------- 243
Back and Leg: 70° and 30° where dissent would reduce: E. Hershaw ---------- 16
Back: 75° to hotel maid: M. Davis ---------- 164
Back: 85° where unrelated vascular problem: A. Francis ---------- 278
Back: 85.5° after reduction: E. Townsend ---------- 14
Back: 95° where prior award of 147°: M. Cecil ---------- 178
Back: 96° where refuse surgery: E. Biros ---------- 18
Back: 96° after laminectomy where can work: J. Wirtjes ---------- 168
Back: 96° to grocery checker: L. McDonald ---------- 170
Back: 98° after surgery: D. Kennison ---------- 282
Back and Leg: 100° and 30° to meat cutter: B. Lewis ---------- 42
Back: 100° called liberal: G. Lanier ---------- 127
Back: 112° including earnings factor: G. Kern ---------- 187
Back: 115° after fall from scaffold: G. Biggers ---------- 52
Back: 115.2 degrees where claim that can't work again: O. Keirsey ---------- 51
Back and Leg: 120° and 8° to 67-year-old: M. Kolander ---------- 107
Back and Legs: 126°, 138° & 32° to janitor: L. Carrell ---------- 10
Back: 128° determination reversed: R. Compton ---------- 240
Back: 138° where consider earnings loss: V. Vesterby ---------- 73
Back: 141° where precluded from heavy work and may need surgery:
K. Meneely ---------- 275
Back: 144° where consider earnings factor: R. Giles ---------- 291
Back: 148° where consider earnings factor: V. Carnahan ---------- 267
Back: 160° for herniated disc: E. Hinzman ---------- 57
Back: 160° where removal of tail bone and fusion: J. Carrion ---------- 147
Back: 192° instead of total: J. Powell ---------- 80
Back: 192° is maximum for 1965 injury: M. Ullrich ---------- 132
Back: 192° after ruptured disc: R. Royse ---------- 249
Back: 198° where consider earnings loss: R. Veneman ---------- 22

Vol. 7

None where intervening auto accident: M. Scheller ---------- 103
None after fall: D. Kraft ---------- 111
None where determination of 19° and hearing award of 40°: B. Lemons ---------- 112
None where refuse surgery and prefer welfare to work: D. Stinnett ---------- 197
None where credibility gap: B. Coghill ---------- 258
None: H. McElwain ---------- 245
5% scheduled and 5% unscheduled affirmed: I. Stephen ---------- 35
16° where 3rd party proceeding got $12,000: D. Deulen ---------- 96
16° affirmed: P. Durham ---------- 139
16° for minimal disability: R. Babcock ---------- 235
16° where prior award: N. Revel ---------- 244
20° for moderate disability: S. Curn ---------- 231
32° for compression fracture where won't work: E. Flaherty ---------- 11

(2) Back, cont. Vol. 7, cont.

32° where some symptoms bizarre: S. Tadlock ---------- 26
32° after Surratt confusion: R. Brown ---------- 90
32° affirmed: R. Kindred ---------- 110
32° where exaggeration: P. Houston ---------- 114
32° where should avoid misuse of back: L. Hancock ---------- 154
32° where no cooperation: E. Tanner ---------- 169
32° from 80°: R. Jones ---------- 178
32° after fracture: A. Kephart ---------- 185
32° reversed where no proof of reduced earning capacity: J. Garcia ---------- 203
32° from 96° to youthful logger: W. Pettyjohn ---------- 216
32° affirmed where not clearly erroneous: G. Larson ---------- 239
32° from 96° for minimal physical residuals: M. Crouch ---------- 248
44° where large prior award: D. Richardson ---------- 30
Back and Leg: 48° and 23° after fall: F. Koppenhafer ---------- 52
48° where earnings increased: A. Hendon ---------- 76
48° for minimal to moderate disability: P. Kenney ---------- 189
48° where wages up: J. Fitzgerald ---------- 193
48° where can work as security guard: J. Davis ---------- 202
48° for strain requiring 5 days in hospital: W. Dunning ---------- 237
48° from 160° where ought to be able to go back to work: B. Manuel ---------- 279
Back and Leg: 57.4° & 16.5° where resist employment: M. Nordquist ---------- 81
64° where long history of back problems: S. Solano ---------- 78
64° after reduction: R. Chapin ---------- 89
64° after reduction on finding of voluntary restriction: C. Heitz ---------- 99
64° after reduction from 240°: I. Smith ---------- 133
64° after bump: I. Hookland ---------- 237
64° where claim can't work: F. Brelin ---------- 263
80° after disc surgery: J. Duke ---------- 129
80° after reduction: T. Mitchell ---------- 151
80° not clearly erroneous: L. Gosson ---------- 185
80° to phoney who refuses surgery: J. Rupp ---------- 217
80° to parts man: R. Garrett ---------- 259
80° from 160° where prior injury: R. Stofiel ---------- 279
Back and Leg: 80° where refuse surgery: L. Martin ---------- 243
96° allowed where determination allowed nothing: B. Sanders ---------- 87
96° for worn out back: G. Schultz ---------- 262
96° for limited motivation: J. Hutchinson ---------- 264
96° to ditch rider: K. Rylah ---------- 265
96° to real estate salesman: D. Ferguson ---------- 252
100° after reduction: J. Dryden ---------- 122
199° from 192°: L. Thompson ---------- 174
100° from 160° to millright: G. Nicholas ---------- 249
104° after disc removal: L. Grover ---------- 113
117.2° where precluded from heavy work: R. Crippen ---------- 73
127° where light work and short shift to avoid surgery: E. Lacey ---------- 40
128° after reduction: T. Beasley ---------- 134
Back and Leg: 128° & 15° where hearing allowed total: S. Jones ---------- 158
128° where making good progress toward vocational rehabilitation: E. Hurst 161
128° to housewife: L. Jones ---------- 197
144° after fusion: G. Levesque ---------- 61

(2) Back, cont. Vol. 7, cont.

144° where want total: B. Munnerlyn ---------- 242
160° after reversed total disability: H. Ainsworth ---------- 48
160° where want total: J. Jenkins ---------- 51
Back and Leg: 160° & 15° to 20 year old with 3 surgeries: D. Stacy ---------- 79
160° remanded where record lost: E. Hammond ---------- 82
160° where back work precluded: M. Clinton ---------- 112
160° where don't want to return to work: V. Collins ---------- 231
176° to cook who can't cook: M. Wallingford ---------- 71
192° for back sprain: J. Dobbs ---------- 39
192° where can't work: K. Kyle ---------- 92
192° settlement on appeal to Court of Appeals: C. Ziebart ---------- 208
192° to carpenter who wants total: A. Jensen ---------- 267
208° award resulted in claim being reopened: N. Savage ---------- 6
218° after reduction from total: O. Duke ---------- 91
320° to carpet layer: E. Vandehey ---------- 236

Vol. 8

None after prostate operation: K. Harper ---------- 12
None where determination reduced: R. Carlisle ---------- 93
None where witness not credible: V. Ahlers ---------- 107
None on finding of adverse credibility: R. Bunch ---------- 114
None for truck driver with discomfort: R. Ballew ---------- 135
None to waitress: E. Smedstad ---------- 155
None where no objective signs: L. Odell ---------- 159
None for occasional pain: G. Fischer ---------- 190
Unknown award affirmed: G. Luff (Fox) ---------- 207
None after reversal: C. Martin ---------- 214
None affirmed: C. Adamson ---------- 285
9.6° where no medical consultation for 1½ years: L. Coffey ---------- 91
16° to brick mason: F. Brown ---------- 35
16° where no objective symptoms: R. Owen ---------- 68
16° for minimal problem: J. Enos ---------- 124
32° where make more money now: R. Minor ---------- 18
32° where obese: H. Hancock ---------- 53
32° where should avoid heavy work: J. Owens ---------- 81
32° after reduction: R. Bult ---------- 120
32° to nurse's aid who ought to avoid heavy lifting: C. Mars ---------- 132
32° for poor credibility: C. Jenkins ---------- 139
32° where reduced earning capacity: B. Lay ---------- 160
32° in poor opinion: D. Rainboldt ---------- 162
32° after conscientious consideration: G. Klocko ---------- 231
32° and reference to rehabilitation: H. Warrington ---------- 228
32° to college student: J. VonRichter ---------- 249
32° where claim other injuries: J. Easterling ---------- 260
40° where prior award: N. Burkland ---------- 15
40° after reduction for not following medical advice: F. Roberts ---------- 62
48° where can work as machinist: G. Moon ---------- 14
48° where don't want to work: R. Herker ---------- 235
48° where need psychiatric care: D. Manley ---------- 245

(2) Back, cont. Vol. 8, cont.

Back and Leg: 48° & 15° affirmed: W. Deblois ---------- 256
48° where won't see doctor: T. Clute ---------- 279
48° after fusion where no loss of earning capacity: K. Muller ---------- 281
52° where precluded from heavy lifting: H. Gerig ---------- 215
Back & Leg: 64° & 15° to obese woman: L. Burbank ---------- 47
64° to meat cutter: W. Baker ---------- 66
64° after reduction to logger who may not be able to log: V. Foster ---------- 50
64° after reduction where Spondylolisthesis: J. Mendoza ---------- 97
Back and Leg: 64° & 15° where claim total: H. Coello ---------- 161
64° after reduction with reference for Rehabilitation: V. Ford ---------- 186
64° on consideration of earnings loss: R. Shirley ---------- 195
64° affirmed on memo: W. Butler ---------- 205
64° affirmed: G. Couch ---------- 235
64° where return to work: R. Bratton ---------- 262
64° for poor candidate for Rehabilitation: B. Rhoades ---------- 269
80° for strain and broken ribs: M. Wright ---------- 41
80° reinstated where hearing officer had reduced determination: O. Bewley 135
80° where can return to truck driving: L. Johnsen ---------- 157
80° after good recovery from fusion: J. Provost ---------- 204
Back, Leg & Arm: 80°, 87° & 68° after fall: W. Dunlap ---------- 211
80° for injury on pre-existing fusion: W. Morgan ---------- 274
80° where can't work: C. Croisettier ---------- 275
96° where other handicaps: G. Fluharty ---------- 14
96° to old professional picket: W. Fry ---------- 7
96° for no heavy work limit: R. Stoltenburg ---------- 123
96° to longshoreman who can return to work: E. Jacoby ---------- 149
96° after reduction: R. Wallace ---------- 168
96° after reduction for mild resideuals: P. Robinson ---------- 182
96° where can't lift: T. Taylor ---------- 225
96° to heavy mechanic who can only do light work: S. Kanna ---------- 241
96° for limited lifting but can bowl: R. Pugh ---------- 268
115.2° on own motion for moderately severe disability: R. Gault ---------- 270
120° settlement: C. Hodge ---------- 113
121° where prior 87°: R. Singleterry ---------- 104
125° on old injury: P. Billings ---------- 71
128° after laminectomy where sporadic work history: M. Barker ---------- 130
128° affirmed on employer appeal: R. Demaris ---------- 163
128° from 32°: W. Gardner ---------- 256
140° from 32°: H. Christiansen ---------- 283
144° plus $1,500 fees on settlement: C. Overstreet ---------- 83
148° where prior award: C. Miller ---------- 33
150° where lack of motivation: L. Beighley ---------- 140
160° where don't want to work again: W. Cox ---------- 154
160° based on earnings loss: A. Buchanan ---------- 160
160° to bean picker: G. Rios ---------- 39
Back & Eye: 160° & 80° where hit by log: L. Brenneman ---------- 75
Back and Leg: 192° & 30°: A. Roberts ---------- 36
192° by stipulation: M. Mullen ---------- 4
Back & Leg: 192° & 45% leg: B. Merritt ---------- 101
240° who wants total disability: J. Moravics ---------- 186

PERMANENT PARTIAL DISABILITY, cont.

(2) Back, cont. Vol. 8, cont.

Own motion award: P. Gillenwater ---- 98
25% arm where Board hostile: C. Berg ---- 101

Vol. 9

Back: Minimal award affirmed: C. Anderson ---- 84
Back: None for some pain: W. Schneider ---- 223
Back: None where refuse myelogram: D. Blair ---- 263
Back: None to fish packer: M. Pekkala ---- 295
Back: 10° affirmed for strain: C. Durst ---- 171
Back: 16° increase affirmed: P. Cranford ---- 79
Back: 16° after excellent recovery from laminectomy: A. Pedigo ---- 270
Back: 20° affirmed in spite of brilliant brief: B. Davis ---- 161
Back: 29° for fusion after 1959 injury: B. Jackson ---- 11
Back: 32° for sore tailbone: A. Deyoung ---- 22
Back: 32° after reduction for sprain: H. Watson ---- 68
Back: 32° after reduction where rehabilitation: R. Martell ---- 23
Back: 32° in worthless opinion: E. Green ---- 44
Back: 32° affirmed and referred to rehabilitation: J. Sanders ---- 132
Back & Foot: 32° & 34° to log loader: T. Lindquist ---- 153
Back: 32° declared inadequate for injury requiring job change: C. Dinnocenzo 176
Back: 32° on settlement: J. Phillips ---- 180
Back: 32° affirmed: D. Stark ---- 196
Back: 32° for 'some limitations': F. Coleman ---- 224
Back: 32° after Court remand for reconsideration: D. Horning ---- 260
Back & Leg: 40° & 15.5° affirmed on SAIF appeal: W. Degner ---- 231
Back: 48° for self-imposed light work: P. Roach ---- 75
Back: 48° affirmed: R. White ---- 204
Back: 48° affirmed where Psychopathology: L. M. Zilko ---- 207
Back: 48° where preexisting back disease: D. Bellerud ---- 212
Back: 48° for strain: L. Herrera ---- 255
Back: 64° proper for job change: C. Dinnocenzo ---- 176
Back: 64° by stipulation: S. Christensen ---- 196
Back: 64° to drunk: G. Anderson ---- 229
Back: 64° after Board reduction: R. Elliott ---- 236
Back: 64° after two surgeries and a job change: W. Richards ---- 248
Back: 75° to chemist with disc out: R. Young ---- 213
Back: 77° where retired: O. Waggoner ---- 83
Back: 80° affirmed: R. Downing ---- 174
Back: 80° to fat woman: E. Watson ---- 200
Back & Leg: 80° & 8° affirmed: S. Collinson ---- 262
Back: 96° where untruthful: W. Cook ---- 4
Back: 96° affirmed: D. Mackey ---- 75
Back: 96° affirmed: B. Hood ---- 119
Back: 96° after surgery: E. Monen ---- 215
Back: 96° where changing occupation: D. Nicholson ---- 237
Back: 96° after skull fracture: R. Van Hecke ---- 250
Back: 112° where hearing officer would reduce: W. Hansen ---- 93
Back: 128° after laminectomy: F. Felske ---- 70
Back: 128° to produce manager: G. Maumary ---- 24

PERMANENT PARTIAL DISABILITY, cont.

(2) Back, cont. Vol. 9, cont.

Back: 128° where two previous laminectomies: H. Thrasher ---------- 26
Back: 128° canceled and reopened for disability prevention treatment: V. Wierichs ---------- 133
Back: 128° to heavy mechanic: D. Yarnell ---------- 153
Back: 134.4° affirmed: G. McClure ---------- 220
Back: 160° where claim total: C. Schmelter ---------- 111
Back: 160° affirmed: W. Hocken ---------- 116
Back: 160° affirmed: H. Hinzman ---------- 163
Back: 160° after reduction: J. Nicholson ---------- 182
Back: 160° to carpenter who is retraining as civil engineer: D. Green ---------- 235
Back: 160° to welder who can't weld: L. Espinosa ---------- 242
Back: 160° after hearing officer increased from 32° to total disability: C. Gutierrez ---------- 249
Back: 192° on clarification: G. Maumary ---------- 35
Back: 192° where can't stand or walk much: R. Holbrook ---------- 217
Back: 240° affirmed: V. Luedtke ---------- 171
Back: 240° in 3-page opinion: W. Brown ---------- 183
Back: 224° affirmed where hard feeling: R. Stollenwerk ---------- 221
Back & Leg: 240° & 30° where want total: H. Deaton ---------- 1
Back: 240° instead of total disability where dirty hands: A. Baker ---------- 226

Vol. 10

Back: Affirmed after laminectomy: R. Davidson ---------- 89
Back: none where no evidence: A. Elliott ---------- 57
Back: none on own motion: A. Barkdoll ---------- 177
Back: 9.6° after laminectomy on own motion closing: H. Issel ---------- 45
Back: 9.6° after fusion: D. Lane ---------- 289
Back: 15° to 17 year old: J. Snyder ---------- 80
Back: 16° for mild strain: C. Heatley ---------- 285
Back: 19.2° additional on own motion: D. Rudisil ---------- 48
Back: 32° to fat old Mexican Widow: S. Gonzalez ---------- 55
Back: 32° after laminectomy on very good recovery: F. Reedy ---------- 64
Back: 32° for paid while lifting: C. Staples ---------- 115
Back: 32° affirmed for "mildly moderate" disability where must avoid heavy mill work: G. Muzzy ---------- 139
Back: 32° affirmed absent proof of lost earning capacity: T. Buckley ---------- 179
Back: 32° for sprain: R. Leno ---------- 238
Back: 32° where seeking light work: C. Hurt ---------- 243
Back: 32° on aggravation: R. Comer ---------- 266
Back: 32° for strain in long opinion: M. Cearley ---------- 267
Back and Arm: 48° and 19° on employer appeal: R. Cox ---------- 12
Back: 48° where can work: M. Lengele ---------- 62
Back: 48° after two laminectomies: J. Griswold ---------- 208
Back: 48° allowed: W. Boothe ---------- 273
Back: 64° for some impairment: W. Nelson ---------- 5
Back: 64° and reference to disability prevention: R. Todahl ---------- 60
Back: 64° for 30% reduced wages: L. Miebach ---------- 81
Back: 64° on reserve capacity intrepetation of diminished earnings: G. Byers ---------- 85

PERMANENT PARTIAL DISABILITY, cont.

(2) Back, cont. Vol. 10, cont.

Back: 64° and 105.6° reinstated after successful SAIF appeal from determination: W. Baldridge ---------- 133
Back: 64° for restricted earning capacity: E. Stahlik ---------- 143
Back: 64° for minimal disability: E. Mitchell ---------- 150
Back: 64° where speculative earnings loss: R. Checkley ---------- 160
Back: 64° affirmed: R. Bogart ---------- 179
Back: 64° for strain: J. Doran ---------- 200
Back: 64° on earning capacity: B. Wilson ---------- 225
Back: 64° for spotty employment record: R. Martin ---------- 254
Back: 64° affirmed: E. Lakey ---------- 268
Back: 64° where can travel and work: F. Gast ---------- 270
Back: 64° for lack of candor: M. Scott ---------- 271
Back: 64° for minimal objective findings: D. McCulloch ---------- 282
Back: 77° to bookkeeper: E. Harrington ---------- 139
Back: 80° where claim total: E. Williams ---------- 83
Back: 80° after fall for strain: G. Litteer ---------- 106
Back and Leg: 80° and 8° after fusion: J. Clauson ---------- 134
Back and Leg and Foot: 80°, 15°, and 135° after fusion: J. Barnhart ---------- 157
Back: 80° with 45° leg: A. Spenst ---------- 163
Back and Leg: 80° and 15° after surgery although hearings officer had increased: L. Leeth ---------- 188
Back: 80° where refuse surgery: M. Hobbs ---------- 191
Back: 80° after surgery: C. Nicodemus ---------- 211
Back: 80° to machinist who must work as office boy prior to surgery: W. Snow 227
Back and Shoulder: 80° and 19.6° on consolidated hearing: C. Keller ---------- 274
Back: 96° after two laminectomies and a fusion: C. Henderson ---------- 58
Back: 96° on reduction where refuse retraining: W. Dalziel ---------- 92
Back: 96° affirmed: A. Taylor ---------- 163
Back: 96° after fall: R. Notestine ---------- 181
Back: 96° by stipulation: W. Momper ---------- 202
Back: 96° where prior fusion, etc.: R. Wolf ---------- 229
Back: 112° on settlement: E. Rundberg ---------- 1
Back: 112° affirmed: R. Blackford ---------- 34
Back: 112° reduced to 48°: D. Cheek ---------- 175
Back: 112° affirmed over SAIF appeal: F. Thomas ---------- 183
Back: 112° on settlement: L. Thompson ---------- 249
Back: 112° after successful Fund appeal: R. Sanders ---------- 290
Back: 128° where barred from millwork: R. Harding ---------- 17
Back: 144° affirmed: J. Combs ---------- 77
Back: 144° where reversed total: E. Kirkendall ---------- 236
Back: 144° affirmed over employer appeal: H. Bell ---------- 252
Back: 160° to woman mill worker: C. Weeks ---------- 88
Back: 160° where hasn't returned to work but could be draftsman: W. Smith 127
Back: 160° for poor chance of rehabilitation: D. Fry ---------- 159
Back: 160° where can't return to work: H. Puls ---------- 218
Back: 160° where back history: J. Lunquist ---------- 289
Back: 166° allowed where 1965 total disability award set aside: F. Pense ---------- 245
Back: 192° where can't work: J. Robertson ---------- 9
Back: 192° increased to total: N. Clark ---------- 98
Back, Leg and Arm: 192°, 38°, and 30° to carpenter: P. Hay ---------- 110

PERMANENT PARTIAL DISABILITY, cont.

(2) Back, cont. Vol. 10, cont.

Back: 192° where job change indicated: D. Nordstrom ---------- 166
Back: 192° after reduction from total: M. McGinnis ---------- 168
Back: 192° where determination had allowed total: M. Egger---------- 178
Back and Leg: 200° and 30° where reverse total disability award:
M. Goodpaster ---------- 126
Back: 200° to woman not interested in retraining: A. Hall ---------- 278
Back: 224° reduced to 128°: C. Plunk ---------- 176
Back: 224° after two attempts at fusion: J. Puckett ---------- 283
Back: 240° where had already lost an arm and a leg: L. Wilson ---------- 15
Back: 240° for bad back: R. Angermeier ---------- 59
Back and Leg: 240° and 15° after surgery: D. Miller ---------- 256
Back and Leg: 256° and 15° affirmed: L. Elkins ---------- 160
Back: 270° where can do some work: H. Keever ---------- 2
Back: 288° where motivation issue: M. Kuziemski ---------- 161

Vol. 11

Back: Award affirmed: G. Dickenson ---------- 42
Back: Affirmed where extreme obesity: S. Hussey ---------- 259
Back and Arm: 40% & 15% on fall from telephone pole: J. Howenstine ---------- 173
Back: 35% where quit trucking: L. Yoast ---------- 156
Back: None where no medical: J. Martin ---------- 6
Back: None for possible discomfort: M. Rouse ---------- 27
Back: None: T. Taylor ---------- 76
Back: Settlement denied approval: D. Jones ---------- 75
Back: Undisclosed award affirmed: A. Driscoll ---------- 25
Back: 10° more on settlement: T. Fisher ---------- 62
Back: 16° for credibility gap: C. Males ---------- 70
Back: 16° to clerk: G. Berlinquette- ---------- 92
Back: 16° for strain: D. Jones ---------- 234
Back: 16° affirmed for lack of motivation: O. Hanson---------- 281
Back: 32° where emotional problem: L. Hurd ---------- 1
Back: 32° affirmed for sprain: D. Sharp ---------- 4
Back: 32° where hearing officer slow: C. Moore ---------- 9
Back: 32° affirmed: K. Cockrell ---------- 40
Back: 32° after fall: N. Schlecht ---------- 138
Back: 32° affirmed: L. Almond ---------- 261
Back: 45° on 1958 injury: J. Robertson---------- 276
Back: 48° after fall: E. Thompson ---------- 66
Back: 48° for mostly subjective: J. Harlow ---------- 71
Back: 48° to kid with strain: R. Martin ---------- 73
Back: 48° after fusion where go back to work: W. Sullivan---------- 129
Back: 48° to mill worker with pain: E. Pierce ---------- 164
Back: 48° affirmed where can still do sawmill work: K. Nevdal ---------- 175
Back: 48° where prior 35% award: R. Hogan ---------- 188
Back: 48° where want total: R. Atwood ---------- 201
Back: 48° to road worker: E. Field ---------- 202
Back: 48° for chronic strain: M. Eatwell ---------- 250
Back: 48° to age 20 carpenter: B. Shell ---------- 253
Back: 60° for back where already retired: T. Pearl ---------- 96

PERMANENT PARTIAL DISABILITY, cont.

(2) Back, cont. Vol. 11, cont.

Back: 64° for minimal loss function: I. Castle ---------- 32
Back: 64° for psychopathology: M. Crouch ---------- 41
Back: 64° where heavy work precluded: W. Boaz ---------- 45
Back: 64° affirmed: R. Rector ---------- 54
Back: 64° for conservative back treatment: D. Schmitz ---------- 132
Back: 64° where prior award: R. Larson ---------- 185
Back: 64° affirmed: S. Tackett ---------- 209
Back: 64° after fusion: K. Schaller ---------- 273
Back: 80° affirmed over employer appeal: G. Krussow ---------- 10
Back: 80° where won't work: A. Kilgore ---------- 131
Back: 80° where retrain as watchmaker: L. Wallace ---------- 180
Back: 80° for sprain: E. Stitt ---------- 186
Back: 80° affirmed: J. Otto ---------- 200
Back: 80° after reduction by stipulation: E. Burns ---------- 240
Back: 80° after laminectomy where precluded from millwork: R. Anthony -- 254
Back: 96° from 192° for mildly moderate disability: A. Causey ---------- 77
Back: 96° for strain: L. O'Neal ---------- 94
Back: 112° where can't return to logging: B. Mattice ---------- 130
Back: 96° where want total: G. Seaberry ---------- 141
Back: 96° where want total: M. Goode ---------- 215
Back: 96° where back to work and still long hours: P. Mitts ---------- 217
Back: 96° affirmed to unemployed: W. Odom ---------- 246
Back: 96° over employer appeal: L. Davis ---------- 261
Back: 112° after fusion: W. Delorme ---------- 29
Back: 112° for no motivation: G. Golds ---------- 224
Back: 112° where barred from heavy work: C. Ballard ---------- 258
Back: 128° to waitress: E. Widmaier ---------- 56
Back: 128° to 300 lb. man: R. Maden ---------- 72
Back and Leg: 128° & 22.5° to millwright who has trouble working: G. Smalley ---------- 136
Back and Leg: 128° & 75° affirmed: J. Randall ---------- 199
Back: 144° as before where reopened for surgery: G. McElroy ---------- 151
Back: 160° after two laminectomies and fusion: D. Stutzman ---------- 25
Back: 160° where can still barber: R. Hill ---------- 45
Back: 160° affirmed: J. Ruiz ---------- 52
Back: 160° for bad fusion: M. Nutini ---------- 68
Back: 160° from total: J. Koroush ---------- 121
Back: 160° to nutty woman: N. Kendall ---------- 171
Back: 160° for emotional reaction to multiple injuries: E. Singletary ---------- 265
Back: 160° to sign painter: D. Gordon ---------- 272
Back: 160° to truck driver: H. Wright ---------- 238
Back: 192° where can manage trailer court: C. Hines ---------- 54
Back: 192° on reversal of total: J. McCuiston ---------- 123
Back: 192° increased to total: R. Salazar ---------- 124
Back: 192° where want total: L. Christiansen ---------- 128
Back: 192° for mildly moderate back: W. Hoover ---------- 159
Back: 192° affirmed: M. Williams ---------- 207
Back: 192° where want total: T. Graves ---------- 249
Back: 192° affirmed: C. Ballew ---------- 262
Back: 192° where need motivation: R. Wright ---------- 266
Back: 192° for poor motivation: E. Rikala ---------- 267

PERMANENT PARTIAL DISABILITY, cont.

(2) Back, cont. Vol. 11, cont.

Back: 200° where can't sit: G. Luff (Fox) ---------- 84
Back and Leg: 204° & 100° affirmed: G. Payne ---------- 267
Back: 208° for mildly moderate disability and can't work: F. Ponder ---------- 36
Back: 256° for fusion and poor motivation: J. Stewart ---------- 122

Vol. 12

Back: none where doing lighter work: M. Johnson ---------- 31
Back: none where doctors can't find anything: V. Slaughter ---------- 148
Back: none on own motion claim: I. Egan ---------- 197
Back: none on own motion: B. Reves ---------- 197
Back: none on own motion: W. Puzio ---------- 212
Back: none where don't want to work: R. Stillwell ---------- 243
Back: none for thoracic pain: R. Boaz, Jr. ---------- 247
Back: 9.6° for sore back: V. Huber ---------- 192
Back: 16° where can go back to work: W. Lawrence ---------- 235
Back: 16° for moderately severe functional overlay: A. Babb ---------- 247
Back: 32° where retrain as typist: V. Schmidt ---------- 6
Back: 32° affirmed where should avoid heavy work: D. Roby ---------- 54
Back: 32° where don't want to work: E. Terry ---------- 74
Back: 32° for minimal and mild problems: D. Colfax ---------- 110
Back: 32° where back to same job: E. Shaw ---------- 124
Back: 32° where excessive subjective complaints: D. Weaver ---------- 127
Back: 32° to fruit picker: L. Samson ---------- 149
Back: 32° for strain: C. Moore ---------- 250
Back: 45° for functional overlay: R. Cramer ---------- 182
Back: 48° after fall: B. Hurd ---------- 32
Back: 48° after rehearing: B. Vance ---------- 47
Back: 48° increase from nothing: R. Hukill ---------- 78
Back: 48° where movies: F. Siller ---------- 82
Back: 48° even though need continuing chiropractic treatments: S. Nelson-- 128
Back: 48° for severe anxiety-tension factor: J. Hubbard ---------- 210
Back: 48° affirmed for mild: P. Derrah ---------- 244
Back: 64° where can still work (reduction): S. Holden ---------- 7
Back: 64° for minimal objective findings: J. Clark ---------- 28
Back: 64° where no light work available: R. Jobe ---------- 37
Back: 64° for phobia: N. Kolling ---------- 80
Back: 64° minimal injury and psychopathology: J. Carpenter ---------- 115
Back & Leg: 64° & 67.5° for trick knee which hurt back: M. Lapin ---------- 118
Back: 64° affirmed: L. Arrance ---------- 181
Back: 64° where can return to same work: F. Smith ---------- 252
Back & Leg: 64° & 15° affirmed: J. Larramie ---------- 265
Back: 64° on reduction from 192° where mostly pain: E. Diamond ---------- 281
Back: 80° where light work only: W. Phillippi ---------- 36
Back: 80° after surgery: L. Nash ---------- 39
Back: 80° for obesity, etc.: N. Farmer ---------- 77
Back & Leg: 80° & 13.5° affirmed: R. Ten Eyck ---------- 110
Back: 80° on reduction: C. Fowler ---------- 130
Back: 80° where C & E allowed none: J. Gonzales ---------- 145
Back: 80° to nurse who can't lift patients but has mild disability: A. Grove 166
Back: 80° to professional hockey player: P. Van Impe ---------- 218

(2) Back, cont. Vol. 12, cont.

Back: 80° where should avoid heavy labor: D. Peterson ---------- 238
Back: 80° affirmed: M. Lash ---------- 264
Back: 96° where want total: F. Baker ---------- 13
Back: 96° where most psychopathology: B. Williams ---------- 18
Back: 96° on own motion reduction from total: G. Roth ---------- 26
Back: 96° where prior awards: C. Greenlee ---------- 29
Back: 96° where laminectomy: G.Sallee ---------- 29
Back: 96° to old janitor: D. Smart ---------- 43
Back: 96° where C&E was 32° and hearing officer found 176°: G. Jenkins - 119
Back & Forearm: 96° & 15° termed liberal: V. Ferguson ---------- 122
Back: 96° affirmed on SAIF appeal: J. Frank ---------- 220
Back: 96°on reduction where can't truck drive: B. Perry ---------- 276
Back: 100° where can't longshore: H. Womack ---------- 154
Back: 112° for poor motivation: H. French ---------- 50
Back & Foot: 112° & 5% to trucker: R. Stedman ---------- 114
Back: 112° affirmed: A. Marek ---------- 176
Back: 112° where lifting limited: D. Gonser ---------- 195
Back: 112° affirmed: W. Short ---------- 275
Back: 112° where want total: B. Sorenson ---------- 282
Back: 120° for chronic strain bars heavy work: G. Braughton ---------- 260
Back: 128° allowed: K. Knapp ---------- 21
Back: 128° to old nurse's aid: J. Brown ---------- 83
Back, Arm & Leg: 128°, 19.2° & 15° in long opinion: R. Vester ---------- 135
Back: 128° after fall: N. Muir ---------- 203
Back: 128° affirmed: J. Ivey ---------- 242
Back: 128° where can't log after surgery: M. Olsen ---------- 284
Back: 150° where want total: L. Depiero ---------- 152
Back: 160° after total reversed: F. House ---------- 15
Shoulder: 160° for wild symptoms after slap on back: J. Kennedy ---------- 86
Back: 160° where must retrain for two years for sedentary job: R. Owens ---------- 122
Back: 160° after two fusions and four determinations: H. Short ---------- 124
Back & Leg: 160° & 37.5° to choker setter after log smash: J. Sperry ---------- 277
Back: 160° after total reversed: M. Jones ---------- 287
Back & Leg: 192° & 75° to roofer: M. Notz ---------- 10
Back: 192° affirmed: M. Louden ---------- 157
Back: 192° where refuse head examination: R. Gammell ---------- 206
Back & Legs: 196°, 45° & 15°: M. Bell ---------- 248
Back: 208° after six surgeries where can still sell cars part time: L. Dipasquale ---------- 164
Back: 240° where want total: W. Buckley ---------- 21
Back & Legs: 240°, 45° & 112° affirmed: J. Rauschert ---------- 113
Back: 240° after reconsideration on remand: L. Wilson ---------- 130
Back: 240° on aggravation: J. Freitag ---------- 171
Back: 240° where want total: K. Parker ---------- 185
Back: 240° from 48° where want total: R. Mata ---------- 240
Back: 256° in lieu of total: M. Myers ---------- 187
Back: 256° to fruit picker: J. Hernandez ---------- 250

(2) Back, cont.

Vol. 13

Back: 45% for serious problem: L. Huey ---------- 3
Back: none for functional overlay: R. Edgar ---------- 154
Back: None for some pain and swelling: M. Anderson ---------- 289
Back: 5% after log truck upset: W. Bailey ---------- 212
Back: 10% on settlement: C. Peterson ---------- 166
Back & Leg: 10% and 10% on own motion determination: M. Anderson ---------- 289
Back: 10% to janitress: S. Flansberg ---------- 302
Back: 15% for minimal physical impairment: C. Rowland ---------- 100
Back: 15% for severe obesity: O. Webster ---------- 140
Back: 15% where limited from heavy work: B. Espy ---------- 206
Back: 15% affirmed: M. Randall ---------- 219
Back: 16% for 300 pounds: S. Ault ---------- 40
Back: 20% affirmed: H. Mackie ---------- 11
Back: 20% where psychopathology: L. Plane ---------- 87
Back: 20% where poorly motivated: C. Alexander ---------- 111
Back: 20% to sawyer: W. Evans ---------- 127
Back: 20% on increase: J. Langehennig ---------- 128
Back: 20% where old employer took back at light work: F. Lee ---------- 190
Back: 20% for fusion where prior award of 25%: W. Allen ---------- 294
Back: 25% for disc removal: D. McPhail ---------- 97
Back: 25% where 50% from later injury: F. Rohay ---------- 99
Back: 25% for sprain: C. Shaw ---------- 103
Back: 25% after fusion: D. Russell ---------- 124
Back: 25% to scraper operator: R. Renfro ---------- 191
Back: 25% after painful fall: R. Barrett ---------- 200
Back: 25% after fusion: J. Lane ---------- 211
Back: 25% where want total: R. Barstad ---------- 242
Back: 25% where limited from heavy work: C. Denny ---------- 278
Back: 25% to welder for "mildly moderate": T. Springgay ---------- 295
Back: 30% affirmed: A. Whittle ---------- 123
Back: 30% for mild back difficulty: H. Yielding ---------- 160
Back: 30% to grocery checker: P. Carpenter ---------- 244
Back & Leg: 35% and 15% after run over by log truck: J. McMurrian ---------- 24
Back: 35% after surgery: F. Brannan ---------- 61
Back and Legs: 35% and 20% each for arthritis: E. Guinn ---------- 136
Back: 35% on employer appeal: J. Phillips ---------- 182
Back & Shoulder: 35% and 50% unscheduled but not total: E. Larson ---------- 192
Back: 40% for chronic strain: E. Krause ---------- 86
Back: 40% to fry cook: M. Boyd ---------- 201
Back & Arm: 40% and 15% to surveyor: M. Flanagan ---------- 249
Back: 45% where no lifting or standing: C. Westerhoff ---------- 98
Back: 45% for self-pity and surgery: G. Hill ---------- 110
Back: 45% after two fusions: D. Smith ---------- 270
Back & Leg: 50% and 30% where want total: S. Brower ---------- 48
Back: 50% to trucker who can't drive: D. Kosanke ---------- 131
Back: 50% after four fusions and broken leg: H. Wideman ---------- 175
Back: 50% affirmed to pensioner: E. Gentry ---------- 188
Back: 50% where not odd-lot: H. Reed ---------- 224

PERMANENT PARTIAL DISABILITY, cont.

(2) Back, cont. Vol. 13, cont.

Back: 50% where retrainable: M. Oxendine ---- 250
Back: 50% affirmed where film: E. Glenn ---- 262
Back: 50% after total reversed: J. Grijalva ---- 267
Back & Leg: 60% and 10% affirmed: A. Zeigler ---- 80
Back: 60% where want total: J. Weaver ---- 174
Back: 60% on own motion: H. Blakeney ---- 222
Back: 60% where large prior award: J. Gray ---- 235
Back: 60% affirmed where lack of motivation: J. McCartney ---- 239
Back: 65% for 50% motion on own motion: S. Gudmundson ---- 52
Back: 65% where want total: D. Nicholson ---- 301
Back: 80% increased to total: B. Arevalo ---- 241
Back: 80% but not total: G. Nicholas ---- 288
Back: 16° affirmed: K. Sells ---- 17
Back: 32° to small nurse: B. Stevens ---- 25
Back: 32° on own motion: S. Rowlands ---- 39
Back: 32° where personality disorder: C. Gonce ---- 240
Back: 35.7° on reduction by stipulation: J. Anna ---- 150
Back: 48° affirmed: C. Lepley ---- 30
Back: 48° after surgery: R. Mallam ---- 35
Back: 48° for subjective symptoms: F. Schuler ---- 75
Back: 64° on reduction: K. Akin ---- 76
Back: 80° after surgery: D. Dixon ---- 10
Back: 80° and 32° on two claims: O. Roseth ---- 123
Back & Leg: 80° and 35° where back to same job: T. Barlow ---- 190
Back: 100° where emotional problem: D. Buckner ---- 64
Back: 112° after fusion: Z. Gregg ---- 155
Back: 122° where want total: H. Sanders ---- 81
Back: 140° for fusion: E. Eddy ---- 7
Back: 144° after refusion: W. Boffing ---- 18
Back: 150° on stipulation: W. Neal ---- 265
Back: 160° for mildly moderate condition: W. McKinney ---- 19
Back: 160° affirmed for moderate disability: W. Scown ---- 20
Back: 160° for 67-year-old nurse: L. Russell ---- 30
Back & Leg: 160° and 7.5° where want total: H. Shubin ---- 83
Back & Legs: 192°, 52.5°, and 15° where want total: D. Lisonbee ---- 218
Back: 208° where retraining necessary: C. Degarmo ---- 47
Back: 208° where want total: J. Mosthaf ---- 183
Back: 256° after numerous injuries: R. Tooley ---- 12
Back: 320° on settlement plus more: C. Newton ---- 220

Vol. 14

Back: 5% for mild sprain: L. Thompson ---- 292
Back: 10% for no briefs: R. Yackley ---- 212
Back: 10% affirmed: W. Reed ---- 197
Back: 10% on reduction: M. Delaney ---- 173
Back: 10% where ten doctors: T. Yegge ---- 34
Back: 10% affirmed: N. Kohler ---- 6
Back: 15% after laminectomy: D. Johnson ---- 22
Back: 15% affirmed: D. Clevenger ---- 29

(2) Back, cont. Vol. 14, cont.

Back: 15% from nothing by Board: P. Green ---------- 269
Back: 20% for fusion: R. Browning, III ---------- 182
Back: 20% to carpenter who must retrain: R. Lara ---------- 169
Back: 20% for upper back: R. Dittrich ---------- 158
Back: 20% affirmed where move to small town: S. Durand, Jr. ---------- 70
Back: 20% affirmed: C. Giltner ---------- 3
Back: 25% on increase: E. Garcia ---------- 116
Back: 25% to farmer who can't farm: W. Schofield ---------- 160
Back: 25% on reduction to mobile home salesman: C.Wood ---------- 278
Back: 30% after surgery: A. Ashenbrenner ---------- 199
Back: 35% where not working and can't do heavy work: J. McCammon ---------- 142
Back: 35% to painter who can't lift or bend: J. Tilander ---------- 241
Back: 40% after fusion, etc.: H. Partridge ---------- 204
Back: 40% for logger who can't log: S. Price ---------- 215
Back: 40% affirmed where no briefs: P. Burch ---------- 174
Back: 40% after surgery: L. Brugh ---------- 98
Back: 40% where won't work nights: A. Sexton ---------- 35
Back: 45% affirmed although excessive: W. Miller ---------- 152
Back: 50% to truck driver who can't drive: G. Wills ---------- 191
Back: 50% where refuse surgery: J. Reed ---------- 187
Back: 50% where can't work construction: C. Paxton ---------- 123
Back: 50% for strain: E. Turner ---------- 114
Back: 50% affirmed: V. Collins ---------- 99
Back: 50% where surgery no help: J. Hollon ---------- 92
Back: 50% on settlement: G. Clark ---------- 23
Back: 60% affirmed over employer appeal: W. Matthews ---------- 277
Back: 60% where can still do work: J. Craig ---------- 141
Back: 60% where want total: V. Willcut ---------- 61
Back: 60% reduced to zero: E. Bishop ---------- 55
Back: 60% after much surgery: G. Kuskie ---------- 34
Back: 60% down from total: M. McGinnis ---------- 18
Back: 65% on reduction: C. Johnson ---------- 43
Back: 65% where serious lung condition: H. Freed ---------- 280
Back: 70% to logger who can't log: D. Lee ---------- 228
Back: 70% after three fusions: S. Ballew ---------- 185
Back: 70% where want total: W. Hocken ---------- 46
Back: 70% for sexual dysfunction, etc: J. Young ---------- 30
Back: 75% from total: K. Hughey ---------- 59
Back: 75% after 20 doctors: M. Scott ---------- 47
Back: 80% on aggravation: D. Brewer ---------- 78
Back: 96° from 160°: T. Sampson ---------- 283
Back: 100% of arm in old case: B. Stevens ---------- 271
Back: 160° for extreme functional overlay: D. Marlow ---------- 178
Back: None after fall: G. Forsyth ---------- 286
Back: None for chronic back: P. Bozikovich ---------- 124
Back: None to cook: F. Velasquez ---------- 300
Back: None where won't work anyway: R. Miller ---------- 143
Back: Total where collateral income not considered: C. Rankins ---------- 122
Back: Zero on reduction from 60%: E. Bishop ---------- 55
Back: Zero for embellished symptoms: B. McElroy ---------- 32

(2) Back, cont.

Vol. 14, cont.

Back and Foot: 30% and 5% affirmed: A. Denzer ---- 7
Back and Leg: 15% and 25% affirmed: J. Riske ---- 285
Back and Leg: 25% and 10% affirmed: D. Falk ---- 60
Back and Leg: 30% and 10% on reduction: B. Wilson ---- 8
Back and Leg: 50% and 25% from total: J. Wilson ---- 139

Vol. 15

Back: none for pain: D. Crawford ---- 120
Back: nothing where need psychological help: E. Harder ---- 196
Back: zero affirmed: J. Seymour ---- 307
Back: 10% affirmed where won't work: H. Green ---- 60
Back and leg: 10% after reduction: E. Molchanoff ---- 261
Back: 20% increase on stipulation: W. Maki ---- 177
Back: 20% after reduction: L. Baker ---- 233
Back: 20% where leg problem: G. Jones ---- 256
Back: 25% affirmed boilermaker: G. Dieringer ---- 47
Back and leg: 25% and 35% found generous: R. Short ---- 115
Back: 25% for no motivation: C. Holland ---- 121
Back: 25% where prior award disregarded: C. Wilkerson ---- 136
Back: 25% for hip: L. Haglund ---- 150
Back: 25% affirmed on employer appeal: R. Hankins ---- 212
Back: 25% for lathe operator: E. Doughty ---- 231
Back: 25% where want odd-lot total: J. Halkyard ---- 291
Back: 30% on increase where must retrain: C. Pennse ---- 13
Back: 30% where can't sit, stand, bend or lift: P. Mayes ---- 37
Back: 35% affirmed: C. Clark ---- 153
Back: 35% where want total: J. Benavidez ---- 164
Back: 35% where want total: M. Geissbuhler ---- 214
Back: 35% where prior awards: B. Staggs ---- 252
Back: 40% where prefer not to work: J. Hopper ---- 17
Back: upper, 40% affirmed: E. Martin ---- 83
Back: 40% on board increase: C. Moe ---- 119
Back: 40% reversed: A. Hughes ---- 174
Back: 40% affirmed but leg award reversed: M. McKinney ---- 175
Back: 40% to logger who can still work: R. Hall ---- 210
Back: 40% from 65%: J. Langley ---- 305
Back: 45% reduced to 25°: J. Fandrich ---- 181
Back: 45% affirmed where prefer not to work: N. Garnes ---- 230
Back: 45% where prior awards of 85%: R. Hill ---- 280
Back: 50% where not going to work: B. Daggett ---- 116
Back: 50% from total: M. Taylor ---- 152
Back: 50% where want total: W. Cannon ---- 253
Back: 50% where overlay: V. Harvill ---- 292
Back: 50% on increase: W. Cadwallader ---- 297
Back: 51.25% settlement: E. Castro ---- 175
Back: 55% on settlement: L. Petty ---- 89
Back: 60% for movies: B. Thorp ---- 269
Back: 70% where want total: D. Bushong ---- 266
Back: 70% where want total: M. Cartwright ---- 300
Back: 75% with heart attack also: R. Kitch ---- 197

PERMANENT PARTIAL DISABILITY, cont.

(2) Back, cont. Vol. 15, cont.

Back: 75% on increase: E. Lakey ---- 283
Back: 80% on settlement: C. De La Mare ---- 81
Back: 80% affirmed: J. Sullivan ---- 244
Back: 80% from total: O. Braughton ---- 279

Vol. 16

Back: none on reclosing: T. Bench ---- 69
Back: none for sprain: R. Loven ---- 172
Back: nothing for wide, short lady: J. Ball ---- 219
Back: nothing where fired: J. Kohler ---- 236
Back: none where films: J. Bruner ---- 254
Back: nothing affirmed: F. Hammond ---- 272
Back: 5% for jejuno-ileo bypass surgery: C. Jones ---- 84
Back: 10% to lawyer on reduction: S. Kowitt ---- 142
Back & Leg: 10% and 10% where refuse surgery: R. Crone ---- 182
Back: 10% to preacher who can't baptize: S. Bukojemsky ---- 210
Back: 10% affirmed for minimal problems: E. Morgan ---- 248
Back: 10% increase over 45% prior after fusion: H. Curry ---- 263
Back: 15% over employer appeal where limited lifting: J. Potter ---- 16
Back: 15% after surgery: R. Ingle ---- 241
Back: 20% affirmed: J. Booth ---- 37
Back: 20% affirmed: L. Engel ---- 195
Back: 20% affirmed: G. Finney ---- 247
Back: 20% for lifting restriction: I. Smith ---- 252
Back: 25% where refuse surgery: J. Klingbeil ---- 265
Back: 30% where must avoid lifting: E. Schoonover ---- 77
Back: 30% where must avoid heavy work: P. Hamill ---- 112
Back: 30% after repeated surgery: D. Stiner ---- 145
Back & Leg: 30% and 25% affirmed: S. Powell ---- 246
Back: 30% to grocery checker: M. Basl ---- 268
Back: 30% where won't cooperate: K. Leonard ---- 288
Back: 35% where don't want retraining: J. Morgan ---- 33
Back & Arm: 35% and 40% to logger for broken back: R. Grimes ---- 225
Back: 37.5% where want total: D. Valesquez ---- 44
Back: 40% on reduction from total: J. Bidwell ---- 101
Back: 40% where not to lift over 10 pounds: I. White ---- 190
Back: 40% to logger: V. Mallory ---- 212
Back: 40% to mental case: R. Parmenter ---- 217
Back: 50% for lifting limited to 25 pounds: C. McKeen ---- 131
Back: 50% for two injuries: D. Morris ---- 303
Back: 60% affirmed in vigorous appeal: A. Parker ---- 24
Back: 60% on reduction from total: P. Brusco ---- 138
Back: 65% where want total: R. Pierce ---- 233
Back: 70% where crushed by tree: J. Beckman ---- 7
Back: 75% where want total: F. Carpenter ---- 67
Back & Leg: 75% and 60% where refuse retraining: R. Haines ---- 74
Back: 75% where want total: L. Gay ---- 183
Back: 75% where retired logger and want total: M. Luster ---- 270
Back: 75% from total: T. Tompkins ---- 291

PERMANENT PARTIAL DISABILITY, cont.

(2) Back, cont. Vol. 16, cont.

Back: 75% where want total: I. Kasza ---- 297
Back: 80% in post-mortem increase: H. Padden ---- 31
Back: 90% remanded to DPD where refuse surgery: E. King ---- 115
Back: 90% where refuse surgery: J. Smith ---- 199

Vol. 17

Back: none affirmed: L. Grecco ---- 73
Back: none for psycho problems: J. Roler ---- 74
Back: none affirmed: B. Lingafelter ---- 140
Back: none affirmed: T. Biondolillo ---- 151
Back: none after 30% reversed: M. Watson ---- 152
Back: none on reduction: M. Richmond ---- 209
Back: none affirmed: R. Burns ---- 220
Back: 10% affirmed for obesity: M. Claudel ---- 136
Back: 10% on reduction: P. Turner ---- 200
Back: 10% on settlement: H. Gollyhorn ---- 195
Back: 15% affirmed over employer appeal: C. McMurrian ---- 289
Back: 15% for minimal strain: A. Jones ---- 296
Back: 15% for minor loss of earning capacity: J. McDonald ---- 117
Back: 15% increase on settlement: J. Barbur ---- 279
Back: 20% where can't do some work: C. Goeres ---- 143
Back: 20% where Spanish: O. Santana ---- 40
Back: 25% for malingering: L. Sawyer ---- 127
Back: 25% to diesel mechanic: M. Howland ---- 189
Back: 30% affirmed where prior 50% award: Z. Dugdale ---- 18
Back: 30% after surgery: C. Barnes ---- 167
Back: 30% where prior 80% lung disability: D. Lucas ---- 268
Back: 30% where retired: E. Hiner ---- 178
Back: 30% where want reopening: V. Schimke ---- 61
Back: 35% on settlement: D. Duit ---- 115
Back: 35% where want total: E. Simmons ---- 94
Back: 40% for mild disability where don't return to work: S. Stuart ---- 259
Back: 40% where not odd-lot: H. Helgeson ---- 156
Back and leg: 40% and 20% on settlement: G. Gibson ---- 90
Back: 50% where prefer not to work: K. Thompson ---- 228
Back: 57.5% on settlement: C. Dennis ---- 129
Back: 60% for mild loss function: T. Bicek ---- 276
Back: 70% reduced to 40% on claimant's appeal: T. Dalton ---- 287
Back: 80% reduced to 50% on cross appeal: E. Brenner ---- 297
Back: 100% where want total: S. Crumpton ---- 6
Back: 120% awarded on multiple claims: L. Kesterson ---- 279

Vol. 18

Back: None on second determination: J. Addie ---- 34
Back: None affirmed: J. Grue ---- 99
Back: None for aversion to work: D. Anton ---- 260
Back: 5% affirmed for exaggerated testimony: R. Chamberlain ---- 261
Back: 5% after surgery: F. Reinholz ---- 303

PERMANENT PARTIAL DISABILITY, cont.

(2) Back, cont. Vol. 18, cont.

Back: 10% for strain: R. Seymour ---- 91
Back: 10% for "minimal" disability: R. Lutz ---- 128
Back and leg: 10% and 10% where avoid bending or twisting: D. Duveneck 148
Back: 10% where want total: N. Hollis ---- 163
Back: 10% where can't return to former work: S. Espy ---- 234
Back: 15% on reduction from 35%: I. Williams ---- 98
Back: 20% where refuse surgery: R. Bingaman ---- 2
Back: 20% affirmed: D. Watson ---- 42
Back: 20% for mild residuals where good retraining: M. Bixell ---- 152
Back: 20% for minimal disability where can't return to job: R. Lewis ---- 176
Back: 20% where want total disability: E. Kitts ---- 213
Back: 20% affirmed: C. King ---- 218
Back: 25% from 50% where demanded total: G. Orman ---- 189
Back: 30% for medical basket case: M. Young ---- 50
Back and leg: 30% and 35% on reduction: M. Caldwell ---- 61
Back: 30% where haven't looked for work: L. Smith ---- 103
Back: 40% for moderate disability where want total: R. Burns ---- 200
Back: 45% where many unrelated problems: M. Nacoste ---- 166
Back: 50% reduced to 15%: E. Archer ---- 1
Back: 50% increased from 10% where want total: V. Johnson ---- 113
Back: 50% to illiterate who cannot return to work: V. Gray ---- 194
Back: 50% where can be retrained: J. Stogsdill ---- 240
Back: 65% where want total: J. Tabor ---- 122
Back: 65% settlement: W. Patton ---- 173
Back: 65% for lack of motivation and functional overlay: D. McIntosh ---- 205
Back: 65% on increase from 15% after total reversed: M. Carrico ---- 297
Back: 70% where want total: R. Longhofer ---- 4
Back: 70% down from total: C. VanMeter ---- 192
Back and leg: 70% and 30% after fusion: B. Broderick ---- 199
Back: 75% where want total on increase from 10%: W. Ross ---- 134
Back: 75% reduced to 50% on SAIF appeal: C. Williams ---- 223
Back and leg: 80% and 20% where want total: J. Hanlon ---- 47
Back and leg: 80% and 60% in lieu of total disability: C. Friend ---- 187
Back: 85% on stipulation: B. Kuhl ---- 272

Vol. 19

Back: none affirmed: S. Grindel ---- 88
Back: none affirmed where no objective findings: L. Layton ---- 217
Back: none for obesity where 25% reversed: D. Tanory ---- 209
Back: none to drug addict: H. Tillery ---- 106
Back: 5% where should avoid heavy lifting: K. Casey ---- 294
Back: 10% for brace and pain: M. Canady ---- 204
Back: 10% for mild to minimal disability: D. Lee ---- 142
Back: 10% for minimal disability: D. Hoffman ---- 77
Back: 10% for subjective complaints: C. Johnson ---- 140
Back: 10% for very minimal disability: K. Johnson ---- 256
Back: 10% to unemployed lawyer: J. Miller ---- 241
Back: 10% where no objective evidence: B. Hicks ---- 137
Back: 13% for pain: F. Sheffield ---- 211

(2) Back, cont. Vol. 19, cont.

Back: 15% for limited lifting to ten pounds: M. Hunt ---------- 185
Back: 15% on board increase: K. Bjorkman ---------- 52
Back: 15% on settlement: I. Gardner ---------- 101
Back: 20% affirmed for sprain: C. Clark ---------- 247
Back: 20% for mild strain with overlay: S. Burtis ---------- 72
Back: 20% for minimal objective findings: J. Horton ---------- 296
Back: 20% on reduction for two injuries: D. Krall ---------- 44
Back: 20% where must avoid heavy work: K. Tucker ---------- 280
Back: 20% where no heavy work: B. Rengo ---------- 42
Back: 25% after fusion: M. Nelson ---------- 257
Back: 25% on reduction from 35%: J. Erwin ---------- 23
Back: 25% on reduction from 40%: L. Pinkley ---------- 98
Back: 25% where can work: A. Hash ---------- 31
Back: 25% where psychotic problems: J. Baldock ---------- 95
Back: 25% where refuse surgery: J. Carter ---------- 253
Back: 25% where want total: I. Stephens ---------- 130
Back: 30% where prior award of 57%: G. Kelly ---------- 24
Back: 30% where unfit for any employment: M. Johnstad ---------- 119
Back: 35% for moderate disability: V. Davenport ---------- 78
Back: 35% increased to total: R. Smith ---------- 236
Back: 35% on reduction from 50%: P. Baley ---------- 47
Back: 35% on reduction from 80%: M. Shannon ---------- 238
Back: 35% where didn't go back to work: V. Carpenter ---------- 110
Back: 35% where want total: A. Dalke ---------- 297
Back: 40% after fusion: J. Macfarquhar ---------- 172
Back: 40% after two back surgeries: H. Wonch ---------- 235
Back: 40% where believe can't work: M. Waldrum ---------- 102
Back: 40% where should change jobs: W. Schnepp ---------- 75
Back: 50% where must drink vodka for pain: B. Northcutt ---------- 293
Back: 50% where want total: D. Heaton ---------- 7
Back: 50% where want total: V. Hams ---------- 54
Back: 55% where want total: P. Bresnehan ---------- 267
Back: 60% for moderate severe disability: D. Kelley ---------- 186
Back: 65% affirmed where want total: M. Smith ---------- 283
Back: 65% where want total: R. Christensen ---------- 213
Back: 65% where want total: Z. Baxter ---------- 221
Back: 75% on reduction from total: A. Elliott ---------- 93

Vol. 20

Back: none for back support prescription: L. Landry ---------- 40
Back: none where need psychiatric care: M. Baker ---------- 93
Back: none affirmed: D. Flanagan ---------- 110
Back: none affirmed: K. Bradfield ---------- 193
Back: none where refuse to work or retrain: S. Park ---------- 242
Back: 5% for low grade back strain: C. Guard ---------- 37
Back: 5% on reduction from 20%: F. Johnson ---------- 183
Back: 5% affirmed: C. Sloan ---------- 185
Back: 5% affirmed: R. Collver ---------- 218
Back: 5% for minimal disability: T. Dennis ---------- 244
Back: 5% affirmed: K. Forty ---------- 252

PERMANENT PARTIAL DISABILITY, cont.

(2) Back, cont. Vol. 20, cont.

Back: 10% affirmed: M. Bradley ---- 65
Back: 10% where must avoid heavy work: P. Bryant ---- 171
Back: 15% for psychiatric problems where no physical disability: L. Hall ---- 254
Back: 20% where want more: T. Hall ---- 56
Back: 20% for poor motivation: B. Chasse ---- 67
Back: 20% where claim total: M. Raymond ---- 145
Back: 20% to engineer who must avoid repetitive bending: W. Wane ---- 169
Back: 20% for compression fracture: F. Kulikov ---- 176
Back: 20% affirmed where can't work: G. Johanesen ---- 190
Back: 20% for questionable credibility: J. Bowers ---- 211
Back: 25% on reduction from 50%: B. Tavenner ---- 214
Back: 30% where consider psychological problem: C. Adams ---- 2
Back: 30% where want total: M. Rice ---- 11
Back: 30% where want total: O. Fitzgibbons ---- 16
Back: 30% where no heavy work: G. Johannessen ---- 107
Back: 30% on settlement: C. Gier ---- 194
Back: 35% for wage loss where can't drive truck anymore: L. Ingram ---- 102
Back: 35% for moderate disability: T. Tomovick ---- 261
Back: 40% reduced to 10%: D. Pugliesi ---- 121
Back: 40% on reduction from 80%: J. Hoots ---- 235
Back: 40% where want total: J. Matchett ---- 247
Back: 45% on reduction from 75% for engineer: D. Michel ---- 151
Back: 50% increased to total: W. Nimtz ---- 48
Back: 50% on reversal of total disability: L. Conn ---- 95
Back: 50% plus 25% arm where want total: F. Nunn ---- 122
Back and neck: 50% in long opinion: J. Faulk ---- 125
Back: 50% on reduction from 75%: L. Harper ---- 191
Back: 50% when pants burned: P. Jellum ---- 224
Back and arm: 50% and 15% where refuse retraining: J. Hutton ---- 264
Back: 55% where want total: E. McCullough ---- 123
Back: 55% on settlement: S. Clevenger ---- 194
Back: 60% where want total: B. Sweeney ---- 40
Back: 60% where want total: A. Howton ---- 46
Back: 60% after retraining where want total: H. Parker ---- 104
Back: 60% on large increase: T. Brady ---- 149
Back: 60% for gross lack of motivation: W. Scott ---- 172
Back: 60% posthumous award: F. Thomas ---- 260
Back: 65% to retired truck driver: W. Grove ---- 112
Back: 65% where unrelated medical problems also: C. Pitts ---- 167
Back: 65% increased to total disability: G. Richard ---- 286
Back: 70% on reduction: A. Lewis ---- 188
Back: 70% for mildly moderate on reversal of total: A. Taylor ---- 215
Back: 75% where doctor says total: B. Cardwell ---- 212
Back: 80% on reduction from total: I. Lamberts ---- 15
Back: 80% on settlement: W. Carter ---- 142
Back: 80% increased to total: E. Coons ---- 243
Back: 90% for moderately severe condition: V. Hamilton ---- 278
Back: 100% by stipulation: M. Terry ---- 202

PERMANENT PARTIAL DISABILITY, cont.

(3) Fingers

Vol. 1

Fingers: Various for punchpress to hand: W. James ---------- 14
Finger: Loss of grip computed in terms of thumb loss: B. Nelson ---------- 20
Finger: None for numbness, soreness, and loss of strength: C. Miller ---------- 21
Finger: Disability not extended to forearm: H. Alexander ---------- 28
Fingers: Various to machinist: V. DeVaul ---------- 86
Fingers: 15% loss to each of four: A. Hargis ---------- 151
Fingers: Various awards for lacerations: F. Butler ---------- 166

Vol. 2

Fingers: None because immobility unreasonable: G. Buscumb ---------- 42
Fingers: None for crushing of finger tips: D. Roberts ---------- 19
Fingers: Award affirmed where damaging movies: R. Puckett ---------- 162
Fingers: Various for mangled hand: J. Smith ---------- 154
Finger: 60% determination not expanded to "hand" or forearm: D. Smith ---------- 97
Fingers: Substantial after table saw accident: R. Kolb ---------- 23

Vol. 3

Fingers: Multiple injuries: D. Grudle ---------- 50
Fingers: Multiple injuries: K. Newlan ---------- 96
Fingers: Various for crushed hand: J. Sutton ---------- 248

Vol. 4

Fingers: Various for mashed hands: O. Edwards ---------- 5
Fingers: Various after sawed off: H. Galland ---------- 181
Fingers: Award confused: D. Rose ---------- 226
Finger: 75% for cut: B. Rogers ---------- 257
Fingers: Various: A. Moore ---------- 267
Thumb: 18 degrees only for partial amputation: S. Tisch ---------- 80
Thumb: Various after partial amputation of thumb: A. Ping ---------- 176

Vol. 5

Thumb: 10% for pinching: K. Ford ---------- 41
Finger: 10% left ring finger for crushing where other matters also: L. Banks 123
Fingers: 28° for electric shock: T. Lund ---------- 176
Fingers: 90° for hand: R. Gilmer ---------- 206
Fingers: Various: S. Morris ---------- 164
Fingers: Various, rancher: E. Sheehy ---------- 270

Vol. 6

Fingers: 3° and 5° for electrical burns: L. Boyce ---------- 169
Fingers: 10° where can return to work: D. Maldonado ---------- 185
Fingers: 10% both hands for dermatitis under occupational disease law:
C. Moore ---------- 134

(3) Fingers, cont. Vol. 6, cont.

Finger: Depuytren's contracture not supported medically: T. Countess ---- 38
Fingers: Various for bean cutter accident: K. Behrens ---- 300

Vol. 7

12° and 2° for dislocations: J. Buol ---- 32
15° and no award for loss of opposition: L. Wynandts ---- 168
17° and 5°: L. Belding ---- 206
Various but no award for loss of opposition: M. Wiedeman ---- 168
Various for saw accident: H. Lovell ---- 210
Various for saw accident: D. Meeks ---- 215
Various: F. Dexter ---- 238

Vol. 8

Thumb: 2° where claim total disability: J. Brennan ---- 69
15° to papermaker: J. Patching ---- 34
Finger & Thumb: 21° & 12° after settlement: R. Brown ---- 217
Various: J. Flippen ---- 239

Vol. 10

Fingers: Various affirmed: R. McKenzie ---- 173
Fingers: Various award for sae injury: J. Brown ---- 32
Fingers: 12° for index finger: J. Smith ---- 56
Fingers: 60% index and 10% thumb affirmed: D. Hoover ---- 130

Vol. 11

Finger: Various to choker setter: J. Pettyjohn ---- 13

Vol. 12

Finger: 1° for contusion: W. Shrock ---- 125
Finger: 10° to index finger: R. Brewer ---- 1

Vol. 13

Fingers: Various affirmed: P. Berg ---- 121

Vol. 14

Fingers: Various: O. Singer ---- 138
Thumb: 10% for puncture: J. Maldonado ---- 216

PERMANENT PARTIAL DISABILITY, cont.

(4) Foot

Vol. 1

Foot: None for fracture: E. Mosley ---- 168
Foot: 5% from logging accident: C. Zwahlen ---- 149
Foot: 10% for sprain and contusion: E. Bradley ---- 63
Foot: 10% for sprain: M. Schaefer ---- 99
Foot: 10% for fracture: E. Stephens ---- 39
Foot: 15% to longshoreman for pain after fracture: D. Cole ---- 61
Foot: 15% loss use for back strain: R. Smith ---- 106
Foot: 20% for fractured metatarsals and limp: E. Stricker ---- 95
Foot: 20% determination affirmed for ankle fracture: J. Walker ---- 153
Foot: 30% for lost motion: W. Bricker ---- 116
Foot: 45% after ankle fracture to logger: R. Spencer ---- 60
Foot: 50% for fracture: T. Ayers ---- 30

Vol. 2

Foot: None for nominal injury.: D. Viles ---- 183
Foot: 5% for contusion of the toes: J. Francis ---- 167
Foot: 10% determination affirmed for toe fractures: E. Misterek ---- 36
Foot: 20% allowed: M. Buck ---- 176
Foot: 20% after fracture where limp: H. Gullixson ---- 129
Foot: 25% after struck by cups and saucers: R. Joy ---- 189
Foot: 25% to logger after fracture where can still log: F. Tonkin ---- 128
Foot: 30% after amputation of great toe : F. Stark ---- 86
Foot: 30% after sprain with complications: C. Acheson ---- 70
Foot: 35% for ankle injury which causes limp and swelling: J. Mofford ---- 120
Foot: 35% determination for crushed ankle: E. McConnell ---- 46
Foot: 40% where 4 toes amputated and vasomotor instability: V. Essy ---- 38
Foot: 100% for amputation below the knee: F. Robins ---- 37

Vol. 3

Ankle sprain on arthritis: B. Roberson ---- 107
Foot: 15% after ankle fracture: H. Meeds ---- 15
Foot: 35% after bad fracture: W. Anderson ---- 183
Foot: 50% for fracture: R. Mattson ---- 4
Foot: 60% after severe laceration: R. Grocott ---- 10
Foot: 30 degrees for sore foot: R. Harper ---- 279
Foot: 60.75 degrees where can return to work: R. Dickey ---- 260
Feet: 87.75 degrees and 20.25 degrees where crushed: J. Moore ---- 258

Vol. 4

Ankle: 7 degrees after fracture: P. Pericic ---- 213
Foot: 13.5 degrees for crushed foot: J. Hart ---- 17
Ankle: 13.5 degrees for fracture: M. Taylor ---- 178
Foot: 27 degrees for fracture: L. Hartley ---- 250
Foot: 40.5 degrees where prior polio: J. Cox ---- 10
Foot: 55 degrees for fracture in belabored opinion: L. Hilliard ---- 285
Foot: 61 degrees for broken toe: F. Wright ---- 289

(4) Foot, cont.

Vol. 5

Foot defined: J. Manke ---------- 129
Ankle: 7° for fracture: W. Leslie ---------- 55
Toes: 27° for four broken: C. Methvin ---------- 90
Foot: 46° for broken leg: L. Poe ---------- 212
Foot: 35% loss to coach: J. Lutz ---------- 224

Vol. 6

Foot: 34° for foot injury: R. Hembree ---------- 82
Foot: 40° for fractured heel: I. Warthen ---------- 72
Foot: 67.5° for fracture of oscalsis: D. Purdy ---------- 226
Foot: 68° for broken leg: R. Walker ---------- 224
Foot: 129° to logger where can just walk; earnings factor considered: H. Uht 289

Vol. 7

14° for broken leg: L. Zehr ---------- 268
20° consistent for being slowed down a little: G. Rees ---------- 25
25° for fracture which required bone graft: R. Herker ---------- 131
27° from 40° for broken ankle on logger who can still log: P. Barrietua ---- 276
27° after reduction: W. Stoner ---------- 57
Heel: 34° for moderate disability: R. Sumner ---------- 188
38° where gout: R. Perry ---------- 248
Heels: 54° & 20.25° for fractures: R. Howard ---------- 241
Ankle: 60° for fracture: H. Marker ---------- 75
135° for amputation: E. Froescher ---------- 61
40% where refuse surgery: L. Rosano ---------- 148
70% foot from 90% leg: J. Mayer ---------- 278

Vol. 8

None because only toes injured: M. Cox ---------- 95
14° where make back complaints: S. Brown ---------- 63
14° for minor discomfort: J. Rawson ---------- 244
15° where can still bowl 200: Z. McVay ---------- 79
34° where prior injury: D. Rayfield ---------- 26
34° affirmed: G. Leaton ---------- 219
52° after reduction of 1°: R. Tyler ---------- 227
Feet: 68° & 54° after rock slide: S. Johns ---------- 189

Vol. 9

Foot: 16° affirmed over employer appeal: M. Godfrey ---------- 160
Foot: 27° for broken ankle: R. Cox ---------- 17
Foot: 34° for smashed toes: R. Nydegger ---------- 114
Foot: 60% not alter on own motion for 1957 broken ankle: C. Frydenall ---- 137
Foot: 60.75° for foot injury: S. McCafferty ---------- 109
Foot: 81° for broken foot: E. Benner ---------- 55
Foot: 135° and 74° affirmed: F. Whitton ---------- 258

PERMANENT PARTIAL DISABILITY, cont.

(4) Foot, cont.

Vol. 10

Foot: 27° after fracture: L. McElhinney ---------- 13
Foot and Back: 40.5° R. Foot, 20.25° L. Foot, 16° back: R. Donkers ---- 47

Vol. 11

Foot: 81° reversed on cross appeal: V. McKinnon ---------- 236

Vol. 12

Foot: 22.4° for mild limp: K. Shanafelt ---------- 265
Foot: 40.5° for fracture: E. Myers ---------- 243
Foot: 135° for amputation on own motion: G. Holsheimer ---------- 75

Vol. 13

Foot: 30% affirmed for fracture: E. Stangl ---------- 77
Feet: 40% and 80% for fractures: D. Thompson ---------- 96
Foot: 34° for pain: T. Story ---------- 153
Foot: 60° where AMA guides not followed: G. Nelson ---------- 65

Vol. 14

Foot: 15% for ankle: M. Menge ---------- 105
Foot: 35° affirmed: J. Hurst ---------- 68
Foot: 35% for fracture: E. Reed ---------- 96
Foot: 45% for fracture: B. Tait ---------- 242
Feet: 30% and 15% for flat feet: M. Larson ---------- 64

Vol. 15

Foot: 10% for smashed toes: R. Thomas ---------- 59

Vol. 17

Foot: 25% for broken ankle: M. Hartman ---------- 276
Foot: 40% where must avoid ladders: P. Hoffart ---------- 219

Vol. 18

Foot: 50% reversed and reduced to 25%: J. Walsworth ---------- 21

Vol. 19

Foot: various to painter: B. Rumsby ---------- 146
Foot: 20% affirmed: L. Roach ---------- 135
Foot: 30% after being run over by stacker: R. Carlson ---------- 178

PERMANENT PARTIAL DISABILITY, cont.

(4) Foot, cont.

Vol. 20

Foot: 15% for cut: V. MacDougall ---------- 14
Foot: 15% for ankle fracture: W. Pugh ---------- 223
Foot: 30% where increase reversed: D. Kane ---------- 39
Foot: 35% where will need fusion: G. Van Uitert ---------- 43
Foot: 40% for fracture: R. Carter ---------- 263
Foot: 50% where must wear special shoes: J. Duffy ---------- 6

(5) Forearm

Vol. 1

Forearm: Award must be based on injury at or above wrist joint: W. Serles-- 50
Forearm: None for laceration: S. Lautenschlager ---------- 170
Forearm: 10% for sore wrist: V. Cochran ---------- 32
Forearm: 10% for fracture: T. Guy ---------- 35
Forearm: 15% for sprained wrist: L. Bogard ---------- 81
Forearm: 50% for chain saw cut to wrist: S. Dupuis ---------- 13
Forearm: 90% for degloved skin and distal phalanges: J. Cumpston ---------- 135

Vol. 2

Forearm: None for contusion and Dupuytren's contracture: J. Rickman ---------- 89
Forearm: 10% affirmed after wrist fracture with subjective complaints: G. Raines ---------- 85
Forearm: 15% after wrist fracture: F. Thomas ---------- 21
Forearm: 17% for burns: K. Popps ---------- 26
Forearm: 20% after chain saw cut: R. Bates ---------- 65
Forearm: 20% for thumb and wrist injury: H. Crooks ---------- 91
Forearm: 25% after fracture: C. Graves ---------- 160

Vol. 3

Forearm: 35% for finger injury: C. McEntire ---------- 36
Forearm: 60% for mangled hand: G. Jackson ---------- 80
Forearms: 15 degrees and 7.5 degrees for Dupuytren's contracture: J. Wilds 241
Forearm: 24.2 degrees for wrist fracture: wage considerations limited to unscheduled disability: B. Canady ---------- 236

Vol. 4

Forearm: 18.15 degrees after reduction: J. Johnson ---------- 168
Forearm: 23 degrees for finger injury: B. Hamm ---------- 289
Forearm: 25 degrees for weakness: C. Smallman ---------- 215
Hand: 75 degrees for lacerations: A. Hanson ---------- 39

Vol. 5

Forearm: Erroneous opinion corrected: G. Walstead ---------- 244

PERMANENT PARTIAL DISABILITY, cont.

(5) Forearm, cont. Vol. 5, cont.

Hand injury reduced to 6°: R. Williamson ---------- 20
Hand: 30° where crushed: C. Lasley ---------- 53
Hand: 109° of maximum of 121° for crushed hand: O. Baker ---------- 63
Hand: 113° for saw cut: G. Walstead ---------- 220

Vol. 6

Forearm: 15° for each for dermatitis: J. Grimm ---------- 150
Forearm: 15° for burns: R. Springstead ---------- 153
Forearm: 23°, 16° and 25° where earnings loss allowed: M. Rogers ---------- 64
Forearm: 35° where consider earnings capacity: M. Hardison ---------- 31
Forearm: 143° for mangled hand: E. Hulme ---------- 263
Forearm: 50% & 25% plus 192° for unscheduled disability: O. Davis ---------- 48

Vol. 7

Hand: None for scar: N. King ---------- 201
Forearm: 15° after fracture: D. Ricketts ---------- 32
Wrist: 15° for dislocation: G. Forney ---------- 73
Elbow: 20° where 2 fingers affected: K. Foxon ---------- 8
Forearm: 23° to neurotic: V. Shaver ---------- 156
Wrist fracture: 50° where won't heal: D. Engle ---------- 66
Forearm: Psychological residuals settled for $3,800: E. McGuire ---------- 135

Vol. 8

5% for Tenosynovities: M. Johnson ---------- 145
18° for occasional pain and some numbness: E. Yerkes ---------- 55
23° affirmed: M. Cole ---------- 220
30° affirmed: H. Hopkins ---------- 211
37° for pain and fatigue: D. McAllister ---------- 158
Forearm & Brain: 68° & 112° where brain surgery needed to relieve wrist pain: D. Brown ---------- 67
Wrist: 75° for fracture: M. Bilyeu ---------- 105
75° after reconsideration on earnings loss: T. Horn ---------- 126
84° for tenosynovitis: V. Brown ---------- 174

Vol. 9

Forearm: Award affirmed: R. Standley ---------- 163
Forearm: 38° affirmed: H. Habada ---------- 169
Forearm: 53° affirmed: C. Mahoney ---------- 281

Vol. 10

Forearm: 30° for wrist: M. Weir ---------- 40
Forearm: 37.5° for smashed hand: V. Johnson ---------- 4

PERMANENT PARTIAL DISABILITY, cont.

(5) Forearm, cont.

Vol. 11

Forearm: No more after 4th closure on arthritic progression: A. Norton---- 1
Forearm: 15° for burns: W. Fulbright ---------- 56
Forearm: 15° where want total: U. Phillips ---------- 81
Forearm: 30° affirmed to 69 year old: F. Holmes ---------- 55

Vol. 12

Forearm: 15° for fracture: G. Wolanski ---------- 33
Forearm, Leg, Back, Head & Shoulder: Various, but not total: J. Bowling - 246
Hand: 22.5° for saw injury: F. Kinney ---------- 241
Hand: 30° affirmed: D. Hanneman ---------- 154
Hand: 45° for puncture wound: P. Ashmore ---------- 170

Vol. 13

Forearm: 40% unchanged on aggravation: C. Hartley ---------- 229
Forearm: 45° for cut: E. Casciato ---------- 16
Forearm: 112.5° for each: L. Vincent ---------- 82
Hand: none for no loss of grip: H. Schwanke ---------- 40
Hand: 50% for crushing: D. Albert ---------- 43
Hand: 75° on stipulation: E. Fercho ---------- 284

Vol. 14

Forearm: 5% allowed: D. Anderson ---------- 266
Forearm: 15% and 20% for carpal tunnel syndrome: R. Fivecoats---------- 166
Forearm: 20% on own motion: I. Egan ---------- 150
Forearms: 30% and 10% after fall: A. Agalzoff ---------- 195
Hand: 15% for impaired grip: L. MacAuley ---------- 136
Hand: 28% for amputation: F. Wilcox ---------- 48
Hand: 40% for mess: D. Tacker ---------- 94
Hand: 60% after loss of four fingers: D. Volk ---------- 291
Hand: None affirmed: L. Iazeolla ---------- 295

Vol. 17

Forearm: awards reduced: P. Reyes ---------- 50
Forearm: 30% for wrist problem: T. Porter ---------- 282
Forearm: 65% for broken wrist: C. Plonski ---------- 260

Vol. 18

Forearm: Various for wrist problems: H. Weaver ---------- 198
Forearm: 10% affirmed for finger injuries: J. Franklin ---------- 64
Forearm: 10% where refuse joint injection: C. Butterfield ---------- 148
Forearm: 60% affirmed for wrist: J. Pledger ---------- 209

(5) Forearm, cont.

Vol. 19

Forearm: 100% and claimant appeals and wins: V. Wolford ---------- 134

Vol. 20

Forearm: 5% on reduction: I. Smith ---------- 267
Forearm: 15% for each on reduction: R. McFarren ---------- 100
Forearm: 20% for fracture: M. Howard ---------- 175
Forearm: 20% for broken wrist: W. Hayes ---------- 256

(6) Leg

Vol. 1

Leg: Award restricted to schedule of benefits even though effect of injury is to render workman unemployable: B. Scoggins ---------- 12
Leg: 10% determination affirmed for fracture but prior Washington award not deducted: L. Lang ---------- 167
Leg: 20% for reinjured knee: T. Hinrichs ---------- 172
Legs: 25% and 15% for burns: J. Freeman ---------- 169
Leg: 25% for weakness: A. Schanno ---------- 74
Leg: 25% for knee fracture: L. Hays ---------- 165
Leg: 25% for knee injury: G. Richards ---------- 176
Leg: 30% for fracture and knee instability: J. Lowell ---------- 141
Leg: 50% for badly injured knee: R. Moultrie ---------- 180
Leg: 65% to old man with severe laceration: T. Trent ---------- 131
Leg: 75% where crushed by cat: W. Jenkins ---------- 125
Leg: 90% award reduced where claimant requested review: R. Loudenbeck ---------- 178

Vol. 2

Leg: 5% determination affirmed where minimal knee injury: A. Cole ---------- 115
Legs: 5% each after grease burns with good recovery: L. Johnson ---------- 116
Leg: 5% for minor injury to knee: W. Hallas ---------- 53
Leg: 10% for slow walk: I. Young ---------- 145
Leg: 15% for knee bruise affirmed: E. McManus ---------- 186
Leg: 15% affirmed for knee disability after fracture: W. Noah ---------- 121
Leg: 15% affirmed for contusions and abrasions: R. Hall ---------- 84
Leg: 15% affirmed for knee injury: T. Taylor ---------- 70
Leg: 15% for fracture with residual "bow leg": S. Knight ---------- 27
Leg: 20% for knee injury: F. Canup ---------- 32
Leg: 20% for contusion of knee: M. Ward ---------- 43
Leg: 25% for joint mice in knee: L. Effle ---------- 165
Leg: 25% and 10% after logging accident: W. Busby ---------- 46
Leg: 30% for knee injury: R. Persinger ---------- 53
Leg: 35% for removal of kneecap: M. Dollarhide ---------- 116
Legs: 40% and 25% for heel fractures: C. Craghead ---------- 33
Leg: 45% affirmed after broken knee: J. Robertson ---------- 181
Legs: 50% of each leg for trauma to one knee: W. Donahue ---------- 6
Leg: 75% for knee which would be better off fused: S. Mansfield ---------- 9

(6) Leg, cont.

Vol. 3

Knees: None for bumps: H. Beer ---- 215
Knee: None for puncture wound: W. Kawecki ---- 6
Leg: None for knee where refused surgery: G. Walker ---- 249
Leg: Determination award set aside: J. Glubrecht ---- 277
Leg: None where 90% prior awards: H. Needham ---- 26
Leg: 5% for sprained knee: R. Nelson ---- 42
Leg: 5% for bruise to groin: C. Docken ---- 3
Leg: 15% where osteomyelitis: J. Crume ---- 57
Leg: 15% for knee injury: H. Hull ---- 49
Leg: 22.5 degrees allowed: C. Hicks ---- 165
Leg: 38.5 degrees where can still walk: D. Bullock ---- 252
Legs: 38.5 degrees and 27.5 degrees after fractures: G. Haun ---- 209
Leg: 44 degrees where limp and squatting problem: J. Crowder ---- 198

Vol. 4

Knee: None where obese: T. Fried ---- 306
Knee: 15 degrees for torn ligaments: R. Dooley ---- 9
Knee: 23 degrees after reduction: S. Withers ---- 224
Knee: 44 degrees after fall: R. Barber ---- 92
Knee: 90 degrees after chain saw cut: D. Underhill ---- 256
Leg and foot: 17 and 14 degrees for 2 injuries to one leg: E. Miller ---- 284
Leg: 22.5 degrees after surgery: L. Voelkers ---- 160
Leg: 27 degrees after fracture: M. Thrasher ---- 215
Leg: 55 degrees for fracture: L. Sauvola ---- 274
Leg: 55 degrees after bruise impaired circulation: M. Alft ---- 116
Leg: 60 degrees for fracture to 74-year-old man: I. Billings ---- 241
Legs and back: Various after crushed by log: A. Wilson ---- 179

Vol. 5

Leg: None to obese woman with subjective complaints: M. Gregoroff ---- 114
Leg: Order amended to limit compensation to foot: F. Osterhoudt ---- 169
Leg: 7.5° after broken toe: F. Osterhoudt ---- 154
Leg: 8° for subjective complaints: A. Garris ---- 217
Knee: 15° to welfare woman: G. Miller ---- 144
Legs: 35° for each leg where dissent would give total disability: D. Beedle 133
Leg and Back: 38° and 32° after fall and fractures: G. Murphy ---- 185
Knee: 45° after glass cut: O. Rogers ---- 44
Leg: 45° award remanded for further evidence: S. Gilmer ---- 101
Leg and forearm: 45° and 45° after fractures: E. Williams ---- 173
Leg and other: 60° and 32°: G. Tiffany ---- 86
Leg: 60° for knee: J. Duffy ---- 177
Leg: 68° for lesion: J. Reese ---- 205
Leg: 68° where earnings loss considered: G. Costa ---- 251
Leg: 75° after reduction: H. Burgeson ---- 117
Leg: 90° and 15° for different injuries: E. Miller ---- 238

(6) Leg, cont.

Vol. 6

Leg: Nothing for knee: L. Lesselyoung ---- 234
Leg: 22.5° by stipulation: A. Amacher ---- 59
Leg: 23° for knee: M. Riechie ---- 164
Knee: 45° where surgery: W. Langston ---- 37
Leg: 50° for thrombophelibitis: V. Phillips ---- 214
Leg: 50° for broken knee where now unstable: L. Holm ---- 85
Leg: 55° reaffirmed after remand: L. Sauvola ---- 255
Leg: 76° where utilize earnings factor: D. McNamara ---- 32
Leg: 90° after stipulated reduction: C. Buchanan ---- 193
Hip: 101.25° for fracture where consider earning capacity: I. Pollack ---- 45
Leg: 113° for knee injury to left leg where previously lost right leg:
I. Redman ---- 83

Vol. 7

Knee: None: P. Kurt ---- 132
5° by stipulation: B. Pearce ---- 89
Knee: 8° for mild problem: J. Anderson ---- 117
Leg & Back: 15° and 29° where won't take rehabilitation: A. O Bannon ---- 42
Knee: 15° for pain: R. Piefer ---- 249
Knee: 15° after surgery: C. Petrie ---- 244
23° for earning capacity deleted: E. Ishmael ---- 198
Legs: 25° and 33° after run over by lumber stacker: N. Ellison ---- 9
30° where prior injury: R. Rundell ---- 140
Knee: 30° where claim terrific pain: R. Chandler ---- 214
Knee: 35° for some soreness: C. Bauder ---- 54
38° where leg works okay: G. Cox ---- 221
40° because can't consider earning capacity: G. Gutierrez ---- 223
Knee: 34° for instability: G. Hyler ---- 175
76° to logger: E. Ishmael ---- 186
Knee: 118° award modified and settled: F. Philebar ---- 66
Knee: Determination reduced on own motion: J. Hinchy ---- 95
75% after remand from Court of Appeals: S. Mansfield ---- 239

Vol. 8

Affirmed: J. Hunt ---- 223
Knee: 23° where prior knee problems: D. Hartman ---- 85
23° where settlement: F. Meade ---- 63
30° where want total: E. Jones ---- 222
30° to logger: H. Lermusiaux ---- 229
30° for moderate injury: M. Enos ---- 250
Leg & Arm: 30° & 29° affirmed: H. Good ---- 258
40° on settlement: W. Allen ---- 150
Leg and Back: 44° & 45° to logger after hit by widow maker: E. Johnson ---- 2
45° remanded for more evidence: W. Powell ---- 175
Leg & Back: 50° & 80° after fall: E. Baron ---- 129
Legs: 81° & 38°: R. Pursel ---- 230
90° for ruptured muscle: C. Ikard ---- 167

(6) Leg, cont.

Vol. 9

Leg: Affirmed: W. Laflash ---- 152
Leg: 15° where want total disability: D. Tallman ---- 73
Leg: 16° in worthless opinion: R. Ward ---- 61
Leg: 30° for knee: B. Webb ---- 76
Leg: 45° for knee: R. Malget ---- 19
Leg: 46° for knee: P. Shine ---- 234
Leg: 53° described as moderate: P. Retherford ---- 131
Leg: 60° increase affirmed: L. Marshall ---- 29
Leg: 60° where can do housework: D. Donegan ---- 100
Leg: 75° affirmed: G. Lowery ---- 173
Leg: 83° after break: D. Bohn ---- 53
Leg: 85% increased to total disability: D. Eastburn ---- 86
Leg: 94° for fracture: C. Collins ---- 264
Leg: 112° for knee: J. Bogden ---- 43
Leg: 127.5° to each on settlement: M. King ---- 59
Leg: 135° for very bad knee: C. Winegar ---- 20

Vol. 10

Leg: 15° for strain: V. Dienes ---- 65
Leg: 15° where refuse medical treatment for knee: C. Bogard ---- 284
Leg: 15° after reversing award for psychological disfunction: C. Salisbury ---- 174
Legs: 30° and 8° after being shot: D. Johnson ---- 180
Leg: 30° for fracture: D. Danielson ---- 273
Leg: 30° for knee injury: R. Wright ---- 287
Leg: 37.5° for bad knee: K. Bishop ---- 46
Leg: 38° for broken leg where prior injury also: R. Shinkle ---- 150
Leg: 45° for knee: J. Jones ---- 21
Legs: 112° and 15° not total: F. Rencken ---- 121
Leg: 120° where want travel expenses to hearing: G. Glenn ---- 22
Leg and Arm: 35% and 15% for fractures: H. Ewin ---- 152

Vol. 11

Legs: Affirmed to log truck driver after smashed by log: R. Foster ---- 50
Leg: Award affirmed: E. Ishmael ---- 63
Knee: 15° affirmed: A. Israel ---- 172
Leg: 30° for knee: R. Unterseher ---- 221
Leg: 35.2° on 1941 injury: J. Croghan ---- 263
Leg: 37.5° for bad fracture: R. Lundquist ---- 140
Leg: 37.5° affirmed: R. Peterson ---- 179
Leg: 45° for knee: D. Stevens ---- 52
Leg: 45° for knee brace: J. Carter ---- 177
Leg: 75° for knee: T. Dillingham ---- 279
Leg: 80° after increase: M. Floyd ---- 46
Leg: 81° for crushed foot: F. Miles ---- 191

(6) Leg, cont.

Vol. 12

Leg: None where nothing wrong: G. Johnson ---- 71
Leg: 7.5° where knee is recovered: E. Spani ---- 140
Leg: 14.5° increase: M. Ross ---- 208
Leg: 15° for knee to rodeo rider: W. Sylvester ---- 64
Leg: 30° for broken kneecap: R. Raines ---- 116
Leg: 33° on aggravation: A. Denton ---- 17
Leg: 37.5° for torn knee ligament: J. Bishop ---- 176
Leg: 38°where too fat to operate: S. Richards ---- 234
Leg: 48° for back after broken leg: Z. Woody ---- 14
Legs: 52.5° affirmed for each: G. Alldritt ---- 217
Leg: 52.5° for fracture: S. Banat ---- 257
Leg: 60° where police officer shot: J. Frazier ---- 180
Leg: 60° to smashed leg: J. Ellison ---- 224
Legs: 5° for each: R. Rafferty ---- 49
Leg: 127.5° for fused knee: O. Middleton ---- 244
Leg: Fracture of hip is scheduled: N. Crane ---- 98

Vol. 13

Leg: no more on second determination: M. Colvin ---- 49
Legs: 10% for burns: R. Maxfield ---- 296
Leg: 15% affirmed: B. Rattay ---- 279
Leg: 15% after knee surgery: J. Nielsen ---- 283
Leg: 20% for knee: T. Wheeler ---- 41
Leg: 20% for knee: G. Christian ---- 152
Leg: 25% for torn cartilage: F. Redding ---- 95
Leg: 25% for knee: L. Robinson ---- 164
Leg: 25% for knee: M. Thompson ---- 194
Leg: 30% to knee: O. Morefield ---- 292
Leg: 33% for chain saw to knww: A. Collier ---- 139
Leg: 35% for knee: C. Shaw ---- 103
Leg: 40% for torn knee: D. Williams ---- 262
Leg & Back: 40% and 20% affirmed: C. Brisbin ---- 288
Leg: 45% for knee: R. Schwab ---- 179
Leg & Back: 60% and 20% for plastic hip: L. Hall ---- 90
Leg: 65% left leg: R. Murphy ---- 63
Leg: 90% for knee: A. Hammond ---- 247
Leg: 53° to logger: D. Holcomb ---- 297

Vol. 14

Knee: 10% after surgery: J. Stearns ---- 227
Knee: 30% for tear: F. Cook ---- 136
Knee: 40% to professional skier who must retire: B. McEneny ---- 168
Leg: 20% for truck wreck: R. Cole ---- 104
Leg: 20% for knee: D. Withrow ---- 92
Leg: 20% for knee: K. Sloan ---- 49
Leg: 20% for twisted knee: D. Shannon ---- 31

(6) Leg, cont. Vol. 14, cont.

Leg: 25% for weak knee: J. Cole ---- 171
Leg: 25% for fracture: F. Davila ---- 106
Leg: 40% on increase: J. Byrd ---- 14
Leg: 60% affirmed: F. Cook ---- 295

Vol. 15

Leg: 15% where can't lay carpet: F. O'Neil ---- 59
Leg: 15% allowed for sore knee: C. Letts ---- 223
Knee: 15% for "minimal" problem: M. Hoffman ---- 237
Leg: 20% knee award reversed: A. Heck ---- 147
Leg: 30% where refuse knee surgery: H. Swain ---- 1
Leg: 30% affirmed: L. Roberts ---- 304
Leg: 45% for fracture: C. Lucas ---- 14
Leg: 50% award increased to unscheduled award also: G. Jones ---- 256
Leg: 55% to logger: J. Sichting ---- 287
Leg: 80% each leg: D. Farley ---- 8

Vol. 16

Leg: 10% affirmed: G. Fry ---- 304
Leg: 15% for logger's broken leg: T. Hadley ---- 220
Leg: 20% affirmed: J. Biasi ---- 204
Leg: 25% affirmed: W. McMichael ---- 109
Leg: 40% for fall: R. Harper, Jr. ---- 162
Leg: 45% on increase: T. Ledwith ---- 245
Leg: 50% to logger for two successive knee injuries: N. Shanklin ---- 213
Leg: 80% for messed up foot: G. Finney ---- 247

Vol. 17

Leg: 15% for knee: K. Virtanen ---- 258
Leg: 15% where want total: G. Kosmos ---- 162
Leg: 20% affirmed for knee which never recovered: T. Payne ---- 37
Leg: 20% for knee: D. McClean ---- 175
Leg and Back: 25% each to ferrier: N. Zeek ---- 41
Leg: 30% after fracture: R. Welch ---- 13
Leg: 30% unscheduled for pulmonary emboli: W. Murphy ---- 2
Leg: 35% on reduction from 65%: P. Nemeyer ---- 110
Leg: 40% affirmed where want total: A. Matherly ---- 154
Leg: 40% on stipulation: T. Payne ---- 104
Leg: 70% and 20% affirmed: O. Lyons ---- 67
Legs: 100% and 65% affirmed: R. Lewis ---- 5

Vol. 18

Leg: 10% on reduction where claimant appealed: R. Burns ---- 200
Leg: 15% for knee: R. Vessela ---- 105
Leg: 15% after cut: L. Fraser ---- 136
Leg: 20% for hip: I. Sawyer ---- 267
Leg: 25% and 15% for knees: C. Rash ---- 186

PERMANENT PARTIAL DISABILITY, cont.

(6) Leg, cont. Vol. 18, cont.

Leg: 35% for knee: P. Glaser ---------- 35
Leg: 50% for weak knee: R. Hoffstot ---------- 9
Leg: 75% for knee: O. Flowers ---------- 293

Vol. 19

Leg: none after varicose veins stripped: F. Rush ---------- 117
Leg: 10% for slightly affected leg: L. Ralph ---------- 230
Leg: 10% where can't run or walk over three miles: C. Steinert ---------- 99
Leg: 20% after foot injury: L. Pinkley ---------- 98
Leg: 35% for mild to moderate knee: R. Parks ---------- 207
Leg: 50% for knee: J. Ranel ---------- 43

Vol. 20

Leg: Hip repair is unscheduled: G. Davidson ---------- 234
Leg: none for psychiatric problems: D. Barber ---------- 34
Leg: 20% for fracture: A. Scott ---------- 156
Leg: 35% and 45% where back: D. Michel ---------- 151
Leg: 60% for phlebitis: W. Rollins ---------- 289

(7) Neck & Head

Vol. 1

Cervical aggravation manifested primarily in arm: V. Birkhans ---------- 99
Concussion and skull fracture: Limited award because most symptoms were preexisting: S. Fullerton ---------- 180
Post concussion syndrome; 15%: O. Reames ---------- 92
Whiplash, permanent impairment not proven: R. Lunsford ---------- 118
Neck; 5% for blow to forehead: H. McClendon ---------- 117
Neck; 5% where large preexisting degenerative change: E. Johnson ---------- 149
Neck and Head; 10% to 69-year-old man: J. Holben ---------- 93
Neck and Shoulder: 10% for minimal injury: H. Shlim ---------- 91
Neck and Thoracic area: 15% to catskinner: R. Mott ---------- 74
Neck and Back: 15% where prior back awards: E. Hodgson ---------- 42
Neck: 45% after laminectomy: K. Wagner ---------- 161
Neck and Arm: 50% and 20% for broken neck: H. Shum ---------- 165
Neck: 60% for blow to head: J. Anderson ---------- 91
Neck: 60% to 63 year old millworker: V. Sommers ---------- 131

Vol. 2

Neck and Head: None where confusion and bizarre symptoms: D. Vallance 124
Neck and Head: None where disability not in excess of prior disability: J. Robinson ---------- 108
Head: Headache claim otherwise unsupported, insufficient: J. Gingles ---------- 74
Head: None for blow to chin: W. Staggs ---------- 19
Neck: 5% determination affirmed where refused myelogram: E. Jones ---------- 142
Neck: 5% determination affirmed: T. Derbyshire ---------- 81
Neck and arm: 10% and 5% where emotional problems: N. Firkus ---------- 126

PERMANENT PARTIAL DISABILITY, cont.

(7) Neck & Head, cont. Vol. 2, cont.

Neck: 15% where prior awards and difficulties: J. Frank ---------- 148
Neck and back: 15% award of hearing officer set aside: V. Kuhnhausen -- 134
Neck: 15% affirmed for strains and sprains: L. Palumbo ---------- 66
Neck: 15% for stiffness: L. Mersch ---------- 18
Neck and Head: 15% for amputation of the thumb: G. Schenck ---------- 16
Neck: 15% for whiplash: J. Eldridge ---------- 22
Neck: 20% determination affirmed: J. Koch ---------- 29
Neck: 25% after double fusion: R. Mann ---------- 88
Neck and Head: 25% for various complaints: C. Groseclose ---------- 113
Head and Neck: 40% after severe blow to head: J. White ---------- 128
Neck and Head: 75% for broken neck, 25% for arm: G. Coltrane ---------- 50

Vol. 3

Cyst from whiplash: 19.2 degrees: G. Aten ---------- 157
Head: None for trauma to hard hat: R. McCulloch ---------- 3
Head: None for trauma: W. Bowser ---------- 1
Head and shoulder: None for two injuries: W. Glover ---------- 214
Head: 15% for headache: C. Jones ---------- 67
Neck: None for strain while pulling on planer chain: G. Lacewell ---------- 57
Neck: None for whiplash: A. Ayers ---------- 242
Neck: None--any disability attributed to overweight: J. Rodgers ---------- 211
Neck: 15 degrees after strain: R. Dloughy ---------- 20, 25
Neck and Head: 16 degrees for strain: J. Russell ---------- 14
Neck and Shoulder: 19.2 degrees for pain: R. Northey ---------- 148
Neck and Arm: 57.6 degrees and 20 degrees after neck fusion: C. Stinson - 212
Neck and Arm: 20% and 20% where lifting limited after cervical disc problem: J. Pingo ---------- 24

Vol. 4

Neck: None where many prior awards: R. Van Damme ---------- 4
Neck: 16 degrees after fall: L. Langan ---------- 185
Neck and Shoulder: 29 degrees scheduled, 28.8 unscheduled after fall: P. Collins ---------- 1
Head, Neck and Arm: 16 degrees where symptoms mixed with unrelated coronary: R. Marvel ---------- 20
Head: Various after fractured skull and brain damage: W. Balmer ---------- 88

Vol. 5

Neck: None where prior problems: C. Taylor ---------- 57
Head: None where hit by log: R. Barber ---------- 158
Neck: 16° for minimal disability: R. Holifield ---------- 269
Neck: 19° where can go back to work: G. Woodley ---------- 189
Neck and Shoulder: 32° where can carry bricks: G. McVicker ---------- 121
Neck: 48° reinstated where can go back to work: A. Evans ---------- 109
Neck: 96° to logger where confusing chain of accidents: R. Gosser ---------- 59

PERMANENT PARTIAL DISABILITY, cont.

(7) Neck & Head, cont.

Vol. 6

Neck and Head: 32° affirmed where sprain and concussion: N. Biggers ---- 68
Neck and Shoulder: 48° after fall: D. Pollard ---------- 35
Neck: 96° to plumber: N. Worley ---------- 178
Neck: 192° where two previous fusions: N. Roth ---------- 136

Vol. 7

Neck: 32° where motivational problems: V. Richardson ---------- 183
Neck & Shoulder: 38° liberal: B. Carter ---------- 115
Neck: 48° after neck surgery: F. Buford ---------- 52
Neck: 48° where chronic alcoholism: E. Cantrall ---------- 280
Neck: 64° for blow to head: R. Puckett ---------- 50
Neck: 80° to waitress: M. Combs ---------- 217
Neck & Shoulders: 192° reduced to 96° over earnings capacity: E. Davis - 139
Neck: Increased to 192° by stipulation: L. Pepperling ---------- 62
Neck & Shoulder: 35% right arm: 25% unscheduled and 70% loss earnings:
H. Wilson ---------- 4

Vol. 8

Neck & Shoulder: None where no medical evidence: R. Maxfield ---------- 161
None for 1967 strain: M. Gosser ---------- 115
19.2° for minor problems: M. Payne ---------- 90
20° for strain: W. Woods ---------- 117
Neck: 64° after simple concussion and sore neck: C. Pedigo ---------- 119
Neck: 112° where conflict of medical: K. McKenzie ---------- 251

Vol. 9

Head: None for concussion: H. Day ---------- 290
Neck: Nothing for sore neck: V. Inglis ---------- 12
Neck: 15% arm on 1966 injury: K. Stenger ---------- 225
Neck: 96° after laminectomy: R. Harral ---------- 239
Neck: 128° after laminectomy: O. Newlin ---------- 112

Vol. 10

Neck and Arm: 80° and 28.8° affirmed: M. Mehlhoff ---------- 175
Neck and Leg: 128° Neck and 15° Leg: P. Jordan ---------- 58
Neck: 128° after employer appeal for strain: B. Smith ---------- 194
Neck: 148° where no briefs: M. Petersen ---------- 165

Vol. 11

Neck and Head: By windshield wiper motor: P. Vernon ---------- 89
Neck: 32° affirmed: E. Surber ---------- 220
Neck and Head: Various increase of 53.5°: M. Arneson ---------- 11
Neck and Shoulder: 96° where Dr. Reinhart wants to treat more: A. Crouch 255
Neck: 128° where hit by widow maker: W. Williams ---------- 9

(7) Neck & Head, cont.

Vol. 12

Neck: 16° affirmed for minimal: D. Lewis ---------- 158
Neck and Shoulder: 16° affirmed where won't work: A. Trever ---------- 233
32° for blow by steel beam: N. Ross ---------- 6
Head: 48° for broken face: D. Blue ---------- 41
Neck: 48° affirmed: W. Teribury ---------- 179
Neck: 64° after reduction: S. Titus ---------- 74
Neck: 64° where want total: M. Chichester ---------- 142
Neck: 67.4° for neck fusion: B. Bliss ---------- 165
Neck: 240° affirmed on SAIF review where no briefs: M. Palodichuk ---------- 280

Vol. 13

Neck: 15% for minimal objective findings: A. Brown ---------- 163
Neck: 20% for fracture: W. Slane ---------- 260
Neck: 30% for no heavy manual labor: L. Johnson ---------- 189
Neck: 50% to nurse: P. Blakely ---------- 217
Neck: 50% after snag falls: A. Trivett ---------- 242
Neck: 19° where other injuries: R. Murphy ---------- 63
Headaches: 112° after concussion: W. Kluver ---------- 23

Vol. 14

Neck: 25% for strain: V. McMahon ---------- 145
Neck: 50% from total determination: E. Moe ---------- 181
Neck: 80% from 15%: E. Backman ---------- 184
Neck and Arm: 10% and 5% for fusion: T. Cheek ---------- 213

Vol. 15

Neck: 15% affirmed: A. Scouten ---------- 55
Neck: 30% affirmed for headache: P. Driver ---------- 83
Neck: 35% for fusion: R. Ingouf ---------- 265

Vol. 16

Back: 60% after fusion to trucker: J. O'Bryant ---------- 155
Neck: 10% affirmed: H. Fuller ---------- 54
Neck: 20% where want total: J. Belk ---------- 242

Vol. 17

Neck: none affirmed: J. Ballweber ---------- 248
Neck: 10% to stockbroker: E. Tarbell ---------- 159
Neck: 10% where refuse surgery: J. Spears ---------- 256
Neck: 20% affirmed: J. Phillips ---------- 275
Neck: 20% on board increase: L. Federico ---------- 131
Neck and arm: 25% and 15% on increase: J. Croft ---------- 4
Neck: 30% affirmed where films: L. Morris ---------- 285

PERMANENT PARTIAL DISABILITY, cont.

(7) Neck & Head, cont.

Vol. 18

Neck: 25% where should avoid lifting: S. Hasey ---------- 112

Vol. 19

Neck: 5% where want total: R. Collins ---------- 132
Neck: 35% affirmed where want total: F. Kerns ---------- 228
Neck: 40% on settlement: E. Thompson ---------- 68
Neck: 50% on reduction from 75 %: G. Wolf ---------- 169

Vol. 20

Head: 50% for concussion: R. Kiewel ---------- 83
Neck: 15% on increase where claim total: J. Frantz ---------- 103
Neck: 20% for fusion: E. Rollins ---------- 248
Neck: 25% for 5% of whole man evaluation: W. Beaty ---------- 32
Neck: 30% for limited lifting: C. Nollen ---------- 240

(8) Hand

Vol. 11

Hand: 30% to saw filer: W. McGuire ---------- 8
Hand: 82.5° for smash: C. Gould ---------- 157

Vol. 15

Hand: 15% affirmed: R. Barnett ---------- 229
Hand: 40% reversed: R. Lotts ---------- 263
Hand: 50% each for frost bite: L. Bartu ---------- 172
Hand: 95% for loss of four fingers: B. Bissinger ---------- 198

Vol. 16

Thumb: 40% plus loss of opposition: K. Martin ---------- 171
Hand: award improper where only thumb hurt: K. Martin ---------- 171
Hand: 40% after finger amputations: M. White ---------- 166
Hand: 50% to housewife who can't lift coffee pot: T. Hoffman ---------- 226
Hand: 75% for sprained thumb: Y. Webb ---------- 106

Vol. 17

Hand: 30% for finger burns: S. Dansca ---------- 95
Hand: 65% affirmed after two amputations: A. Avalos ---------- 109

Vol. 18

Hand: 15% affirmed: I. Larson ---------- 95

(8) Hand, cont.

Vol. 19

Hand: 5% for carpal tunnel syndrome: M. Pacheco ---------- 26
Hand: 15% each after burns: D. Pierce ---------- 129

Vol. 20

Hand: 5% affirmed: L. Spencer ---------- 177

(9) Unclassified

Vol. 1

Aches and pains: none for fall: M. Aikman ---------- 100
Bizzare claims without supporting medical testimony are not compensable: C. Rios ---------- 26
Burns: Various awards after severe burn: R. Rhode ---------- 37
Burns with residual tenderness insufficient: I. Lewis ---------- 114
Contact dermatitis basis for award to fry cook: E. Wasson ---------- 11
Curative surgery inconsistent with PPD: J. Bonner ---------- 40
Earning capacity explored, Kajundzich rule: D. Hutchison ---------- 147
Eyes: Photo sensitivity--25% combined binocular visual loss: S. Finley ---- 55
Eyes: Visual losses may not be converted into unscheduled disabilities: R. Rhode ---------- 37
Eye: 20% determination affirmed: W. Fretwell ---------- 159
Eyes: Method of computation of visual loss: I. Boorman ---------- 97
Eyes: No loss where glasses correct: O. Reames ---------- 92
Heart attack evaluated at 55% loss arm: E. Kociembra ---------- 101
Impotency not compensable: H. Alexander ---------- 28
Intervening injury merely makes evaluation more difficult: S. Raney ------ 27
Loss of hearing capacity is basis for compensation: S. Raney ---------- 27
Lung: 60% loss of vital capacity: E. Gray ---------- 27
Narcolepsy: Remand for further diagnosis: H. Cunningham ---------- 58
Pain, per se, is insufficient: M. Edington ---------- 9
Physical functions not former occupation measure: G. Kautz ---------- 25
Prior awards, did present injury result in additional disability: D. Bridge -- 33
Red nose not compensable; permanent disabilities must be those known to surgery: H. Sminia ---------- 10
Ribs: No award for contusion: E. Murray ---------- 67
Scars compensable where limit mechanical function and damage psychologically: R. Rhode ---------- 37
Skin Graft: Donor area compensable: J. Arthur Cumpston ---------- 135
Taste loss not compensable: T. Ayers ---------- 30
Toe: 55% determination affirmed: M. Nelson ---------- 107
Unscheduled disabilities should be stated in terms of equivalents to loss of an arm by separation and not to loss function: J. Coleman ---------- 33

Vol. 2

Bronchitis: 10% after inhaling chlorine: C. Lucas ---------- 89

(9) Unclassified, cont. Vol. 2, cont.

Burns: 10% foot after skin graft: B. Adams ---- 25
Collarbone: 5% determination affirmed: S. Barth ---- 4
Crushed body: 50% of workman: G. Gregory ---- 163
Crushed body: 75% unscheduled, 10% loss use left arm, 35% loss hearing, right ear: M. George ---- 90
Douglas Fir dust allergy: 15% loss arm: N. Laknes ---- 69
Electric shock: 10% affirmed: H. Sears ---- 73
Eyes: None after burns: H. Anderson ---- 151
Eyes: Nonvisual eye problem not compensable: H. Anderson ---- 151
Eyes: 3% award affirmed for scarring; J. Pool ---- 188
Face and nose: 25% loss arm for severe laceration: V. Essy ---- 38
Hearing loss from bullet wound: D. Johnson ---- 38
Incredible problems: 10% loss arm affirmed: W. Pleasant ---- 18
Lungs: 10% to heavy smoker for inhalation of chlorine gas: C. Lucas ---- 168
Lungs: None where preexisting allergy temporarily irritated: R. Williams ---- 54
Multiple injuries award affirmed: E. Essig ---- 178
Multiple injuries; 40% loss arm affirmed: G. Pierson ---- 107
New formula for unscheduled disability awards explained: L. Berry ---- 191
Relationship of "workman" awards to "loss arm" awards explained in unscheduled awards cases: R. Frank ---- 192
No disability found after Circuit Court remand: M. McGill ---- 22
None for various ailments; Hearing officer reversed: J. Brooks ---- 141
None where disabilities are voluntary and intermittant: E. Stafford ---- 60
Pelvis fracture: 20% allowed: R. Haun ---- 16
Successive injuries with different insurers: L. Kappert ---- 78

Vol. 3

Assorted injuries: 16 degrees: B. Holifield ---- 120
Bowel and Urinary problems not associated: C. Brooks ---- 1
Buttocks, sacrum and neck, contusion: 15% affirmed: C. Pemberton ---- 2
Clavical and Scapula: 19.2 degrees for fracture: D. Wendlandt ---- 165
Conversion hysteria: 20% to elderly illiterate after fall: R. Holeman ---- 75
Crushed body and arm: 19.2 and 28.8 degrees after ditch cave in: K. Gaittens ---- 126
Crushed body and arm: 32 and 28.8 degrees after ditch cave in: K. Gaittens ---- 114
Electric shock: 192 degrees: E. May ---- 132
Great Toe: Award limited to toe: I. Wirta ---- 98
Miscarriage after fall: None: B. Jones ---- 186
Multiple injuries: 296.5 degrees after 50-foot fall: J. Johnson ---- 116
Multiple injuries from falling snag: U. Pykonen ---- 134
Multiple injuries by rolling rock and widow maker ---- 187
Multiple injuries from falling logs: L. Schlecht ---- 190
Muscle tear: M. Smith ---- 30
Other injuries from fall: 57.6 degrees: V. Sickler ---- 135
Pelvis: 48 degrees for fracture to logger: T. Vosika ---- 229
Rib fracture and strain: 28.8 degrees where transitory pain: O. Creasey ---- 240
Rib fractures: 32 degrees where prior back trouble: C. Jensen ---- 42
Testicle: 16 degrees for loss: L. Rennich ---- 61

(9) Unclassified, cont. Vol. 3, cont.

Toes: Multiple awards: J. Caso ---------- 111
Wage considerations limited to unscheduled awards: B. Canady ---------- 236

Vol. 4

Brain damage not basis for separate unscheduled award: M. Rosenstengel -- 171
Contusion and burn: 32 degrees for subjective complaints: V. Vance ---------- 232
Eye: 8 degrees after wire injury: D. Magill ---------- 297
Eyes have double vision: M. Rosenstengel ---------- 171
Head injury: 48 degrees where psychopathology: J. Damron ---------- 263
Hearing loss--high frequency: J. Neufeld ---------- 281
Hearing loss as occupational disease: L. Stallings ---------- 142
Heart attack: 77 degrees after reduction: B. Flaxel ---------- 300
Heat exhaustion: P. Simpson ---------- 305
Hernia: No permanent disability: L. Collins ---------- 249
Hernia: No permanent disability: A. Liles ---------- 148
Hip: 48 degrees after reduction: T. Egan ---------- 251
Jaw and teeth: Not compensable : J. Neufeld ---------- 281
Nose: None where preexisting collagen disease: C. Tippie ---------- 269
Nothing for numerous complaints: L. Griggs ---------- 193
Toe: Old award increased to foot award: D. Esplin ---------- 133
Twenty-five percent more where prior awards of 80%: G. Heurung ---------- 100
Various complaints not proven: D. DeCoteau ---------- 308

Vol. 5

Burns: 48° right arm; 38.4° left arm and 16° unscheduled: K. Ford ---------- 41
Contusions and abrasions: Nothing: D. Hoover ---------- 267
Crushed body: 32° where prior awards: E. Schmitt ---------- 46
Electric shock: 28° for fingers: T. Lund ---------- 176
Hearing: No compensation for high frequency loss: D. Oberman ---------- 66
Hearing: 28% loss right ear: C. Smith ---------- 84
Hearing: Remand where doubt over computation: R. Moore ---------- 240
Hernia: None: J. Quirk ---------- 14
Multiple fractures: 50° where claimed total disability: H. Fields ---------- 23
Multiple injuries after log truck wreck: 30° for leg: B. Taskinen ---------- 74
Ribs: 32° for undescribed symptoms: J. Freitag ---------- 263
Septum: None for fracture: F. Ingles ---------- 246
Tail bone and shoulder: 192° where other problems: A. Scott ---------- 139
Toes: 34° where amputated and useless: J. Manke ---------- 129
Undescribed: 35°: L. Ortiz ---------- 175
Undetermined award does not survive: T. Tattam ---------- 187

Vol. 6

Allergy: 16° under occupational disease law: S. Jones ---------- 146
Dermatitis: 192° where sensitivity triggered by x-rays: O. Davis ---------- 48
Fumes exposure: 32° in complicated case: F. Barron ---------- 200
Gunshot wounds: 96° to sheriff: D. Kauffman ---------- 74
Heart attack: 32° where go back to work: R. Pattison ---------- 127

PERMANENT PARTIAL DISABILITY, cont.

(9) Unclassified, cont.

Vol. 6, cont.

Hip: 32° for pain: J. Holloway ---- 99
Multiple fractures from log: 80° & 14° affirmed: T. Thompson ---- 78
Multiple injuries from car wreck: 80° after reduction: M. Stout ---- 161
None for numerous complaints: C. Rios ---- 33
Pelvis: 16° for fracture: L. Fuller ---- 28
Pelvis: 32° for fracture where can't work: L. Dinnocenzo ---- 254
Pelvis: 98° for fracture: E. Walty ---- 126

Vol. 7

Belly strain: 16° where want total: H. Spittler ---- 150
Bruises: 32° after fall: B. Hopper ---- 229
Burns: 64° where psychological problems: F. Ross ---- 88
Burns: 128° to fireman where return to work: G. Treloggen ---- 252
Eye: Award reduced on own motion: E. Silvey ---- 94
Eye: 40° for rock: R. Rose ---- 35
Eye: 90° for destroyed central vision: C. Mills ---- 234
Headache: None from 24°: A. Harrison ---- 232
Headache: 32° after blow to face: C. Mills ---- 234
Heart attack: 70%: M. Barraclough ---- 146
Heart attack: 80° for pain: B. Riback ---- 172
Heart attack: 160° to steamfitter: V. Bird ---- 42
Hernia award after surgery reversed: D. Carte ---- 250
Posterior: 24° for arthritis: E. Castro ---- 1
Stomach: None for subjective symptoms after blow: J. Thomas ---- 183
Unscheduled award not justified: C. Wellings ---- 257

Vol. 8

Asthma: 105° for wood dust allergy: W. Jackson ---- 199
Brain: 112° after surgery to relieve pain: D. Brown ---- 67
Bronchitis & Trachiatis: None: W. Caparelli ---- 117
Burns: 32° after reduction: H. Black ---- 210
Coccyx: 80° for fracture: J. Garrett ---- 87
Eye: 100° where already blind: D. Scarpellini ---- 131
Eyes: 141° loss binocular vision: G. Meyer ---- 237
Eye: 80° for diplopia: L. Brenneman ---- 75
Facial injuries: 10° settlement: J. Potter ---- 184
Hearing loss as occupational disease: A. Lundin ---- 49
Neurotic: 96° where afraid to go back to work: T. Graves ---- 96
Pain not disabling: L. Renfrow ---- 255
Toes: 17° because toes extend to ankle: M. Cox ---- 95
Pelvis: 48° after reduction: R. Louis ---- 87
Unknown award affirmed: G. Almond ---- 206

Vol. 9

Disability award affirmed: R. VanDamme ---- 164
Dizzy spells after hit by tree; 240° where still work: M. Jones ---- 261
Eye injury: None to deputy sheriff: E. Ranslam ---- 244

(9) Unclassified, cont. Vol. 9, cont.

Head injuries: 48° for misc. symptoms: H. Shirley ---------- 254
Hearing loss: 67° affirmed: E. Long ---------- 150
Hearing loss: 83° after increase: R. Long ---------- 151
Heart condition: 208° affirmed: D. Hickman ---------- 162
Heart disease: 288° where can do sedentary work: J. Moline ---------- 238
Hernia: J. Prewitt ---------- 155
Hysterical reaction: 48° after sore elbow: L. Lucero ---------- 20
Internal injuries: 48° after multiple injuries: V. Sikes ---------- 293
Lungs: 108° where can't breathe: J. Parkerson ---------- 28
Nothing for undisclosed difficulty: C. Tew ---------- 164
Photophobia: Unscheduled disability: R. Van Hecke ---------- 250
Psychopathology: 32° reversed: L. Burgess ---------- 202
Affirmed: C. Auch ---------- 88
Vision: 141° affirmed: W. Schlesinger ---------- 113

Vol. 10

Breast Contusion: None where 5 doctors can't find: L. Bristor ---------- 246
Bullet hole in chest not basis for unscheduled award: D. Johnson ---------- 180
Eye: Claimed unscheduled: G. Burr ---------- 83
Eye: 15% on aggravation: W. Dickey ---------- 264
Face: 16° for facial muscle: T. Abel ---------- 6
Hearing loss: 175° on settlement: E. Long ---------- 185
Hernia allowance reversed: K. Pierce ---------- 35
Increase reversed for minor objective symptoms: B. Matthews ---------- 137
Malodorous fumes: 40% on settlement: C. Willhoit ---------- 63
Nothing where no medical: J. Boone ---------- 41
Nothing: H. McCullough ---------- 167

Vol. 11

Asthma: 64° where can't work in cannery: S. Beeson ---------- 96
Burns: 160° after reduction from 296° in case where claimant due to seniority got soft job: L. Gilster ---------- 3
Burns: None for coffeepot burn: W. McCloskey ---------- 73
Concussion, etc.: 192° from 32°: B. Kageyama ---------- 178
Eye: Undisclosed affirmed: R. Oleman ---------- 210
Heart attack: None where return to same job in 30 days: W. Bryan ---------- 93
Hearing: 42.04° rejected: A. Kilgore ---------- 131
Hearing: 60.48° on increase after SAIF appeal: A. Kilgore ---------- 131
Lungs: None for chlorine gas: E. Davis ---------- 221
Multiple injuries affirmed: J. Petit ---------- 272
Multiple injuries of leg, foot, forearm and head: D. Blanchard ---------- 137
None period: A. Jackson ---------- 237
Nose: No PPD: R. Proffitt ---------- 211
Nose: 80° from 128°: D. Miller ---------- 37
Obesity: S. Hussey ---------- 259
Occupational disease: 32° affirmed: E. Murdock ---------- 251
Spleen: 96° for complications: J. Green ---------- 247
Tailbone: 16° affirmed: J. Skogseth ---------- 263
Two claims settled for $725: C. Hartley ---------- 18
Unknown: 48° reversed: B. Bailey ---------- 17

(9) Unclassified, cont.

Vol. 12

Bladder, etc.: 128°: G. Alldritt ---- 217
Bullet wound to belly: 64°: J. Frazier ---- 180
Burns: None for discoloration: B. Coleman ---- 76
Burns: 80° where must retrain: J. Claiborne ---- 16
Burns: Severe results in various awards including disfigurement: T. Cody ---- 104
Contact Dermatitis: None to millwright: H. James ---- 99
Contact Dermatitis: 60° affirmed: H. Deister ---- 93
Ear: 25° for hot slag: E. Henry ---- 101
Eye: 100° where can't tolerate glasses strong enough to correct problem: R. Sears ---- 146
Hearing loss: Prior case reversed, new method of computation: O. Privette 253
Heart condition: Affirmed: A. Daggett ---- 208
Lung condition: 32° affirmed: W. Charles ---- 285
Lungs: 160° where could work away from dust: C. Morgan ---- 117
Pelvic fracture: 48° on reduction where retraining: J. Dawson ---- 263
Phlebitis: To both back and Leg: J. Carson ---- 168
Psychological disability: 160° affirmed: R. Babcock ---- 91

Vol. 13

Eye: 53° on stipulated reduction: J. Davenport ---- 27
Eyes: none when glasses solve problem: E. Campbell ---- 120
Hearing loss: none found: A. Bennett ---- 81
Hearing loss: 24° affirmed: N. Thomas ---- 177
Heart attack: 20% upon recovery: E. Fields ---- 276
Burns: various: B. McCutchen ---- 195

Vol. 14

Concussion: 64° affirmal: H. Brown ---- 7
Hearing: 90% allowed: R. Flick ---- 115
Heart: 65% for attack: F. Schmunk ---- 51
Hernia: 80° for complications: E. Mines ---- 13
Jaw fracture: Nothing to teacher: A. Floyd ---- 159
Miscellaneous pain: 25% allowed: A. Peterson ---- 208
Phobia: 40% affirmed: E. Bice ---- 21
Photophobia: No allowance: B. Mealue ---- 107
Psoriasis: 35% on reduction: C. Pedersen ---- 53
Ribs: 20% for fracture: C. Payne ---- 63
Tail bone: 20% affirmed: D. Case ---- 97

Vol. 15

Brain: 100% for head injury: D. Bush ---- 299
Bullet holes: 50% for numerous problems: R. Vance ---- 86
Chest and lung: 25% from total: G. Stone ---- 273
Dermatitis: 10% for forehead: E. Miller ---- 85
Dermatitis: 25% on increase: D. Brandtner ---- 199

PERMANENT PARTIAL DISABILITY, cont.

(9) Unclassified, cont. Vol. 15, cont.

Headache: 50% where want total: J. Pacheco ---- 258
Hearing loss: 57.5% allowed: J. Jackson ---- 218
Hip repair basis of unscheduled award: M. Way ---- 31
Lungs: 20% for breathing problem: A. Robertson ---- 183
Nose fracture gets nothing: E. Medina ---- 87
Rib: none for fracture: P. Zanobelli ---- 246

Vol. 16

Anxiety neurosis: 32% on increase: C. Mellen ---- 282
Burns: nothing for paranoia: R. Stevens ---- 285
Dermatitis: 50% unscheduled: C. Olson ---- 102
Epilepsy: 20% plus 5% each for leg and arm: D. Zwirner ---- 185
Groin: 40% when hit saddle horn: R. Madison ---- 1
Hearing loss: computation in normal ranges: C. Olson ---- 102
Hearing: 22½% affirmed: D. Mauck ---- 203
Heart attack: 75% from total: K. Hickman ---- 64
Tooth: nothing for loss: T. Gueck ---- 267

Vol. 17

Hearing loss claim: J. King ---- 245
Leg fracture causes pulmonary emboli: W. Murphy ---- 2

Vol. 18

Asthma: None affirmed: B. Hamlin ---- 38
Eye: 100% on increase: W. Smith ---- 89
Eye: Nothing after injury which can be corrected with glasses: M. Russell - 104
Eye: Unscheduled award not proper: R. Minton ---- 242
Hearing loss: 19% on reduction from 60%: A. Needham ---- 80
Heart attack: 75% where breathing problem: H. Karns ---- 254
Jaw and throat: 50% where can't eat, talk, or drink well: M. Erickson ---- 294
Pelvis: 10% for fracture: G. Hixson ---- 202

Vol. 19

Hearing loss: 30% affirmed: W. Post ---- 20
Hormone: 65% reversed: I. Armstrong ---- 176
Lung condition: none where pollution causes trouble: D. Parker ---- 250
Nervous disorder: 75% where want total: F. Parazoo ---- 212
Psychological: 25% on forearm injury: V. Wolford ---- 134

Vol. 20

Eye: none where already blind: P. Flora ---- 57
Eye and Headache: 10% after robbery: J. Kleatsch ---- 106
Heart attack: 60% to disabled logger: R. Stoneking ---- 22
Nervous system: 50% for concussion: R. Kiewel ---- 83
None for nervous stomach: H. Harris ---- 31

(9) Unclassified, cont. Vol. 20, cont.

None for conversion reaction after freon gas exposure - over dissent E. Wamboldt ---- 293
Orchiectomy no basis for disability: G. Frandsen ---- 273

PROCEDURE

Vol. 1

Appeal from a stipulation of remand not called for: J. Hill ---- 89
Attempted denial must meet requirements of ORS 656.262(6): J. Loper ---- 34
Board indicated briefs desirable to clarify issues and position of parties: J. Bell ---- 142
Denial by delegates of employer effective to start 60-day period running despite Circuit Court ruling to contrary: J. Sain ---- 177
Employer may delegate responsibility for acceptance, denial, and payment to carrier: J. Sain ---- 177
Faulty appeal notice does not prevent proper appeal: R. Haak ---- 128
Form 801 is claim, even if widow does not know and thereby loses appeal rights: C. Printz ---- 71
Request for hearing directed to Department may be excusable: L. Hogson ---- 144
Rule 5.05 D is legal and proper rule: S. Dalton ---- 148
Stay in proceedings not available pending Supreme Court appeal: M. Chetney ---- 171

Vol. 2

Abatement ordered where also making tort claim for damages: R. Pacheco ---- 150
Aggravation claim processing procedure laid out: H. Jones ---- 132
Board comment on piecemeal proceedings: C. Mumpower ---- 178
Board denounces absence of brief: C. Groseclose ---- 113
Board confusion: B. Flaxel ---- 137
Board ignores Circuit Court ruling on point: L. Culp ---- 167
Case remanded where claimant absented himself from Physical Rehab.: H. Vicars ---- 172
Claim process methods discussed: H. Kleeman ---- 179
Claimant without attorney trapped by procedure: W. Von Kienast ---- 102
Confusion: G. Hutchison ---- 45
Department cannot volunteer jurisdiction of Board where time for claim of aggravation has run: J. Tolley ---- 150
Determination canceled on claim where AOE/COE issue in Circuit Court: B. Flaxel ---- 118
Failure to appoint doctor, basis for dismissal of appeal to Medical Board of Review: G. Thibodeaux ---- 196
Felon in penitentiary not entitled to adversary proceedings: J. Guse ---- 125
Hearing officer should insist on full evidence: D. Purkerson ---- 143
Hearing officer may order a stay, pending review: L. Kappert ---- 78
Late request justified where improper service of hearing order: H. Newman ---- 187
Remand from Circuit Court gains nothing: R. Turvey ---- 161
Review dismissed by stipulation: I. Appleby ---- 196
Right to hearing lost when take lump sum award: E. Pittsley ---- 140

Vol. 2, cont.

Stipulation approved reopening claim: D. Frankfother ---------- 200
Which carrier liable for occupational disease: I. Sedergren ---------- 48
Widow proper substitute party where claimant commits suicide pending review: G. Klinski ---------- 104
Widow may pursue increased award of permanent partial disability: J. Eldridge ----------

Vol. 3

Case remanded where transcript unavailable: C. Stroh ---------- 265
Case remanded where no transcript: R. Bolt ---------- 182
Claim remanded for submission for determination: E. Lee ---------- 222
Claim records inadequate: C. Beck ---------- 94
Confusion over whether new injury or aggravation: F. Nolan ---------- 170
Hearing should actually be held if order is to so recite: H. Crocker ---------- 273
Improper appeal: R. Krueger ---------- 106
Inadequate appeal instructions given by Department so time limit didn't run: D. Ford ---------- 34
Late briefs will be considered anyway: B. Walch ---------- 32
Motion for reconsideration denied: D. Smith ---------- 267
No right to hearing: J. Nelson ---------- 244
Proceedings to establish own motion jurisdiction over aggravation proceeding: R. Gault ---------- 179
Remanded for hearing on merits: R. Dooley ---------- 54
Remanded when transcript destroyed by fire: G. Jones ---------- 226
Review dismissed for want of prosecution: R. Nation ---------- 54
Should have been in Circuit Court: T. Schrick ---------- 243
Stipulation disapproved: J. Rush ---------- 76
Stipulation approved: E. McMahon ---------- 139
Stipulation on reopening claim approved: J. Kennedy ---------- 139
Survivor insisting that not subject to Compensation Act and Employer claiming coverage: R. Brookey ---------- 179
Where claim reopened should go back for new determination, not remain pending before the Board: J. Penuel ---------- 264

Vol. 4

As related to occupational disease: F. Barron ---------- 32
Claim found compensable even though beneficiaries opposed: R. Brookey ---------- 121
Dismissal proper where great delays and no response: D. Thompson ---------- 153
Interlocutory appeals from hearing officer barred: J. Nicholas ---------- 181
Mess in occupational disease case: S. Jones ---------- 290
Multiple proceedings criticized: B. Hopkins ---------- 109
Non-complying status--time for appeal: T. Hazelette ---------- 212
No appeal from settlement: A. Campbell ---------- 254
On remand: J. Lowery ---------- 157
Own motion procedure explained: M. Thomas ---------- 26
Prior law injury: appeal time expired: H. Fairbairn ---------- 1
Rehearing petition does not extend time for appeal: A. Grumbles ---------- 79
Remand where transcript burned: W. Wood ---------- 19
Remand where hearing before determination: M. Bice ---------- 61

Vol. 4, cont.

Remand where transcript burned: H. Rost ---------- 71
Remand where transcript burned: L. Balcom ---------- 77
Remand for application of Ryf case: A. Magnuson ---------- 94
Remand where notice of appeal withdrawn: A. Grumbles ---------- 99
Remand where hasty decision: J. Lowery ---------- 117
Remand for further hearing: G. Elder ---------- 117
Remand where transcript burned: D. Allen ---------- 161
Remand where defective medical evidence: E. Lyman ---------- 167
Remand where transcript burned: L. Dawley ---------- 192
Remand where dismissal for want of prosecution: N. Kahler ---------- 221
Reopening of claim and time for appeal awards of permanent disability:
R. Barber ---------- 92
Second hearing of issues already decided not proper: M. Glover ---------- 235
Survival condition of appealing permanent disability award: T. Coulter ---------- 148
Where several hearings and re-openings: N. Thomas ---------- 311
Where claimant gets worse before hearing: C. Whiteshield ---------- 203
Where doubt as to who the employer is: J. Greer ---------- 211
Widow can pursue claim after apparent suicide: W. Tolbert ---------- 13
Widow did not make claim: R. Grosjacques ---------- 104

Vol. 5

Admin. Order 5-1970: C. Moore ---------- 119
Affadavit of prejudice against hearing officer not well taken: A. Jones ---------- 169
Amended order where mistake: G. Walstead ---------- 244
Award reduced where employer didn't appeal: E. Miller ---------- 238
Claimant loses where won't go to hearing or medical examination: H. Basco 152
Claim settled: G. Baker ---------- 247
Confusion: T. Tattam ---------- 187
Hearing Officer may remand for determination where appropriate: R. Clifford 85
No credit for unidentified voluntary payment: D. Freeny ---------- 160
No interim appeals from hearing officer: W. Hormann ---------- 146
No right to hearing on 1964 accident: J. Petty ---------- 193
Occupational disease: S. Jones ---------- 225
Question where either new injury or aggravation: C. Keller ---------- 281
Remand where doubt as to which carrier responsible: F. Bennett ---------- 241
Review dismissed where requests for delays and then no action: W. Schwabauer 242
Review dismissed for failure to serve employer with notice of appeal:
E. Whiteman ---------- 258
Rule 3.04: H. Lingo ---------- 148
Rules 5.01 B; 4.01; 401 A: M. Wolfe ---------- 36
Rules 5.06 A and 5.06 B: M. Gregoroff ---------- 114
Rules 7.01; 7.02: M. Wolfe ---------- 36
Where ambiguous order of remand from Circuit Court: J. Johnson ---------- 96
Widow may not pursue partial disability award: D. McLaws ---------- 63

Vol. 6

Board modified order to apply earnings factor: A. Lee ---- 41
Case remanded for additional medical report: C. Kelley ---- 143
Claim denied after 15 months: K. Applegate ---- 1
Confusion where have direct appeal and aggravation claim pending at same time: R. Royse ---- 228
Denial of back claim set aside 10 days after claimant's death, claim settled: R. Franklin ---- 273
Denial after hearing on extent of disability: J. Gourley ---- 294
Further order after defective attempt to appeal to Circuit Court: D. Allen ---- 142
Hearing should be dismissed after claim reopened: W. VanHorn ---- 268
Non-complying employer: L. Gillispie ---- 35
No right to hearing regarding 1965 injury: D. Packebush ---- 9
No right to hearing where in prison: C. Robinson ---- 295
No right to hearing on 1966 injury even though no formal closing: D. Mitchell ---- 222
No rights if in prison: F. Winchester ---- 114
Mandamus available to enforce payment pending appeal: E. Brown ---- 145
Order reaffirmed after consideration of impact of RYF: M. Bray ---- 76
Procedure for appeal to Circuit Court: L. Holmes ---- 149
Remand for further hearing where exacerbation after hearing and prior to decision: E. Partridge ---- 293
Remand for joinder of additional employer: E. Kilgore ---- 159
Review dismissed where prior proceeding in Circuit Court which should have disposed of the issues: R. Schulz ---- 169
Set for hearing on merits where SAIF failed to properly advise claimant of his rights: R. Day ---- 61
Stipulated remand: W. Koivisto ---- 274
Where question of compensability decided to benefit of workman prior to his death, beneficiaries may have benefit of this finding: J. Peters ---- 285

Vol. 7

Acceptance of claim may be withdrawn at any time: C. Ward ---- 24
Affidavit not proper supplementation of record: W. Clarke ---- 260
Aggravation dismissal for inadequate medical report held to preclude further hearing with report: E. Cloud ---- 265
Appearance by insurance co. without attorney criticized: E. Archer ---- 64
Board may go beyond the record in determining whether fee allowable: C. Vanderzanden ---- 157
Board presumes all laws constitutional: W. Cheadle ---- 163
Board refused to strike brief from record: D. Moore ---- 141
Claimant died while hearing pending: L. Skirvin ---- 80
Claimant died pending review: E. Maffit ---- 87
Consolidate hearings whenever possible: L. Skirvin ---- 80
Denial of aggravation, effect of: R. Davis ---- 170
Dismissal affirmed when stall in agreeing to hearing: H. Murray ---- 107
Dismissal affirmed where attorney refused to answer mail: R. McKeen ---- 107
Dismissal for want of an adequate medical report does not preclude getting another medical report and starting over again: M. Gibson ---- 56
Dismissal of "rejection" refused: C. Marsh ---- 245

Vol. 7, cont.

Dismissal reversed where lay personnel of SAIF induced Hearings Officer to summarily dismiss request for hearing where there were bonafide issues to be decided: R. Richards 45
Dismissal without hearing is equivalent to judgment on demurrer and claims in request for hearing must be treated as true: F. Wilhelm 23
Fact that denial issued to belated notice of injury does not waive problem of timely notice: A. Richmond 38
Failure to request review even if induced by SAIF is fatal to claim: S. Pruitt 106
Good cause for delay more than neglect: R. Ostberg 167
Goofed request for review: D. Bellinger 226
Hearings Officer may modify order before request for review and before expiration of 30 days: R. Crippen 73
Hearings Officer may not tax costs: J. Mayer 278
Hearings Officer may require segregation of benefits under ORS 656.228: D. Stutzman 49
Hernia surgery after refusing for 2 years: L. Mitchell 75
Inability of attorney to locate claimant not cause for delay: E. Fulop 258
Mandamus judgment followed: E. Brown 129
Medical services don't always require reopening: C. Ray 142
Medicals need not be paid pending appeal: W. Wood 116
Motion to disqualify Hearings Officer denied: C. Vaughan 62
Must pay compensation pending review: G. Aten 274
No right to hearing after reopening of 1960 injury: C. Best 77
Order corrected: F. Brelin 273
Order modified within 30 days: F. Harper 157
ORS 656.222 construed as to back claims: C. Templin 226
ORS 656.245 requires medical opinion: D. Wear 261
Penitentiary inmate died after determination before hearing: C. Marshall 160
Petition for reconsideration: E. Fields 267
Protest about no brief: W. Schuett 190
Record limited on review to record made at hearing: E. Cantrall 211
Referred for hearing after own motion reduction: J. Hinchy 200
Referred for hearing after own motion reduction: A. Christensen 200
Rejection is appeal procedure from occupational disease claim: A. Frey 122
Remand where no record as to whether either employer or workman were subject to Workmen's Compensation Act: C. Giltner 144
Remand where most recent medical report 2 years old at time of review: E. Kirkendall 64
Remand for joinder with proceeding on subsequent injury: V. Brown 118
Remanded for additional medical report: B. McKinney 224
Remanded where Hearings Officer thought incompletely heard: G. Ingram 262
Remand where need for further surgery appears while review pending: R. Thomas 211
Remand where defective transcript: C. Hartman 270
Request for review only be mailed within 30 days not received: C. Miller 210
Responsibility allocated between two injuries: M. Johns 109
Review considered abandoned when claimant probably deported: M. Miremadie 36
Review deemed abandoned: G. Wheeler 58
Review request not received in time: G. Pitney 166

Vol. 7, cont.

Rule 204: C. Ray ---- 142
Rule 5-1970: L. Fulbright ---- 224
Rule 5.05 C 2: D. Richardson ---- 30
Rule 7.02: C. Vanderzanden ---- 128
Rule 7.02: C. Ray ---- 142
Rule 7.02: L. Fulbright ---- 224
SAIF required to appear by attorney: R. Richards ---- 46
Supplemental reports not proper on review: K. Rylah ---- 265
Survival of benefits: C. Ward ---- 24
Unscheduled award requires finding of impaired hearing capacity: P. Kenney 189
When two requests for hearing regarding same scheduled area, hearing should be combined: R. Robinson ---- 19
Won't pay compensation pending appeal: C. Blisserd ---- 36

Vol. 8

Advance payment and then State modification of award: M. Land ---- 188
Aggravation claim without adequate medical reports: B. Walls ---- 48
Aggravation claim dismissed where not first submitted to employer: G. Chapman ---- 221
Aggravation claim remanded for hearing: G. Joern ---- 159
Claim defeated for want of timely request for hearing: H. Hartman ---- 60
Corporation must appear by counsel: D. Dishner ---- 4
Consolidation appropriate where aggravation and new injury claim: N. Burkland ---- 15
Death while pending decision: F. Kirkendall ---- 58
Defective denial coupled with defective request for hearing: G. Burkholder 8
Delay closing order: A. Jackson ---- 24
Denial of previously accepted claim permissible: E. Ramsey ---- 40
Direct appeal and aggravation claim pending at same time: M. Meeler ---- 128
Deposition attorney fee: B. Lisonbee ---- 227
Deposition: $75 fee plus mileage to take medical deposition: A. Davis ---- 251
Denial may be made at any time: G. Ward ---- 177
Dismissal set aside on showing of illness of counsel: A. Manz ---- 11
Error corrected: A. Liggett ---- 81
Felony conviction bars right to hearing: W. Delorme ---- 246
"Filing" requires letter arrive: R. Loan ---- 92
Formal substitution of parties proper after claimant's death: J. Ross ---- 179
Foreign doctor report for aggravation claim: H. Curry ---- 69
Hearing officer may reverse himself within 30 days of opinion: H. Black ---- 56
Hearing after own motion reopening: B. Jackson ---- 168
Motion for reconsideration denied: F. Vaughn ---- 288
Motion for reconsideration of remand denied: M. Gregorich ---- 270
Notice of denial mailed to phoney address: G. Burkholder ---- 8
No constitutional right to be over-compensated: T. Horn ---- 126
Order of dismissal for want of prosecution set aside: L. Berge ---- 1
Order allowing fee for taking deposition is not appealable: A. Davis ---- 251
Occupational disease appeal on extent of disability is to Workmen's Compensation Board: W. Capparelli ---- 236
Occupational Disease: J. Melhorn ---- 261

Vol. 8, cont.

Partial denial: C. Smith ---- 102
Previous review order withdrawn and canceled: H. Adams ---- 201
Previous order corrected: J. Davis ---- 265
Proper to offset excess temporary total disability from permanent award: C. Cahill ---- 42
Proliferation of hearings prohibited: E. Puckett ---- 158
Remand on representation of counsel where appeared that had been reopening pending review: T. Cotter ---- 84
Remand for tardy medical report: L. Whedon ---- 139
Remand for hearing notwithstanding expiration of appeal time: S. Hammond 152
Remand where reference to rehabilitation center: W. Powell ---- 175
Remand for psychiatric care: H. Adams ---- 201
Remanded for evaluation at Disability Prevention Division: M. Gregorich ---- 257
Remand by stipulation for redetermination: M. Luttrell ---- 267
Reopening after some permanent partial disability paid: T. Horn ---- 213
Reopening for chiropractic care: M. Sink ---- 151
Request for hearing dismissed after almost two years: G. Howard ---- 153
Setting of hearing no appealable: R. Randall ---- 58
Unemployment not inconsistent with temporary partial disability: R. Roland 176
Venue of hearing set in St. Helens in oscure order: C. Mueller ---- 245
Whiplash case remanded for further medical evidence: H. Adams ---- 187

Vol. 9

Aggravation during appeal: V. Luedtke ---- 171
Aggravation claim: W. Baker ---- 210
Aggravation claim with no medical report: B. Parnell ---- 241
Appeal after own motion reduction: L. Kaser ---- 37
Appeal after own motion modification: W. McAllister ---- 40
Appeal dismissed: R. Grant ---- 80
Appeal where two injuries: I. Winterstein ---- 89
Attempted splitting of cause of action: T. Poe ---- 288
Case on review remanded for consolidation with companion case: G. Coombs 136
Claimant ought to come to hearing: W. Skeen ---- 9
Claimant switched issues at hearing: N. Marshall ---- 275
Compliance with order doesn't waive right to appeal: L. Gibbs ---- 161
Death where medicals unpaid: B. Coghill ---- 71
De Facto denial: R. Lewis ---- 81
Dismissal set aside: D. Fain ---- 48
Dismissal for want of cooperation: H. Warrington ---- 85
Dismissal inappropriate language for decision on merits: J. Hervey ---- 168
Divided responsibility for Psychotherapy treatment: R. Kowalke ---- 219
Election of remedies: C. Herbage ---- 266
Employer allowed incident as aggravation instead of new injury to avoid the increased partial disability benefits: E. Workman ---- 158
Erroneous order corrected: A. Delay ---- 144
Erroneous order withdrawn: M. Carey ---- 167
Error in order corrected: R. Elliott ---- 249
Estoppel for failure to give proper notice of appeal rights: C. Herbage ---- 266
Fund's effort at overcharging not excuse for not buying: W. Wright ---- 292

Vol. 9, cont.

Hearing loss claim: G. Gerber ---------- 161
Hearing officer reduced determination: C. Gaylor ---------- 278
Insurance carrier desires to shift responsibility to another carrier of same employer: E. Winterstein ---------- 273
Medicals not paid pending appeal: B. Giese ---------- 259
Motion for more evidence denied: W. Bradley ---------- 43
Motion for reconsideration denied: S. Pruitt ---------- 72
Motion to strike portion of request for review: G. Hanks ---------- 276
New request after previous dismissal: J. Burakov ---------- 277
Ninety day appeal time fixed by hearing officer: B. Jones ---------- 47
Order republished where copy not provided to claimant's attorney: H. Watson 137
Order amended to include date: E. Hartzell ---------- 188
Order corrected: H. Robbins ---------- 232
Order corrected where bad advice as to appeal rights: C. Hampton ---------- 286
Own motion on 1957 back injury: A. Christensen ---------- 56
Personnel manager of corporation no standing to appeal because not attorney: Z. Baxter ---------- 276
Plenary appeal allowed after redetermination: J. Miller ---------- 53
Prior overpayment may not be deducted from total disability award: R. Rooker 103
Reconsideration petition for introduction of new evidence denied: E. Ranslam 285
Referred to medical board of review regardless of attempt to appeal: N. Armstrong ---------- 177
Remand from Circuit Court does not grant plenary power: G. Aten ---------- 15
Remand where one of exhibits misplaced: L. Haugen ---------- 39
Remand from Circuit Court: W. Wait ---------- 149
Remand for hearing: J. McCullom ---------- 178
Remand where record destroyed: H. Thompson ---------- 216
Review of occupational disease award: M. Carey ---------- 154
Second petition for reconsideration: J. Neilsen ---------- 276
Third party settlement distribution: H. Kochen ---------- 95
Time loss dispute after claimant's death: L. Skirvin ---------- 187

Vol. 10

Additional evidence refused: C. Heatley ---------- 127
Affirmed where can't understand record: J. Francoeur ---------- 120
Appeal dismissed for want of service other parties: A. Green ---------- 46
Appeal dismissed where no attorney: V. Clayborn ---------- 94
Attempt to disavow stipulation turned back: R. Delamare ---------- 136
Award corrected: M. McGinnis ---------- 171
Board stayed hearing division on interlocutory application: A. West ---------- 135
Case number corrected: G. Glenn ---------- 263
Claimant got out of state hearing: A. Camarillo ---------- 103
Claimant wanted to obtain revocation of carriers certificate: J. Powers ---------- 121
Closing division fouled up: L. Balfour ---------- 257
Computation of date to begin total disability: L. Cummings ---------- 291
Constitutional issues sidestepped: H. Hall ---------- 292
Credit allowed where worked for 18 months while getting total disability: F. Pense ---------- 245
Date of commencement of permanent total disability payments explained: E. Zinn ---------- 189

Vol. 10, cont.

Denied claim appeal dismissed where attorney quit: E. Adams ---------- 214
Dismissed for lateness on denied claim: C. Davis ---------- 116
Estoppel claimed re late request for hearing: D. Johnson ---------- 197
Ex Parte order not res Judicata: H. Hall ---------- 292
Fee on motion: M. Larson ---------- 229
Fee increased on reconsideration: D. Johnson ---------- 235
Hearing officer shouldn't consider recollections of claimants previous hearings: J. Lundquist ---------- 289
Interlocutory appeal considered: A. West ---------- 232
Medical examination ordered at Fund request: A. Johnson ---------- 29
Medical information required after long delay: H. Court ---------- 102
Medical report not required for aggravation claim if filed within one year even if direct appeal: A. West ---------- 232
Motion practice: H. Bradbury ---------- 3
Motion for remand denied: M. Lengele ---------- 62
Motion to reconsider denied: M. Egger ---------- 183
Motion for reconsideration: I. Peck ---------- 192
Motion for reconsideration granted: G. McElroy ---------- 232
Motion for reconsideration denied: E. Schmidt ---------- 235
On remand: A. Dahlstrom ---------- 24
Order corrected: R. Harding ---------- 20
Own motion: F. Dalton ---------- 20
Payments may not be reopened: C. Harness ---------- 186
Pending hearing relief sought: E. Sailer ---------- 203
Pleading rules established to prohibit seeking relief not asked for in request for hearing: M. McGinnis ---------- 168
Redenial after stipulation withdrawing denial: T. Ripley ---------- 16
Referred for medical examination at fund expense in own motion case: S. Graves ---------- 101
Remand for further evidence where surgery after hearing and before review: L. Harris ---------- 21
Remand by agreement: D. Woodard ---------- 28
Remand on joint request: B. Vance ---------- 56
Remand for closing: C. Allen ---------- 73
Remand refused for medical information as to matters arising after hearing: S. Kilburn ---------- 113
Remand refused: J. Dozier ---------- 116
Remand for more evidence: R. Granger ---------- 172
Remand for more evidence: L. Wilson ---------- 227
Remand for further consideration: P. Kernan ---------- 250
Request for reconsideration denied: T. Williams ---------- 105
Review dismissed: R. Ross ---------- 93
Review dismissed without prejudice: P. Blank ---------- 244
Service Coordinator use as witness criticized: M. Cearley ---------- 267
Subjectivity case referred for hearing: J. Palmer ---------- 182
'Testimony' in brief: T. Williams ---------- 85
Time loss termination may not mean medically stationary: G. Dierdorff ---------- 42
Two requests for hearing in one year relating to extent of disability: A. West 232
Veteran's administration need not be reimbursed pending appeal: T. Horn ---------- 212

Vol. 11

Affirmed on payment procedure: W. Rogers ---------- 53
Attorney fee of $75 for attending deposition of doctor: V. Johnson ---------- 98
Back injury manifest in leg: J. Carson ---------- 100
Claimant missed hearing because in Coast Guard: M. Sears ---------- 85
Cross-appeal struck pay dirt: V. McKinnon ---------- 236
Death claim untimely despite change in law: M. Garman ---------- 214
Death claim dismissed: G. Gronquist ---------- 213
Defacto denial: E. Simmons ---------- 282
Dismissal inappropriate terminology after hearing: W. Bidegary ---------- 179
Dispute among carriers: E. Simmons ---------- 282
Disobeyance of remand order sought: C. Delamare ---------- 208
Employer requested hearing 11 months after total disability award: L. Krugen 155
Fee not allowable by Board for court work: B. Casper ---------- 142
Fee in occupational disease case: M. Carey ---------- 138
Medical only referred for determination: F. O'Neall ---------- 139
Medicals not compensation under ORS 656.313: R. Kline ---------- 64
Mooted request where claim reopened: M. Hill ---------- 181
Motions for supplementing record dismissed: A. Verment ---------- 24
Motion to present more evidence denied: H. Briggs ---------- 20
Motion for reconsideration denied: G. Roberts ---------- 123
Notice of appeal left off: L. Ervin ---------- 202
Offset of time loss paid pending appeal against PPD where time loss award reversed not proper: R. Todahl ---------- 168
Order corrected: G. Luff (Fox) ---------- 109
Order corrected: E. Ashworth ---------- 110
Order messed up: B. Kageyama ---------- 197
Offer evidence if plan to claim that refused: C. Sutton ---------- 145
Own motion hearing consolidated with new injury: C. McCarty ---------- 125
Own Motion jurisdiction doesn't extend to denied claims: E. Fields ---------- 288
Phoney denial: J. Dozier ---------- 23
Read this one: E. Simmons ---------- 282
Reaffirmed on remand: W. Buckley ---------- 71
Reconsideration denied: A. Anderson ---------- 39
Reconsideration vs. appeal time: R. Larson ---------- 231
Remanded for new evidence on motion: E. Rikala ---------- 63
Remanded for more record: J. Carson ---------- 100
Remanded for additional evidence: C. Calder ---------- 277
Remanded where additional medical report tendered on review: L. Jelks ---------- 215
Reopening may not kill Permanent Partial Disability award; if not grounded on failure to be medically stationary: R. Larson ---------- 252
Request for review dismissed as untimely: R. Wright ---------- 66
Resistance of claim at hearing is defacto denial: J. Lowe ---------- 143
Retention of jurisdiction by hearing officer pending curative treatment: E. Taylor ---------- 207
Ruling 2½ years after determination because of employer delays: L. Krugen - 155
Screwed up forms normal: H. Briggs ---------- 289
Separate claims for different parts of body are not required: M. Floyd ---------- 46
Service of request for review: M. Schneider ---------- 230
Service of request for review is jurisdictional: W. Grable ---------- 57
Settlement disapproved: J. Pietila ---------- 67
Settlement approval denied where included total release: D. Jones ---------- 75

PROCEDURE, cont.

Vol. 11, cont.

Settlement where occupational disease confusion: W. McCoy ---------- 113
Settlement (phoney) may cause insurer to pay twice: J. Barrett ---------- 115
Settlement claimed void: J. Barrett ---------- 115
Settlement approved regarding electroshock therapy: R. Smith ---------- 118
Split request for review creates procedural mess: M. Hill ---------- 181
Supreme Court ruling that not employee for tort liability purposes not binding on Board, says Board: S. Bebout ---------- 133
Time loss and Permanent Partial Disability not payable at same time: W. Reid 83
Time loss prior to filing of Aggravation: L. Cummings ---------- 184

Vol. 12

Acid comments for not filing briefs: M. Palodichuk ---------- 280
Agency expertise: P. Osborn ---------- 89
Aggravation time limit (READ): M. Gibson ---------- 108
Appeal not allowed from own motion reduction of benefits: G. Hanks ---- 61
Back claim sold for $5,470: W. Younger ---------- 261
Board considered issue abandoned if not briefed: V. Smith ---------- 52
Board approval necessary for reduction of benefits due to divorce: L. Browder 172
Cross-request becomes request where original request first withdrawn: E. Bea 273
Date of mailing, not receipt, controls even if slight evidence as to what that is: A. Whittle ---------- 268
Decision didn't follow administrative practice: O. Privette ---------- 131
Dismissal of cross-request leaves original request intact: N. Meyer ------ 52
Dismissed on stipulation: N. Meyer ---------- 97
Evaluation of hearing losses changed: O. Privette ---------- 131
Further evidence denied if available at first hearing with due diligence: L. Wicklund ---------- 163
Hearing allowed after statute found unconstitutional: E. Findley ------- 270
Jurisdictional mess: K. Mull ---------- 48
Knee problem should have been considered: F. Ashby ---------- 84
Malpractice: B. Haas ---------- 189
Mass consolidation for appeal denied: R. Horwedel ---------- 255
Medical addition improper after hearing: P. Morgan ---------- 227
Mess up notice of appeal: P. Blank ---------- 188
Motion charging misjoinder irregular: E. Kincheloe ---------- 228
Muffed appeal: C. Leggett ---------- 224
Multiple carriers and injuries: F. Radie ---------- 216
Overpayments because of divorce: L. Browder ---------- 172
Own motion matter dismissed: V. Cullings ---------- 101
Own motion remanded for hearing: A. Cave ---------- 188
Pending right order: J. Barrett ---------- 112
Prior case overruled: N. Gibson ---------- 108
Prior injuries no excuse for not processing subsequent claim: G. Howard --- 175
Rebuttal required by SAIF if to defeat aggravation claim: K. Eckley ------ 220
Reconsideration denied: S. Holden ---------- 35
Reconsideration granted: H. Briggs ---------- 63
Reconsideration denied: G. McMahon ---------- 97
Reconsideration denied: J. Reinarz ---------- 289
Referred for further examination on review: M. Pointer ---------- 214

Vol. 12, cont.

Remand denied: J. Pike ---- 161
Reopening may not extend aggravation rights. READ THIS ONE: T.Cody ---- 104
Request for reconsideration denied: J. Reed ---- 62
Second determination affirmed: L. Rider ---- 227
Settlement: L. Hanset ---- 111
Supplementation of record not allowed: D. Monson ---- 200
Technical defect in order corrected: C. Brown ---- 84
Thirteen issues: J. Reed ---- 39
Time loss not required until formal closing: H. Thurston ---- 81
Time loss hearing may not preclude Partial Disability hearing: H. Briggs ---- 152
Time loss not properly ordered as part of direction to accept claim:
L. Wicklund ---- 163
Unemployment claimed also: R. Horwedel ---- 237
Voluntary reopening: C. Johnson ---- 189
Waiver of late appeal not allowed: W. Harris ---- 255

Vol. 13

Administratrix has standing: F. Hoseley ---- 205
Aggravation request filed on last day: J. Bugbee ---- 4
Amended order: B. Gerhard ---- 107
Avoidance of payment pending appeal: P. Buyas ---- 290
Beneficiaries may litigate liability for medicals: W. Ganong ---- 89
Burden of proof in opening medical only claim: G. Reynolds ---- 92
Consolidation allows other insurer to request review: C. Yost ---- 68
Denial letter not received, but claimant had a lawyer: P. Patton ---- 42
Fee on dismissal of appeal: C. Nollen ---- 111
Fee in own motion matter: L. Forester ---- 187
Five years expired: J. Lowe ---- 261
Hearing claim timely: D. Conger ---- 146
Hearing claim timely: R. Callerman ---- 147
Hearing request late: M. Reed ---- 245
Lawyer not needed: D. Hill ---- 223
Malpractice: K. Lange ---- 234
Medical only claim should go for determination: K. Kelsey ---- 35
Medical services refused: J. Doyle ---- 224
Moot, therefore dismissed: E. Bea ---- 277
Motion for remand denied: H. Rhodes ---- 34
Motion to dismiss denied: A. Anderson ---- 50
Motion to vacate denied: W. Smith ---- 188
Motion to strike denied: V. Michael ---- 238
Multiple insurers: W. Benda ---- 74
Order changed to correct order: J. McMurrian ---- 60
Order corrected: C. Williams ---- 122
Own motion matter remanded for hearing: L. Nicholson ---- 70
Own motion denied where aggravation time not expired: T. Toureen ---- 203
Own motion sent for hearing: H. Van Dolah ---- 253
Own motion allowance of total after snafu: C. Sutton ---- 282
Prior denial bars aggravation: R. Murphy ---- 63
Reconsideration allowed: C. Nollen ---- 144

Vol. 13, cont.

Reconsideration of own motion allowed: I. Egan ---- 238
Referee delegated authority to resolve third party dispute: W. West ---- 73
Remand for late medical report consideration: R. Hallmark ---- 49
Remand for finding that not permanently disabled: A. Wood ---- 53
Remand refused: D. Monson ---- 102
Remand denied in aggravation case: P. Morgan ---- 235
Remand denied to prove bowling activity: D. Shoults ---- 237
Remand bypassed: O. Sauls ---- 264
Remand denied for defect correctable on review: B. Stevens ---- 275
Remand where further surgery pending review: C. Quick ---- 286
Remand: L. Sutfin ---- 303
Remanded and consolidated where no objection: G. Young ---- 295
Republished where date omitted: M. Reed ---- 280
Republished over date error: H. Farmer ---- 281
Republished over date error: R. Davenport ---- 281
Request for hearing late: S. Saraceno ---- 239
Res judicata: A. Osborne ---- 297
Reviewing method: J. Phillips ---- 182
Secondary injury caused pro-rate liability: S. Armstrong ---- 255
Settlement set aside: H. Wonch ---- 31
Settlement in third party case: J. Boatman ---- 77
Show cause order: B. Farley ---- 74
Time loss due pending denial: A. Zouvelos ---- 166
Trap in consolidated own motion and new injury hearing: F. Radie ---- 185
Unscheduled abdomen claim not same as hernia: G. Dalthorp ---- 104

Vol. 14

Settlement left some issues open: W. Smith ---- 16
Order corrected: B. McCutchen ---- 24
Determination canceled: E. Jordal ---- 26
Affirm where no briefs: R. Pagan ---- 27
Default on compliance case: C. Ware ---- 42
Order corrected: C. Johnson ---- 46
Referred for hearing on reconsideration: J. Yoes ---- 62
Appeal of two claims where one own motion: P. Petite ---- 77
Review where two insurance carriers: C. Smith ---- 80
Benefits must be paid pending appeal: O. Lewis ---- 88
Multiple employers: R. Fuller ---- 117
Collateral estoppell applicable: J. Harmaning ---- 119
Order corrected: W. Zunck ---- 120
Collateral income no evidence lack of disability: C. Rankins ---- 122
Order corrected: T. Audas ---- 134
Own motion not available to set aside a denial: B. Bruns ---- 149
Own motion appeal: W. Lish ---- 153
Review hampered by no brief: H. Morse ---- 172
Cause of action split won't work: B. Newton ---- 179
Computation of payment dates: F. Dieter ---- 186
Remanded: W. Rogers ---- 200
Reopened for more evidence: Fitzgibbons ---- 207

Vol. 14, cont.

Remanded for better evidence where Rinehart is doctor: R. Iverson ---- 216
Claim for widow's benefits: G. Slater ---- 223
Dismissal for want of prosecution upheld: C. Jackson ---- 225
Dismissed as moot: M. Ross ---- 232
Employer may not appeal in SAIF case: V. Michael ---- 243
Order corrected: F. Parazoo ---- 247
Supplemental order: N. Bartlett ---- 247
Phony disputed claim: J. Barratt ---- 249
Twelve page opinion: J. Barratt ---- 249
Brief absence basis for reversal: D. Olson ---- 260
Order corrected: R. Phillips ---- 265
Remand for newly discovered evidence: E. Menchaca ---- 270
Order amended: W. Phillip ---- 275
Evidence, medicals required: J. Barry ---- 288
Hearing request was late: A. Forcht ---- 291
Supplemental order: O. Fitzgibbons ---- 292

Vol. 15

Amended stipulation approved: C. De LaMare ---- 185
Claim messed up: S. Veerkamp ---- 40
Dismissal set aside: C. Dennis ---- 51
Effect of Washington denial: H. Cline ---- 133
Further evidence taking error: R. Webster ---- 3
Heart claim improperly dismissed: W. Corder ---- 254
Late request too bad: J. Chisholm ---- 99
Lawyer foul-up not good cause: I. Sekermestrovich ---- 65
Motion to remand denied: L. McKinney ---- 265
Motions denied: H. Olson ---- 129
New injury vs. own motion: H. Boutin ---- 58
Non-complying employer has standing to appeal: H. Mitchell ---- 80
Order clarified: A. Cozad ---- 52
Order corrected: J. Morford ---- 132
Order corrected: W. Reichlein ---- 149
Order corrected: V. Hinz ---- 247
Order corrected: M. Schallberger ---- 248
Order corrected: R. Lotts ---- 304
Pay until deny: S. Gardner ---- 275
Permanent partial disability not allowable until claim closure: J. Campbell- 146
Permanent disability cannot be considered while claim open, even for aggravation: E. Blanco ---- 167
Personal representative has standing to litigate denied claim: C. Chaney ---- 248
Post appellate: M. Schneider ---- 2
Prior award disregarded: C. Wilkerson ---- 136
Reconsideration denied: W. Phillip ---- 32
Remand denied where evidence available: E. Allen ---- 4
Remand on stipulation: K. Leonard ---- 25
Remand denied: E. Blom ---- 74
Remand motion denied: E. King ---- 223
Remanded for reconsideration by referee: T. Hoffman ---- 84

Vol. 15, cont.

Remanded for hearing: C. Adams ---- 177
Remanded to join another employer: J. Faulk ---- 205
Stipulation upheld in subsequent litigation: H. Court ---- 53

Vol. 16

Amended order extended appeal time: P. Baley ---- 22
Benefits survive: H. Padden ---- 31
Computation of beginning date of total disability award: O. Love ---- 251
Constitutional questions not reached: W. Wisherd ---- 258
Denial no basis for attorney's fees: S. Halstead ---- 191
Denial improper during appeal time: S. Hollingsworth ---- 269
Extent of compensation pending appeal which must be paid: W. Wisherd ---- 258
Fireman's presumption: J. Gerstner ---- 193
Joinder of prior insurer under own motion: K. McRay ---- 187
Law of case prevents rerun: R. Dahlstrom ---- 197
Lump sum payment rule not retroactive: C. Clapp ---- 237
Order corrected: H. Prince ---- 267
Order corrected: R. Parmenter ---- 271
Own motion where no formal objection to reopening: G. Mendoza ---- 56
Own motion not substitute for appeal: D. Conger ---- 223
Own motion not substitute for appeal: R. Callerman ---- 223
Own motion application premature: P. Carpenter ---- 280
Paying agency designated: J. Bleth ---- 277
Paying agency designated: H. Short ---- 295
Processing delayed for about a year: A. Templeton ---- 265
Reconsideration refused: R. Seymour ---- 177
Reconsideration granted: P. Geidl ---- 307
Rehabilitation order effect on claim appeal: N. Shanklin ---- 289
Remand for rehabilitation pending appeal: G. Wicklander ---- 71
Remanded for determination: J. Kleatsch ---- 28
Reopening discretionary: J. Booth ---- 37
Sixty-one-day request denied claim: G. Williams ---- 72
Two-carrier defense: dismissal not final: J. Faulk ---- 154
Vocational rehabilitation procedure outlined (read): G. Leaton ---- 9
Vocational rehabilitation ordered: W. Edmison ---- 175

Vol. 17

After count remand: M. Schneider ---- 60
Aggravation or new injury quagmire: F. Villavicencio ---- 251
Appeal rights on reopening after aggravation rights expire: F. Estabrook ---- 66
Appeal divests jurisdiction: D. Krall ---- 295
Correction issued: H. Prince ---- 27
Cross appeal late: D. McIntosh ---- 140
Denial upheld even though attorney not notified and claimant in prison: J. Rhyne ---- 11
Fee allowed on amendment: E. Kitts ---- 43
Fee by supplemental order: M. Thomas ---- 115
Fee reduced--must go to circuit judge: S. Malar ---- 120
Late denial: P. Pritchard ---- 272

Vol. 17, cont.

Lump sum settlement barred appeal: A. Green ---- 185
Lump sum settlement means what it says: D. Davidson ---- 202
Medical need not be paid pending appeal: W. Miller ---- 227
Motion not remedy: W. Edmison ---- 42
Motion to dismiss on jurisdictional question denied: L. Kesterson ---- 114
Non-disabling claim found disabling: M. Krager ---- 176
One-page order to correct date: M. Schneider ---- 73
Order corrected: P. Pritchard ---- 299
Own motion determination corrected: A. Joy ---- 215
Payment of award not waiver of appeal: S. Khal ---- 36
Prior award signiticance discounted: Z. Dugdale ---- 18
Reconsideration refused: E. Dayton ---- 101
Reconsideration denied: K. Gilmore ---- 167
Reconsideration denied: T. Wann ---- 238
Reduction on claimant's appeal only: T. Dalton ---- 287
Refused myelogram: J. Johnson ---- 192
Reimbursement on own motion atter settlement of ORS 656.307 case:
C. Williams ---- 278
Remand for evidence denied: K. Binette ---- 118
Remand for further medical affirmed: B. Lingafelter ---- 140
Remand: E. King ---- 147
Remand to DPD affirmed: W. Edmison ---- 149
Remand denied: P. Snyder ---- 166
Remanded for additional medical where SAIF withheld important medical:
M. Marcott ---- 88
Remanded where no findings: J. Datz ---- 290
Reopening timely: C. Hansen ---- 135
Repayment by employee not allowed: S. Khal ---- 36
Second aggravation claim barred by first: F. Velasquez ---- 229
Shafted where claimant won't keep medical appointments: J. Hurst ---- 183
Stay allowed pending appeal: J. Chisholm ---- 237
Suspension of benefits where refuse surgery: E. Glahn ---- 294

Vol. 18

Amended order: C. Friend ---- 265
Annulment results in getting benefits restored: L. Aselson ---- 178
Attempt to overturn disputed claim settlement refused: A. Seeber ---- 92
Beginning date of total disability explained: M. Floyd ---- 211
Closing order was legal: C. King ---- 218
Defective denial: D. Ward ---- 106
Denial may be made at any time: S. Anderson ---- 110
Good cause for late request: D. Christian ---- 179
Grounds for appeal need not be stated: R. Smith ---- 43
Hearing otficer may withdraw opinion before appeal or 30 days: J. Holder - 159
Late request for hearing dismissed: A. VanBlokland ---- 133
Motion for paying agency without merit: L. Neilan ---- 195
Order corrected: W. Scheese ---- 154
Order corrected: R. Bennett ---- 244
Order corrected: S. Larsen ---- 256

Vol. 18, cont.

Order clarified: A. Wood ---- 269
Order corrected: D. Ward ---- 281
Paying agent designated: W. Puzio ---- 242
Payments must continue even if claimant leaves country: A. Bilovsky ---- 281
Reconsideration denied: C. VanMeter ---- 253
Reduction on claimant's appeal: R. Burns ---- 200
Remand for consideration of extra medical: G. Kelly ---- 86
Remand for more evidence denied: M. Canady ---- 194
Remanded for consideration of medicals: M. Salloum ---- 225
SAIF can't win by proving problem related to another claim which also insured: F. Miles ---- 168
Settlement not set aside: J. McBride ---- 218
Stay of compensation not available: L. Kellogg ---- 87
Unilateral offset allowed on claim closure: R. Vessela ---- 105

Vol. 19

Additional medical refused: D. Easton ---- 53
Appeal from denial of vocational rehabilitation denied until medically stationary: T. McCormick ---- 229
Carrier dismissed out of proceeding: K. McRay ---- 62
Consolidation possible only by remand: I. Tallman ---- 164
Denial after first payment: S. Stamm ---- 232
Denial eight years after accident: J. Fritz ---- 259
Dismissed where no closure: B. King ---- 272
End run on denied claim attempted by own motion determination: W. Wamsher ---- 260
Extra evidence refused: G. Kuskie ---- 4
Good cause is not just personal problems: O. Strickland ---- 253
Good cause not shown where lawyer had letter: M. Botts ---- 290
Insurer can't get expedited review: M. Hartman ---- 69
Moot by vocational rehabilitation admission: D. Bennett ---- 162
Motion denied: M. Koonce ---- 11
Non-complying employer must be served with review request: J. Cash ---- 161
Notice of injury four years late: M. Shifton ---- 208
Order corrected: C. Woodruff ---- 271
Order corrected: W. Patterson ---- 293
Order modified several months later: S. Kahl ---- 3
Order revised: J. Mauldin ---- 105
Own motion closure was error: N. Crane ---- 200
Own motion not relief valve for defective appeal: W. Wamsher ---- 260
Reconsideration denied: P. Snyder ---- 293
Remand denied: W. Ritchie ---- 90
Remanded on stipulation: R. Gaylord ---- 114
Res judicata on medicals: G. Richards ---- 223
Retraining program moots claim closure: J. Mauldin ---- 70
Settlement modified: J. Hanlon ---- 288

Vol. 20

Attorney fee not reimbursed on third-party recovery: R. Harding ---------- 231
Claimant whipsawed by multiple carriers: E. Burns ---------- 25
Decision revised based on evidence submitted to Board after decision:
M. Burton ---------- 173
Denial overturned 7 years later on heart claim: E. Fields ---------- 210
Employer may appeal where carrier doesn't: R. Fenton ---------- 5
Employer has burden of proof: G. Logerwell ---------- 63
Employer contact with claimant improper: H. Boutin ---------- 132
Employer allowed to file brief even though SAIF requested review: R. Durfee 199
Joinder upheld: J. Faulk ---------- 72
Letter of transmittal not part of record: V. Stadel ---------- 69
Medical bills need not be paid pending appeal: M. Norgard ---------- 24
Medical must be paid pending appeal: J. Fritz ---------- 178
Messed-up 1955 claim: W. Casteel ---------- 200
Multiple carriers: J. Faulk ---------- 125
Multiple employers: M. Hopkins ---------- 137
Occupational disease: L. Terrell ---------- 129
Oral denial at hearing: M. Koonce ---------- 91
Order amended: T. Grund ---------- 170
Reconsideration denied: B. Swetland ---------- 4
Referee has no authority to order retraining: J. Rosenberry ---------- 249
Referral to Vocational Rehabilitation moots ppd appeal: G. Merrifield ---- 230
Refusal to pay pending appeal not basis for dismissing appeal: W. McFarland 21
Reimbursement where all claims ultimately denied: S. Goetz ---------- 208
Remand denied: W. Rollins ---------- 9
Remanded where right of rebuttal promised then revoked: E. Kunkel ----- 239
Reopening moots extent of disability appeal: R. Davidson ---------- 130
Reopening doesn't mean premature closure: C. Knapp ---------- 271
Review filed on time: T. Knaus ---------- 52
Review delayed to see if claim to be reopened: D. Compton ---------- 131
Settled for $2,240.00 where vocational rehabilitation is involved: R. Evans 180
Settlement on appeal: J. Hansen ---------- 108
Third-party settlement dispute: D. Herman ---------- 279

REQUEST FOR HEARING

Vol. 1

Postage meter impression dated prior to 60-day period insufficient for jurisdiction: A. Cobb ---------- 139
Request addressed to State Compensation Department gives no jurisdiction:
J. Lewis ---------- 133
Request addressed to State Compensation Department held insufficient:
R. Cooper ---------- 26
Request directed to State Compensation Department held sufficient, as previous occurrences indicative of inadequate notice of appeal rights: L. Hogson 144
Subsequent claim acceptance not bar to attorney's fees: C. Hooper ------ 160
Time expired before widow knew claim filed: C. Printz ---------- 71
Where partial denial, time runs as to that denied from date of partial denial and not subsequent determination: G. Wunder ---------- 113

REQUEST FOR HEARING, cont.

Vol. 1, cont.

Where year has run may allow filing of aggravation claim: J. Peck ------ 17
Year allowed for request even though determination is delayed until long after secret closure of claim: L. Fitzhugh ---------- 145

Vol. 2

Filed more than 60 days after a denial--dismissed: E. Burton ---------- 122
Filed more than a year after a determination--dismissed: J. Claridge ------ 121
Must be within 60 days after a partial denial: A. Weidner, Jr. ---------- 26
Must be within 60 days where injury under prior law: F. Licurse ---------- 122
Not timely: O. Spenst ---------- 107
Not timely--letter misdirected to Department: C. Brewer ---------- 132
Permissible after request for lump sum award where pertains to medical services: R. Carter ---------- 20
Time limitation problem more complicated than meets the eye: C. Petersen - 118
Void notice of denial does not start time running: F. Hilton ---------- 2

Vol. 3

Not abandon: J. Reisdorf ---------- 59
Request misaddressed and too late: B. Walch ---------- 32

Vol. 4

Obsolete form used to deceive claimant: J. Brooks ---------- 172
Sixty-first day is too late: B. English ---------- 66
Sixty-first day is too late: A. Zaha ---------- 77
Time limit excused where 11-year-old boy: J. Stewart ---------- 264
Too late: H. Keitzman ---------- 89
Year and a day is too late: C. Debnam ---------- 78

Vol. 5

Belated denial doesn't restore right to hearing: J. Koch ---------- 267
No right after 6 years, even if SAIF has recently paid some benefits on voluntary basis: C. Cole ---------- 141
Too late: H. Sherman ---------- 24

Vol. 6

Claimant bears risk of nonarrival of letter requesting hearing: R. Loan ---- 251
Direction of request to SAIF good cause for application of 180 day limit: S. Ellis ---------- 277
Too late where comes 184 days after partial denial: E. Keller ---------- 204

Vol. 8

Attorney's failure to file request on time is not "Just Cause": E. Hartzell -- 82
Request not "filed": R. Loan ---------- 92
One year requirement binding: J. Philpott ---------- 185
Untimely: J. Flippen ---------- 239

REQUEST FOR HEARING, cont.

Vol. 9

Dismissal for want of prosecution set aside: W. Wyles ---- 143
Estoppel by SAIF where misrepresent time in which to request hearing:
F. Cleveland ---- 101
Heart claim filed 4 years after attack: F. Mendenhall ---- 134
Letter to Board deemed adequate as request for hearing: H. Fay ---- 5
Pleading must be sufficient to show jurisdiction to proceed: S. Lyons ---- 34

Vol. 10

Estoppel against untimely request: D. Johnson ---- 197
None permitted over 1964 injury: K. Lange ---- 14

Vol. 11

Allowed beyond 60-day period: K. Smith ---- 87
No exuse for letting 60 days run from denial: W. VanWinkle ---- 107
Not timely where also filed for off-job insurance: R. Pierce ---- 106

Vol. 12

Not timely: D. Tadlock ---- 25

Vol. 14

Benficiaries' claim: G. Gronquist ---- 166

Vol. 15

Good cause for delay shown: D. May ---- 103
Good cause not shown: W. Wamsher ---- 189

REQUEST FOR REVIEW

Vol. I

Claimant should seek if wants increased award: R. Harper ---- 108
Failure to request within 30 days goes to jurisdiction: P. Lowe ---- 23
Failure to request within 30 days goes to jurisdiction: P. & G. Medford ---- 46
Must be timely: Notice to counsel; notice to parties: M. Benjamin ---- 54
Request may be withdrawn: B. Castricone ---- 17
Service on SCD: Failure not jurisdictional: D. Doud ---- 81
Service of SCD: Failure is jurisdictional: D. Doud ---- 69
Stipulation of settlement may be disavowed: R. Schulz ---- 59

Vol. 2

Delay justified where no service of hearing order on counsel: H. Newman ---- 187
Employer must pay compensation due pending review: B. Logan ---- 94
Late request is jurisdictional: I. Bennett ---- 144
Must serve Department to perfect request: R. Hastings ---- 130
Request dismissed on stipulated settlement: E. Powers ---- 109

Vol. 3

Case remanded when transcript not available: N. O'Callaghan ---------- 180
Dismissed for want of prosecution: D. Cure ---------- 59
Additional time granted where inadequate appeal instructions: D. Ford ---- 34
Order pursuant to stipulation: H. Maxwell ---------- 70
Penitentiary Inmate: J. Rout ---------- 81
Stipulation approved: E. McMahon ---------- 139
Withdrawn by employer: N. Hughes ---------- 28
Withdrawn: E. Pennington ---------- 58
Withdrawn: Q. Rabideau ---------- 96
Withdrawn: D. Helfer ---------- 155
Withdrawn on arm disability case: R. Leers ---------- 173
Withdrawn: H. Boesch ---------- 266
Withdrawn: W. Crane ---------- 267
Withdrawn: L. Ownby ---------- 274
Withdrawn: R. St. Onge ---------- 275

Vol. 4

Defective: Q. Frazier ---------- 164
Dismissed upon stipulation: G. Couch ---------- 28
Dismissed: D. Gould ---------- 258
Withdrawn: J. Ladd ---------- 19
Withdrawn: E. Martin ---------- 157
Withdrawn: E. Mitchison ---------- 220
Withdrawn: F. Hubinsky ---------- 234
Withdrawn: R. Forbess ---------- 278

Vol. 5

Failure to receive copy of hearing officer order no excuse for not appealing within the 30 day time period: S. Johnson ---------- 105
Failure to mail notice to employer is jurisdictional: B. Landers ---------- 128
Not timely: M. Dotton ---------- 48
Withdrawn: F. Bennett ---------- 12
Withdrawn: M. Neathamer ---------- 99
Withdrawn: L. Spencer ---------- 167
Withdrawn: H. Ellerbroek ---------- 191
Withdrawn: L. Pepperling ---------- 204
Withdrawn: S. Matthew ---------- 253
Withdrawn: I. Wirta ---------- 278

Vol.6

Case settled: R. Duncan ---------- 91
Not timely: D. Miller ---------- 62
Not timely: P. Mabe ---------- 98
Review dismissed where claim reopened to await determination: R. Davis -- 251
Thirty-first day held soon enough: J. Williams ---------- 149
Withdrawn: M. Kimbrough ---------- 6
Withdrawn: J. Fleishman ---------- 14
Withdrawn: M. Blachfield ---------- 24

Vol. 6, cont.

Withdrawn: W. Smith ---- 64
Withdrawn: E. Dahack ---- 108
Withdrawn: J. Stiles ---- 112
Withdrawn: L. Lovel ---- 176
Withdrawn: J. Ivey ---- 299

Vol. 7

Dismissed without prejudice upon information that claim had been reopened: H. Kleeman ---- 70
Goof request: D. Bellinger ---- 226
Irregular when seek review from "letter of intent": L. Skirvin ---- 80
Settled: T. Onque ---- 259
Withdrawn: B. McGlone ---- 5
Withdrawn: R. Morgan ---- 60
Withdrawn: M. Oman ---- 85
Withdrawn: J. Truitt ---- 105
Withdrawn: F. Johlke ---- 162
Withdrawn: T. Davis ---- 191
Withdrawn: M. Young ---- 191
Withdrawn: B. Benham ---- 216
Withdrawn: M. Otterstedt ---- 234
Withdrawn by stipulation: C. Brunner ---- 272

Vol. 8

Claim reopened pending appeal: G. Zapata ---- 99
Reconsideration by hearing officer and subsequent order extended appeal time: E. Puckett ---- 55
Request dismissed: J. Page ---- 143
Review dismissed for late request: M. Farmer ---- 156
Withdrawn: L. Rouse ---- 31
Withdrawn: R. Andrews ---- 51
Withdrawn: E. Ranslam ---- 89
Withdrawn: O. Sylvester ---- 165
Withdrawn: D. Weber ---- 165
Withdrawn: V. Whitehall ---- 240

Vol. 9

Dismissed on advice that claimant was deceased: H. Oleman ---- 22
Settled: A. Colburn ---- 91
Settled: M. Proffitt ---- 3
Withdrawn: R. Graham ---- 3
Withdrawn: J. Frank ---- 3
Withdrawn: R. Blackford ---- 21
Withdrawn: J. Miller ---- 53
Withdrawn: J. Russell ---- 58
Withdrawn: W. Cunningham ---- 60
Withdrawn: B. Balcom ---- 89
Withdrawn: J. Mitchell ---- 116

REQUEST FOR REVIEW, cont.

Vol. 9, cont.

Withdrawn: M. Glover ---- 123
Withdrawn: T. Webb ---- 126
Withdrawn: P. Densmore ---- 132
Withdrawn: L. Marsh ---- 132
Withdrawn: B. Carter ---- 146
Withdrawn: W. Resell ---- 186

Vol. 10

Service must be on other parties, not just their attorneys: L. Smith ---- 125
Untimely: G. McElroy ---- 184
Withdrawn for 11° increase: G. Simpson ---- 99
Withdrawn: W. Scott ---- 103
Withdrawn: D. Bailey ---- 133
Withdrawn: R. Fanning ---- 145
Withdrawn: M. Sanchez ---- 148
Withdrawn: J. Ross ---- 212
Withdrawn: M. Fox ---- 225

Vol. 11

31st day request: R. Wright ---- 40
Claimed late filing: N. Reiling ---- 195
Dismissed for want of proper service: M. Schneider ---- 214
Interlocutory appeal on joinder case: J. Barrett ---- 115
Interagency mail used: G. McElroy ---- 29
Late filing: N. Cobb ---- 224
Procedural trap: M. Schneider ---- 230
Proof of service neglected: W. Grable ---- 57
Settled for $250: J. Ferguson ---- 43
Settled: C. Turan ---- 109
Withdrawn: R. Qualls ---- 30
Withdrawn: F. Dieter ---- 36
Withdrawn: R. Hadwen ---- 61
Withdrawn: D. Jensen ---- 90
Withdrawn: D. Johnson ---- 110
Withdrawn: W. Sullivan ---- 129
Withdrawn: M. Paulson ---- 187
Withdrawn: A. Moore ---- 192
Withdrawn: P. Pyper ---- 218
Withdrawn: L. Adams ---- 218
Withdrawn: D. Marvin ---- 232
Withdrawn: J. Oren ---- 280

Vol. 12

Claimant not served: N. Meyer ---- 44
Cross-request must also be served on claimant, not just attorney: F. Sandstrom 268
Date on request will control absent better evidence: A. Whittle ---- 268
Muffed appeal: C. Leggett ---- 224

Vol. 12, cont.

Procedural mess: K. Mull ---- 48
Procedure: H. Rhodes ---- 193
Waiver of late appeal not allowed: W. Harris ---- 255
Withdrawn: F. Bratton ---- 23
Withdrawn: W. Mattison ---- 55
Withdrawn: G. Smith ---- 63
Withdrawn: S. Sommers ---- 64
Withdrawn: W. Mitchell ---- 83
Withdrawn: C. McCarty ---- 92
Withdrawn: N. Fountain ---- 119
Withdrawn: H. Cox ---- 142
Withdrawn: G. McMahon ---- 197
Withdrawn: W. Wood ---- 200
Withdrawn: C. Lunsford ---- 201
Withdrawn: J. Frankovich ---- 212
Withdrawn: B. Thompson ---- 237
Withdrawn: B. Miller ---- 272

Vol. 13

Dismissed on reconsideration: C. Nollen ---- 176
Dismissed for want of proper service: L. Haglund ---- 213
Dismissed for want of proper service: C. Clark ---- 213
Late filing: V. Michael ---- 210
Timely request: R. Sears ---- 109
Withdrawn: J. Mooney ---- 26
Withdrawn: F. Feiss ---- 67
Withdrawn: A. Anderson ---- 71
Withdrawn: B. Gerhard ---- 95
Withdrawn: B. Gerhard ---- 122
Withdrawn: D. Smith ---- 137
Withdrawn: W. Winner ---- 148
Withdrawn: K. Frischman ---- 150
Withdrawn: K. Frischman ---- 163
Withdrawn: F. Tucker ---- 211
Withdrawn: W. Sargent ---- 215
Withdrawn: R. Fout ---- 267

Vol. 14

Withdrawn: T. Pettit ---- 18
Withdrawn: F. Yakis ---- 20
Withdrawn: V. Cross ---- 20
Appeal defective: R. Benefield ---- 21
Withdrawn: D. Hoisington ---- 42
Withdrawn: D. Michaels ---- 58
Withdrawn: V. Williamson ---- 130
Withdrawn: L. Anderson ---- 139
Withdrawn: L. Kincaid ---- 146
Withdrawn: R. Bohl ---- 179

Vol. 14, cont.

Withdrawn: L. Robinson ---- 243
Employer may not request in SAIF case: V. Michael ---- 243
Withdrawn: D. Conway ---- 271

Vol. 15

Dismissal of attempted review of stipulation: B. Urbano ---- 192
Dismissed as moot: D. Coliron ---- 81
Dismissed as late filed: P. Baley ---- 264
Late request: D. Nelson ---- 62
Non-complying employer may request: H. Mitchell ---- 80
Withdrawn: S. Claiborne ---- 32
Withdrawn: J. Vogl ---- 34
Withdrawn: A. Hargon ---- 51
Withdrawn: B. Bowen ---- 76
Withdrawn: L. Casey ---- 79
Withdrawn: E. Hill ---- 80
Withdrawn: R. Hoskin ---- 100
Withdrawn: R. Burell ---- 131
Withdrawn: B. Gray ---- 131
Withdrawn: F. Schafer ---- 131
Withdrawn: W. Arriaga ---- 146
Withdrawn: W. Wiles ---- 158
Withdrawn: E. Blom ---- 159
Withdrawn: H. Stoll ---- 171
Withdrawn: F. Rohay ---- 192
Withdrawn: R. Wheeler ---- 201
Withdrawn: F. Nabti ---- 207
Withdrawn: D. Barrera ---- 209
Withdrawn: A. Lewis ---- 241
Withdrawn: O. Yutze ---- 261

Vol. 16

Late postmark not always fatal: F. Blanton ---- 262
Settled: J. Yoes ---- 150
Withdrawn: R. Thurston ---- 1
Withdrawn: B. Grisso ---- 1
Withdrawn: M. Hatcher ---- 133
Withdrawn: D. Wright ---- 151

Vol. 17

Dismissal denied--notice timely: J. Kindy ---- 82
Postmark controls time: C. Butterfield ---- 20
Terminates jurisdiction: D. Krall ---- 295
Withdrawn: N. Goodwin ---- 36
Withdrawn: C. McCracken ---- 114
Withdrawn: M. Salem ---- 116
Withdrawn: R. Schwach ---- 116
Withdrawn: R. Hess ---- 299

Vol. 18

Dismissed as late: H. White ---- 89
Dismissed as late: D. Bassford ---- 141
Dismissed for lack of service: E. Keech ---- 244
Dismissed for lack of service: D. Harding ---- 251
Dismissed for late request: W. Casey ---- 271
Muddled up by attorney: D. Harding ---- 196
Withdrawn: C. Slack ---- 19
Withdrawn: E. Yost ---- 23
Withdrawn: R. Hendrickson ---- 113
Withdrawn: C. LaHaie ---- 130
Withdrawn: E. Overall ---- 156
Withdrawn: E. Driesel ---- 171
Withdrawn: D. Jordan ---- 171
Withdrawn: J. Hunt ---- 265
Withdrawn: F. Smith ---- 281
Withdrawn: G. Carrothers ---- 299

Vol. 19

Defective notice: A. Jones ---- 2
Defective notice: E. Keech ---- 4
Defective notice nets dismissal: A. Albiar ---- 5
Dismissed as late filed: G. Zimmerman ---- 105
Dismissed as moot: J. Mauldin ---- 105
Dismissed for defective notice: A. Albiar ---- 35
Employer must be served: J. Cash ---- 161
Withdrawn: R. Maynard ---- 36
Withdrawn: J. Mauldin ---- 39
Withdrawn: R. Franklin ---- 88
Withdrawn: H. McLeod ---- 98
Withdrawn: L. Huey ---- 160
Withdrawn: W. Bowen ---- 161
Withdrawn: J. Ball ---- 264
Withdrawn: T. Bryson ---- 291

Vol. 20

Almost late: T. Knaus ---- 52
Appeal on 32nd day timely: R. Williams ---- 119
Cross-request is untimely: R. Williams ---- 195
Defect in request not fatal: M. Wirges ---- 179
Dismissal threatened for want of prosecution: A. Kytola ---- 19
Employer has standing: R. Fenton ---- 5
Late request fatal: R. Williams ---- 89
Settled for $1126.32: J. Pinney ---- 129
Timely on 31st day: P. Stevens ---- 76
Withdrawn: W. Patterson ---- 19
Withdrawn: L. Wonsyld ---- 19
Withdrawn: M. Mattern ---- 87
Withdrawn: K. Feuerstein ---- 198

Vol. 20, cont.

Withdrawn: C. Van Buskirk ---- 201
Withdrawn: W. Parker ---- 228
Withdrawn: R. Smith ---- 238
Withdrawn: J. Yockey ---- 238
Withdrawn: C. Herzberg ---- 275

SCOPE OF REVIEW

Vol. 1

Board determination may not be reduced by Hearing Officer without cross-request by defense: J. Byers ---- 25
Medical Board should determine presence of occupational disease: J. Lescard 36

SCOPE OF WORKMEN'S COMPENSATION ACT

Vol. 1

Carpenter found not to be a subject workman under prior law: J. Bowman ---- 29
Certain settlements of claims not permissible: D. Staley ---- 135
Custom farming usually incidental to farming: B. Westfall ---- 126
Department may not unilaterally suspend SIAC award of total disability: J. Rawls ---- 155
Employee of farm labor contractor engaged in farming or work incidental thereto: T. Burk ---- 8
Employee defined for purposes of "four employee rule": Beaver Spt. Prop ---- 48
Invalid child over 18 not beneficiary where widow survives: W. Leech ---- 70
Prison inmate not covered while attending school: R. Edgar ---- 119
Pellet mill found to be farming activity: Schmidt Bros. Farms ---- 24

Vol. 2

Apartment manager not casual employee, although paid less than $100: G. Entler ---- 111
Corporation officer not subject employee: R. Rising ---- 57
Employer not retroactively subject to Act by 1965 revision: H. Eveland ---- 117
Illegitimate twins beneficiaries where there is surviving spouse also: L. Thornton ---- 203
Incidental means relative size: J. Weimer ---- 61
Inmate payment of 25¢ per day does not make an employee: L. Dixon ---- 57
Pellet mill incidental to commercial farming operation: D. Brennan ---- 63
Sprinkler business incidental to farming: J. Weimer ---- 61
State line injury: F. Hilton ---- 2

Vol. 3

Applies to car ferrying operation: P. Allen ---- 64
Cherry picker conspiracy to avoid insurance coverage won't work: C. Lawrence ---- 171
Definition of farming problem: B. Westfall ---- 150

SCOPE OF WORKMEN'S COMPENSATION ACT, cont.

Vol. 3, cont.

Settlement of airplane death approved: G. Clark ---------- 17
Stipulation approved: E. Vandehey ---------- 11

Vol. 4

Homeowner's subjectivity: J. Briery ---------- 293
Stepchildren of 10 days are beneficiaries: R. Housley ---------- 29
When awards are payable: C. Lisoski ---------- 27

Vol. 6

Live-in Nurse not subject workman: C. Gunter ---------- 138
Paperboy is employee of Oregonian: D. Oremus ---------- 129

SECONDARY INJURY

See: Intervening Injury

Vol. 6

Heart attack symptoms treated as aggravation: K. Payton ---------- 299

Vol. 7

Aggravation or new injury: D. Richards ---------- 54
Aggravation or: P. Stang ---------- 100
Aggravation vs. new injury: L. Fulbright ---------- 224
Home injury was new: E. Partridge ---------- 247
New injury if substantial portion of disability traceable to that event:
J. Wight ---------- 124
Not proven: J. Cunningham ---------- 196
Two accidents found: A. Neal ---------- 182

Vol. 12

New injury here: D. Story ---------- 2

SECOND INJURY FUND

Vol. 17

Application not timely: ---------- 238
Relief on arm fracture of 100%: P. Bartell ---------- 216
Relief denied in long opinion: O. Webster ---------- 240

Vol. 18

Dismissed: M. Simms ---------- 88
Nursing home gets 35% relief: G. Stoppleworth ---------- 158
Relief denied where no prior knowledge on injury: R. Peterson ---------- 65

SECOND INJURY FUND, cont.

Vol. 19

Relief denied: C. Woodruff ---------- 234
Relief denied: J. Brawner ---------- 267

SELF-EMPLOYED

Vol. 4

Corroborative evidence needed: T. Boyer ---------- 8
Must have employee before can elect: C. Swanson ---------- 220
No corroborative evidence: C. Swanson ---------- 220

Vol. 5

Problem where have no employees: R. Gray ---------- 126
Incorporated without notice to SAIF: M. Waymire ---------- 199

SUBSTANTIAL EVIDENCE RULE

Vol. 1

De novo review rule adopted: C. Miller ---------- 119
Substantial evidence rule applied to affirm choice of medical theories:
M. Bowles ---------- 45
Substantial evidence rule applied over claimant's protest: E. Goldberg ---- 78

Vol. 2

Applied?: W. Hedrick ---------- 72

SUBJECTIVITY

Vol. 10

Non-complying employer: G. Brittain ---------- 71
Personal election: V. Gosso ---------- 162
Race car accident: M. Cain ---------- 141
Referred for hearing: J. Palmer ---------- 182
Rental apartment: J. Ivie ---------- 259
Riding academy: J. Buckner ---------- 198
Trailer repair company: L. Barber ---------- 277

Vol. 13

Joint adventure: J. Sells ---------- 170
State not exempt: E. Charon ---------- 133

Vol. 16

Berry picker not contractor: M. Cardoso ---------- 180
Corporate officer in fact log truck driver and subject: J. Webb ---------- 173

SUICIDE

Vol. 2

Suicide does not destroy rights accrued prior to death: G. Klinski ---------- 104

Vol. 4

Death from overdose of barbiturates might not be suicide: W. Tolbert ------ 13

TEMPORARY DISABILITY

Vol. 1

After treating physician's initial release, limitations: W. Benedict ------- 38
Computation based on loss of wages: L. Andrews ---------- 87
Computation where partial temporary disability: C. Adams ---------- 140
Discharge from employment two months after injury sufficient basis for award: M. Walsh ---------- 1
Hernia complications extend carrier's liability: A. Sheppard ---------- 158
Jailed claimant does not suspend obligation to pay: T. Cheek ---------- 120
Jail residence not excuse to stop paying: M. Brudana ---------- 90
Lower back injury cases in which the claimant suffers from continuing problems, a myelogram should be effected prior to a declaration that medically stationary: J. Belanger ---------- 22
Medically stationary condition not found: H. Young ---------- 62
Medically stationary condition not found: W. Adams ---------- 60
Medically stationary condition not found: L. Andrews ---------- 87
None during Vocational Rehabilitation: F. Lamm ---------- 21
None during Vocational Rehabilitation: I. Boorman ---------- 97
None during Vocational Rehabilitation: B. Philibert ---------- 109
Part- vs. full-time employee: L. Antoine ---------- 62
Pregnancy--effect: C. Hayward ---------- 96
Retroactive determination permissible: I. Boorman ---------- 97
Seasonal worker: Too speculative: A. Belding ---------- 61
Temporary and not permanent employee: M. Winburn ---------- 127
Treating doctor's release did not stop: E. Sager ---------- 174
Termination prior to release or determination, when OK: W. Benedict ----- 38
Unemployment compensation may not be used as setoff: W. Adams -------- 60
Unemployment compensation may not be used as setoff: H. Young -------- 62
Vacation with pay terminates: R. Haak ---------- 128

Vol. 2

Additional allowed for psychiatric examination: N. Firkus ---------- 126
Additional months allowed after remand: B. Williamson ---------- 136
Additional allowed after ulcers cause aggravation: R. White ---------- 28
Additional allowed: L. Schanaman ---------- 156
Allowed for additional period: T. Foreman ---------- 12
Allowed for additional psychiatric consultation after brain damage: H. Cunningham ---------- 29
Allowed set off for overpayment against an aggravation claim: L. Blackmore 98
Claimant found not medically stationary: J. Keeler ---------- 8
Computation for woman whose husband is in jail: L. Rawlings ---------- 134

Vol. 2, cont.

Difficulty in computation of temporary partial disability: L. Andrews ---- 77
Fees and penalties attach where slow payment: D. Sampson ---- 201
Improperly terminated: W. Arnold ---- 170
Paid for 33 weeks while regularly employed: L. Kappert ---- 78

Vol. 3

Award affirmed: J. Caso ---- 111
Computation confused by tips: N. Crane ---- 136
Computation to moonlighting employee: R. Grocott ---- 10
Computation where moonlighting: M. Culwell ---- 244
Not medically stationary: C. Shelley ---- 159
Temporary partial award excessive: R. Weber ---- 27
Temporary partial disability computation: M. Clover ---- 269
Volunteer fireman: R. Stilwell ---- 271

Vol. 7

Additional week not allowed: J. Hash ---- 53
Claimant died while claim pending: D. Wolfe ---- 131

Vol. 8

Reopening affirmed: L. McBride ---- 220
Unemployment compensation: R. Roland ---- 176
Where claim reopened: T. Horn ---- 213

TEMPORARY TOTAL DISABILITY

Vol. 4

Additional allowed: J. Delgado ---- 120
Additional allowed: R. Munnerlyn ---- 210
Computation where part-time employee: M. Janssens ---- 30
Dispute over number of children: R. Peterson ---- 134
Suspended where no cooperation: D. Filbeck ---- 190

Vol. 5

Claim ordered reopened: C. Bivens ---- 171
Claim reopened: W. Whitehead ---- 191
Claim reopened but no penalties or fees: W. Woods ---- 273
Employee fired after attempt to return to work: O. Brown ---- 70
No more where retired: E. Downing ---- 254
None additional allowed: F. Banta ---- 75
Procedure where two injuries: L. Jackson ---- 1
Remand for psychological counselling: D. Mayfield ---- 172
Remand for further hearing where claimant's employment terminated: P. Mabe 236

Vol. 6

Additional period affirmed: J. Alverez ---------- 189
Claim reopened but not retroactively: D. Anderson ---------- 75
Claim reopened for psychiatric treatment: T. Graves ---------- 179
Hernia claim: W. Miller ---------- 6
Not allowed when case in this posture: B. Sinden ---------- 236
None where receive unemployment benefits: G. Emerson ---------- 239
None where fired: R. Nicholson ---------- 287
One period disallowed: B. Lampheare ---------- 213
Order reopening claim for psychiatric care reversed: J. Holland ---------- 155

Vol. 7

Credit for overpayment on prior injury allowed: J. Powers ---------- 240
Farm worker limitation construed: W. Cheadle ---------- 163
Farm worker limitation attacked: G. Rios ---------- 165
Further time allowed in lieu of award for total disability: L. Martin ---------- 233
Jaw broken: R. Smith ---------- 232
Liability pro-rated: M. Johns ---------- 109
No additional allowed: N. Bird ---------- 2
Order reopening reversed: D. Ashbaugh ---------- 177
Payment by employer as soon as discover due is soon enough: D. Englund ---------- 153
Reopened when don't know what else to do: R. Bennett ---------- 171
Reopened for Physical Rehabilitation evaluation: M. Zilko ---------- 172
Reopening reversed: M. Culwell ---------- 188
Unilateral termination not proper: H. Christiansen ---------- 86

Vol. 8

Additional allowance by hearing officer deleted: J. Walker ---------- 46
Award modified: L. Jeffers ---------- 221
Claim reopened: S. Powell ---------- 125
Claim settled for $12,500: D. Howland ---------- 182
Claim reopened: I. Smalling ---------- 118
Computation of minimum: S. Spurlock ---------- 196
Computations of minimum amount: W. Michael ---------- 13
Payment stopped on return to work but claim not closed: R. Wetherall ---------- 264
Part-time employe receives $27 per week: C. Campbell ---------- 134
Remand for decision relating to psychological problems: C. Horton ---------- 173
Reopening for psychological problems: J. Techtman ---------- 106
Reopening ordered on knee injury: J. Satre ---------- 190
Reopened and re-submitted to SAIF: H. Hamilton ---------- 233
Reopening denied: W. Davis ---------- 246
Two years additional allowed: E. Monen ---------- 96

Vol. 9

Adjudication after death: L. Skirvin ---------- 187
Back claim reopened for disability prevention: V. Wierichs ---------- 133
Claim reopened for further medical treatment: F. Fox ---------- 252
Extended for reference to disability prevention clinic: D. Fry ---------- 144

Vol. 9, cont.

Fired from job: B. Brady ---- 203
If not employed at time of disability: E. Ornbaun ---- 270
No more allowed in worthless opinion: F. Kimball ---- 42
Own motion on 1957 back claim: A. Christensen ---- 56
Readjusted: G. Rogers ---- 105
Reopening on stipulation: M. Holland ---- 185
Reopening ordered: T. Rice ---- 172

Vol. 10

Additional declined: D. Tracy ---- 221
Allowed for further psychotherapy: C. Lee ---- 295
Authorized termination may not be same as medically stationary:
G. Dierdorff ---- 42
Claim reopened: J. Neumiller ---- 107
No more allowed: R. Throckmorton ---- 96
Retroactive benefits available on aggravation claim: J. Lane ---- 44
Won't work but could: G. Parks ---- 101

Vol. 11

Additional allowed: M. Arneson ---- 11
Additional allowed: H. Briggs ---- 289
Affirmed: R. Wright ---- 17
Aggravation disability prior to filing claim: L. Cummings ---- 184
Off-set prohibited where paid pursuant to order pending appeal: R. Todahl - 168
Reopening reversed: A. Crouch ---- 255

Vol. 12

Closing said premature: R. Bigelow ---- 258
Computation to moonlighter: B. Loerzel ---- 223
Divorce will affect benefits: D. Smith ---- 161
Divorce after accident: L. Browder ---- 172
1973 amendment not retroactive: T. Thompkins ---- 149
No effect for overpayment: R. Hindman ---- 23
Partial disability not proper: T. Kelly ---- 10
Reopened but not retroactively to closing: P. Brusco ---- 144
Requirements pending formal closing: H. Thurston ---- 81
Terminated where in prison and not having medical treatment: G. Hanks — 1
Unemployment receipt not proper offset: R. Horwedel ---- 237
Unequivocal medical report requires payment of time loss even if don't believe it: F. Smith ---- 230

Vol. 13

Additional allowed: P. Mowry ---- 32
Computation of partial disability: M. Shepherd ---- 101
Denied where no lawyer: D. Hill ---- 223
Payments pending denial: A. Zouvelos ---- 166

Vol. 13, cont.

Premature closing: R. Shauer ---------- 157
Rehabilitation: M. Pointer ---------- 178

Vol. 14

Two and half years additional allowed: M. Larson ---------- 64
Reopened for psychiatric case: E. Williams ---------- 84
Setoffs on reopening: H. Harmon ---------- 131
More allowed: G. Reese ---------- 140
Own motion: A. Kube ---------- 194
Reopened: M. Hollinger ---------- 230
Read this one: W. Phillip ---------- 261

Vol. 15

Aggravation claim commencement: E. Barr ---------- 48
Allowance reversed: H. Olson ---------- 90
Claim prematurely closed: H. Simmons ---------- 169
Computation for moonlighter: V. MacDougall ---------- 117
Extra allowed: S. Minor ---------- 138
Partial disability - claimant must cooperate in computing: M. Barker ---------- 106
Reopened for three years of time loss: A. Cozad ---------- 6
Reopening order reversed: J. Tubb ---------- 20
Reopening order over loud protest: J. Lee ---------- 200
Year's benefits reversed on conflicting medical testimony: J. Poelwijk ---------- 25

Vol. 16

Hernia claim: J. Keeton ---------- 97
Hysterectomy after back injury: W. Stinson ---------- 95
Payable on aggravation until denial made: C. Anderson ---------- 19
Rehabilitation terminated after stipulation for 20-month loss: P. Kern ---------- 113
Remanded for closure: R. Seymour ---------- 59
Vocational rehabilitation lead case: G. Leaton ---------- 9

Vol. 17

Attorney held up medical report: E. Dayton ---------- 75
Claim reopened: E. Kitts ---------- 25
Continued until rehabilitation complete: M. Thomas ---------- 104
Light work release where no light work available: J. Turner ---------- 125
One year later on back claim: T. Yarbrough ---------- 232
Rate includes in kind service value: D. Piper ---------- 179
Reopened over SAIF appeal: M. Witt ---------- 55
Reopened on settlement: R. Pierce ---------- 91
Reopening denied: D. Biggs ---------- 204
Reopening overturned on appeal: V. Schimke ---------- 61
Reopening reversed in three pages: K. Duggan ---------- 261
Three-day week computation justified: H. Lillie ---------- 283

TEMPORARY TOTAL DISABILITY, cont.

Vol. 18

Additional allowed: C. King ---- 218
Computation where moonlighting: D. Hari ---- 284
Reopened where psychological problems: H. Scott ---- 305
Reopening order reversed: J. Guilliams ---- 121
Required even if claimant leaves country: A. Bilovsky ---- 281

Vol. 19

Days off to visit doctor compensable: W. Perkins ---- 277
Denied where prior litigation: P. Snyder ---- 249
Pain clinic basis for reopening: L. Kingsbury ---- 287
Reopening denied: B. Debolt ---- 246
Termination proper: F. Mahoney ---- 243
Time loss premature closing where no psychiatric evaluation: P. Dimmick ---- 19

Vol. 20

Aggravation claim: J. Graham ---- 253
Closure was not premature on reversal: M. Baker ---- 93
Denied claim: M. Genz ---- 274
None where palliative treatment: J. Kindy ---- 270
Payable on claim ultimately denied: M. Burton ---- 84
Reopening denied: M. Hillman ---- 105

THIRD PARTY CLAIM

Vol. 3

Settlement of airplane death approved: G. Clark ---- 17

Vol. 5

Distribution dispute: L. Johnson ---- 166
Moot: R. Roderick ---- 68
Third party distribution approved: P. Conner ---- 288

Vol. 6

Effect of potential aggravation claim: E. Bingham ---- 226

Vol. 7

Settlement approved: D. Stewart ---- 63
Settled for $12,000: D. Deulen ---- 96

Vol. 8

Third party settlement: M. Holland ---- 142

THIRD PARTY CLAIM, cont.

Vol. 9

Electrical shock: H. Kochen ---------- 95

Vol. 11

Distribution dispute: D. Ceglie ---------- 183

Vol. 12

Uninsured motorist coverage: S. Holden ---------- 7

Vol. 13

Distribution dispute: R. Garrett ---------- 136
Retroactive reserve: D. Dyer ---------- 1

TOTAL DISABILITY

Vol. 2

Affirmed for back disability: G. Robinson ---------- 96
Allowed for inhalation of paint fumes: J. Lescard ---------- 24
Allowed for back disability: W. Williams ---------- 68
Allowed on own motion order: W. Koch ---------- 162
Allowed to 65-year-old man for back injury: D. Jackman ---------- 166
Award reversed by Board where claimant died before medically stationary: E. Milburn ---------- 62
Denied where non job-connected death while on temporary total disability: E. Wagenaar ---------- 4
Denied where age and general poor health plus injury rendered claimant unable to work: N. Weeks ---------- 86
Denied where residual function in hands: L. Shuey ---------- 105
Denied where recovery complicated by heart condition: A. Wright ---------- 146
Denied where successive large back awards: L. Faulkner ---------- 135
Heart attack claim merits total disability: C. Rundel ---------- 174

Vol. 5

Allowed after long procedure: J. Rush ---------- 218
Award reversed where functional overlay: D. Jenness ---------- 282
Award set aside to Hyster driver: C. Ziebart ---------- 13
Dissent would allow: D. Beedle ---------- 133
Grandchildren in loco parentis: M. Webb ---------- 244
Hearing: 58½% of right ear and 24% of left ear plus blind in one eye not total disability: H. Crocker ---------- 24

Vol. 6

Affirmed for construction worker for back disability: J. Dubravac ---------- 269
Allowed for back disability: A. Paquin ---------- 266
Allowed where more surgery would not be wise: E. Trentham ---------- 241

Vol. 6, cont.

Allowed for crushed body: C. Conrad ---- 232
Allowed by majority for blow to face: E. Ashford ---- 217
Allowed for neck injury where any other employment not shown: C. Inman ---- 172
Allowed where prior award of 95% for unscheduled disability: N. Kipfer ---- 74
Allowed for arm injury where previous loss of a forearm: L. Durham ---- 54
Allowed for back disability on own motion: C. Cole ---- 109
Allowed where now substantially precluded from lifting, stooping and bending: A. Rossiter ---- 125
Allowed for whiplash: I. Gibbs ---- 152
Attorney's fees applicable if compensation not reduced where hearing on own motion proceeding: E. May ---- 211
Award affirmed: F. Hilton ---- 277
Dissent would allow: J. Powell ---- 80
Knee injury not total disability: D. Howland ---- 230
Logger after four years of temporary total disability: C. Johnson ---- 301
Sought by beneficiaries: R. Buhrle ---- 256

Vol. 7

Affirmed where employer couldn't prove other employment available: B. Plunkett ---- 10
Affirmed for back injury: E. Peterson ---- 12
Allowed for back injury: L. Smith ---- 16
Allowed for back injury in close case: A. Heppner ---- 77
Allowed by Board: L. Davis ---- 104
Allowed by way of aggravation: E. DeWitt ---- 118
Allowed on rehearing after previously settling matter for 128°: A. Campbell 130
Allowed where no jobs available: F. Willadsen ---- 149
Award reversed for back injury: H. Ainsworth ---- 48
Award reversed: S. Jones ---- 158
Award set aside on own motion where return to work: T. Austin ---- 3
Determination allowed: Hearing and review found no residual disability whatever: C. Selanders ---- 147
Determination found no disability: R. Bennett ---- 171
Disabled when consider obesity and poor motivation: C. Brauckmiller ---- 44
Earnings of $8,000 over 1½ years conclusive that not totally disabled: C. McDowell ---- 137
Limited bookkeeping ability doesn't preclude: H. Lessar ---- 253
Low back and leg not enough: W. Taylor ---- 260
Own motion consideration: D. Chamberlin ---- 274
Reduction to 218°: O. Duke ---- 91
Some disability plus no return to work isn't equal to total disability: M. Jenkins ---- 51

Vol. 8

Affirmed to old sawyer: L. Parish ---- 28
Allowed where death pending decision: F. Kirkendall ---- 58
Allowed: C. Chmelik ---- 246
Allowed: J. Croy ---- 247

Vol. 8, cont.

Allowed on Odd Lot Doctrine: C. Middleton ---- 254
Allowed: L. Lettenmaier ---- 279
Award vacated on own motion jurisdiction where award for electric shock had been made: E. May ---- 110
Can fish and farm: F. Hill ---- 27
Girlfriend is not a widow: L. Johnson ---- 125
Hearing ordered pending own motion termination: F. Pense ---- 111
Husband and wife simultaneously rendered totally disabled: M. Johnson ---- 141
Leg injury and psychological factors will not support total award: E. Jones ---- 222
Medical evidence unnecessary: F. Hill ---- 27
Odd Lot Doctrine applied: B. Turpin ---- 57
Odd Lot Doctrine for back injury: C. Cooley ---- 64
Odd Lot Doctrine applied: R. Krosting ---- 136
Permanent total case reopened and remanded for Rehabilitation: A. Spliethof 164
Psychiatric impairment: A. Grandell ---- 224
Reopened for further medical care: F. Baker ---- 248
Seventy year old man who died pending appeal: J. Ross ---- 179
Total allowed to nurse's aid on Odd Lot Doctrine: E. Ward ---- 39
Total where work for Goodwill: E. Pyeatt ---- 175
Total award after advance payment: M. Land ---- 188

Vol. 9

Award revoked when return to work: F. Pense ---- 44
Award affirmed: M. Manning ---- 168
Crazy woman: D. Sydnam ---- 230
Denied: L. Crispin ---- 189
Denied even after remand: C. Briggs ---- 108
Hernia which reoccurs: J. Prewitt ---- 155
Leg disabilities: D. Eastburn ---- 86
Neurosis basis of award: R. Hart ---- 143
No 'Odd Lot' here: F. Fitzgerald ---- 116
Odd Lot disability: D. Buster ---- 97
Occupational disease award affirmed: M. Carey ---- 154
Prior 3 level fusion: J. Dyer ---- 233
Remanded for psychiatric treatment: D. Sydnam ---- 230
Reversed: J. Nicholson ---- 182
Reversed where offered job: W. Dodd ---- 148
Severe heart condition: R. Perdue ---- 214
Smashed body: O. Cheek ---- 240
Terminated and 96° allowed: G. Roth ---- 65
Total award affirmed: C. Stroh ---- 120
Total award affirmed: A. Loving ---- 122
Total on odd lot theory: H. Kelley ---- 123

Vol. 10

Affirmed where claimant went crazy after pipe wrench dropped on him: J. Techtman ---- 132
Affirmed for illiterate with one blind eye who can't lift or stand: J. Gruber 280

Vol. 10, cont.

Allowance reversed: F. Rencken ---- 121
Allowance on determination reversed: M. Egger ---- 178
Allowed for psychopathology: D. Dedman ---- 6
Allowed where heavy pre-existing disability: A. Goebl ---- 67
Allowed over vigorous defense: D. Clark ---- 91
Allowed by board: N. Clark ---- 98
Allowed where psychopathology: B. Anglin ---- 151
Allowed for back strain: J. McCulloch ---- 154
Allowed where can't work mostly because of scheduled disability problem:
M. Seems ---- 156
Allowed where issue as to whether aggravation or new injury: C. Wheeler ---- 222
Allowed where C and E fouled up: L. Balfour ---- 257
Arm and shoulder injury basis for total award: C. Owens ---- 201
Award reversed on aggravation claim: S. Jones ---- 61
Award affirmed where psychological factors: V. Lynch ---- 72
Award affirmed: B. Swing ---- 75
Award affirmed: A. James ---- 113
Denied: C. Staiger ---- 51
Denied where movies: L. Haugen ---- 242
Own motion: B. Clayborn ---- 61
Own motion allowance: R. Allman ---- 117
Payment date for total disability award: E. Zinn ---- 189
Phoney settlement: H. Douglas ---- 35
Previous award (1965) set aside where now working: F. Pense ---- 245
Procedure requires specific request in request for hearing, maybe?:
M. McGinnis ---- 168
Reopened where claimant went back to work after award: J. Taylor ---- 269
Reversed: E. Kirkendall ---- 236

Vol. 11

Affirmed for left leg: G. Glenn ---- 270
Affirmed over employer appeal: L. Krugen ---- 155
Affirmed to store clerk: D. Elliott ---- 60
Aggravation to, where prior 240°: V. Luedtke ---- 231
Aggravation total: R. O'Dell ---- 146
Aggravation total: M. Pentecost ---- 147
Allowed by way of aggravation: C. Sutton ---- 145
Allowed where seniority list makes reemployment in soft job impossible:
R. Grunst ---- 204
Allowed for tailbone surgery: H. Crowell ---- 26
Award reversed: J. Koroush ---- 121
Award reversed: J. McCuiston ---- 123
Award set aside and reopened: J. Massingale ---- 148
Died pending appeal: L. McInnis ---- 112
Bad fusion not enough to make odd-lotter: M. Nutini ---- 68
Bartender could work: J. Rutherford ---- 275
Brain damage: J. Pietila ---- 233
Broken back: W. Koivisto ---- 28
Heart attack: R. Jaime ---- 59

Vol. 11, cont.

Heart so bad can't work as janitor: W. Kern ---- 281
Logger who can't log: H. Smith ---- 278
Logger with bad leg, hearing and narcolepsy: H. Welch ---- 21
Lump sum settlement stipulation disapproved: J. Pietila ---- 67
Multiple injuries: F. Morelli ---- 291
Odd lot total: E. Ashford ---- 213
Open sore, infection and osyeomyelitis basis for Total: J. Allison ---- 31
Phoney settlement on multiple insurer claim: J. Barrett ---- 115
Review abandoned: C. Zachow ---- 38
Severe disc degeneration: C. Applegate ---- 164
Total on third appeal: H. Vicars ---- 5
Total where can't speak English: R. Salazar ---- 124
Wants to work but can't: L. Shortreed ---- 234

Vol. 12

Affirmed: V. Smith ---- 52
Affirmed in good opinion: W. Lamb ---- 214
Asthmatic bronchitis: S. Hammond ---- 231
Award reversed: C. Heitz ---- 181
Award reversed: M. Myers ---- 187
Award reinstated after work return unsuccessful: J. Taylor ---- 198
Back is seriously injured: G. Bowman ---- 70
Both legs hurt, but not badly enough: R. Rafferty ---- 49
Denied where refuse head examination: R. Gammell ---- 206
Denied after four myelograms and three surgeries: M. Bell ---- 248
Emotional cripple: A. Brinkley ---- 78
Heart condition: L. Hilliker ---- 123
Heart condition allowed on reconsideration: A. Daggett ---- 236
Odd Lot total: F. Goska ---- 38
Odd Lot total: E. Cox ---- 199
Odd Lot total: R. Thoma ---- 229
Old logger with double fusion: I. Wilson ---- 27
Prima-facie total: F. Huntley ---- 219
Psychological aggravation of foot injury: J. Solesbee ---- 222
Reduction to 96° on own motion: G. Roth ---- 26
Retarded illiterate who could only rake leaves before: R. Warren ---- 160
Reversed and 160° allowed: F. House ---- 15
Reversed and 160° allowed: M. Jones ---- 287
Roofer won't retrain himself: M. Notz ---- 10
Total affirmed over Fund appeal: K. Church ---- 196
Total on 1964 injury: V. Bonner ---- 251

Vol. 13

Affirmed: R. Anderson ---- 108
Already in bad shape before injury: J. Barnes ---- 169
Back total where no surgery: A. Stark ---- 43
Death claim of total: S. Kilburn ---- 253
Depression reaction: G. Biggers ---- 168

Vol. 13, cont.

Farmer who can't clean barn: W. Hampton ---- 165
Increase from 20%: A. Tewalt ---- 132
Odd lot total where not suitable for rehabilitation: H. Flipse ---- 67
Odd lot total: L. Baier ---- 138
Odd lot Mexican: B. Arevalo ---- 241
Own motion allowance: C. Sutton ---- 282
Psychiatric difficulties: G. Stauber ---- 45
Psychiatric disorder: R. Selander ---- 156
Rehabilitation failed: R. Pitts ---- 192
Reversed where medical not supporting: J. Grijalva ---- 267
Saleslady age 75: F. Sandstrom ---- 204
Six years of treatment couldn't help: M. Lewis ---- 153
Total award affirmed: P. Kernan ---- 70
Total for compression fracture: H. Lacy ---- 87
Total for a smashed heart: R. Harrison ---- 272

Vol. 14

Aggravation: H. Liggett ---- 157
Allowed: A. Freeman ---- 38
Allowed where 50% determination: D. Yarnell ---- 290
Allowed where mostly preexisting disability: L. Burkhartsmeier ---- 103
Award proper where chance of recovery remote: M. Carlson ---- 58
Award reduced to 75%: K. Hughey ---- 59
Back strain where prior heart attack: D. Shoults ---- 129
Benefit commencement time: F. Dieter ---- 186
Determination overturned: C. Fitch ---- 226
Determination reduced to 50%: E. Moe ---- 181
Odd lot total to young fish canner: H. Morton ---- 5
Odd lot total for pulmonary problem: R. White ---- 9
Odd lot (potato grader): J. Craigen ---- 221
Odd lot total (truck driver): S. Carter ---- 219
Odd lot (truck driver): R. Granger ---- 217
Old and three prior injuries: G. Beer ---- 71
Own motion allowed: K. Lange ---- 86
Psychological dysfunction: W. Staines ---- 218
Reversed: G. Kuskie ---- 34
Reversed: C. Johnson ---- 43
Reversed twice: M. McGinnis ---- 18
Secretary: collateral income not proper consideration: C. Rankins ---- 122
Total for bad fusion: C. Rosencrans ---- 28
Total where disabled from all except sheltered workshop before injury:
W. Campbell ---- 103

Vol. 15

Allowed over dissent where determination was total and employer had
appealed: H. Cutler ---- 35
Allowed by Board: J. Morford ---- 111
Appeal remand: M. Schneider ---- 2

Vol. 15, cont.

Artificial hip is sufficient basis: M. Way ---- 31
Award affirmed: R. Shell ---- 9
Back from 50% to total: D. Smith ---- 61
Bellyache supports award: G. Hunt ---- 39
Board allowed in long opinion: W. Kauffman ---- 141
Computation where advance payment: H. Horn ---- 277
Last employer responsible: P. Buyas ---- 94
Odd-lot total to dishwasher: E. Jenness ---- 67
Odd-lot total: N. Shook ---- 102
Odd-lot total: W. Reichlein ---- 129
Odd-lot total: W. McCoy ---- 219
Odd-lot total: M. Lankins ---- 220
Odd-lot total: W. Bushnell ---- 268
Old award sent back for hearing: G. Dillon ---- 101
Own motion total: B. Hinz ---- 211
Prior awards of over 100% doesn't make total: R. Hill ---- 280
Reduced to 50%: M. Taylor ---- 152
Reduced to 80%: O. Braughton ---- 279
Reduced to 50%: V. Harvill ---- 292
Reversed and 25% allowed: C. Canfield ---- 186
Reversed award to retired 71-year-old: G. Stone ---- 273
Scheduled disability total statute not retroactive: D. Farley ---- 8

Vol. 16

Affirmed over dissent: B. Clawson ---- 234
Allowed over employer appeal: C. Long ---- 83
Allowed where SAIF claimed retrainable but took no action: K. Mull ---- 130
Arthritis plus strain: C. Pressel ---- 76
Back claim total: M. Nelson ---- 283
Computation of beginning date: O. Love ---- 251
Continued by stipulation: N. Wingfield ---- 81
Cook who can't cook: E. Nimsic ---- 73
Death benefit claim: C. Cronin ---- 88
Denied to smashed up logger: J. Beckman ---- 7
Determination upheld on SAIF appeal: K. Vanderpool ---- 122
Odd-lot total: G. Stoppleworth ---- 51
Odd-lot total: G. Thompson ---- 168
Odd-lot at age 66 mostly because of leg: R. Rea ---- 170
Own motion grant on 1968 injury: L. Lovel ---- 153
Personality disorder over trivial back injury: G. Brooks ---- 17
Reduced to 40%: J. Bidwell ---- 101
Reduced to 50% for dermatitis: C. Olson ---- 102
Reduced to 70% for neck sprain: D. Lucky ---- 188
Reversed on review: K. Hickman ---- 64
Reversed and reduced to 60%: P. Brusco ---- 138
Reversed where don't want rehabilitation: T. Tompkins ---- 291
Shoulder sore on Greek: L. Agouridas ---- 117
Termination attempted: T. Taylor ---- 119
Total on board increase from 90%: C. Askew ---- 148
Zero partial award upped to total: H. Ayer ---- 20

Vol. 17

Affirmed where pain clinic refused: E. Landes ---- 218
Allowed for sore neck: G. Serrano ---- 29
Back of 30 years for same employer: G. Crabtree ---- 206
Cancellation unsuccessful: G. Dillon ---- 169
Death prior to determination: E. Galbreath ---- 164
Denied where prefer not to work: K. Thompson ---- 228
Denied where 120% back claim: L. Kesterson ---- 279
Denied and partial award reduced also even without cross appeal: T. Dalton 287
Determination of total reversed on employer appeal: A. Abelsen ---- 249
Heavy equipment operator prevails: E. Staggs ---- 23
Logger who fell with prior bad back: F. Howard ---- 10
Mechanic with broken leg: E. Van Dusen ---- 78
Multiple employers juggle potato: W. Langley ---- 133
Odd-lot total for leg problem: D. Cluster ---- 34
Odd-lot total: R. Brink ---- 92
Odd-lot not proven: H. Helgeson ---- 156
Odd-lot total for back-leg syndrome: D. Marshall ---- 280
One-armed logger lost out: G. Brockman ---- 220
Prior award not set aside: H. Lacy ---- 233
Reaffirmed after procedural appeal: M. Schneider ---- 60
Reduced to 80%: J. Wilson ---- 253
Retired not odd-lot: E. Hiner ---- 178
Reversed where injury to knee and arthritis of whole body problem: E. Ritz - 122
Reversed on shoulder injury where prior fusion: R. Vavrosky ---- 269
SAIF appeal from own motion total: C. Sutton ---- 81
Shot at total nets reduction: E. Brenner ---- 297
Total where couldn't work anyway: O. Hastings ---- 107

Vol. 18

Affirmed on SAIF appeal: D. Beverage ---- 230
Beginning time for payments is date last medically stationary: W. Scheese - 96
Board allowed for pain: P. Mowry ---- 68
Denied where works around farm: J. Hanlon ---- 47
Denied for medical basket case: M. Young ---- 50
Determination reversed and reduced to 50%: C. Miller ---- 27
Electrical shock causes brain damage: M. Shortridge ---- 17
Fusion on logger: R. Shelton ---- 44
Logger allergic to moss: J. Seibert ---- 3
Odd-lot total: L. White ---- 182
Odd-lot total logger: R. Ross ---- 289
Payments should be figured from date of determination unless order says otherwise: M. Floyd ---- 211
Reduced to 30%: V. Briggs ---- 167
Reduced to 75%: M. Jackson ---- 232
Reversal - 70% allowed: C. VanMeter ---- 192
Reversed and reduced to 20%: G. Johnson ---- 77
Reversed and reopened for further care: D. Pratt ---- 79
Reversed: D. Friend ---- 187
Reversed and reduced to 60%: S. Larsen ---- 203

Vol. 18, cont.

Reversed and 55% reinstated: J. Middleton ---- 273
Reversed where employer offered job to claimant which she could have done: M. Carrico ---- 297
Stipulation on 1967 injury: R. Plymale ---- 53

Vol. 19

Advance payment may be offset: H. Horn ---- 138
Advance payment offset--but not without agency approval: D. Pittman ---- 154
Affirmed for woman: M. Rogers ---- 90
Affirmed over dissent: M. Culwell ---- 27
Affirmed over dissent: M. Nelson ---- 14
Affirmed where can't work: R. Smith ---- 236
Affirmed where multiple carriers: M. Taylor ---- 224
Apple picking for three weeks not enough to terminate award: L. Satterwhite 189
Arthritis and knee support claim: G. Christian ---- 73
Award of 5% neck allowed: R. Collins ---- 132
Denied even though unfit for any employment: J. Johnstad ---- 119
Denied for hernia: A. Holten ---- 205
Denied for lack of motivation: O. Olson ---- 18
Determination reversed and reduced to 75%: N. Thompson ---- 281
Odd-lot total: S. Mack ---- 32
Odd-lot total: B. Jones ---- 46
Odd-lot total: L. Amos ---- 173
Odd-lot total after fall where severe emotional overlay: D. Chose---- 79
Own motion allowance on 1961 claim: B. Hopper ---- 273
Reduced to 30%: D. Coleman ---- 49
Reduced to 50% on split vote: R. Guerra ---- 80
Reduced to 75%: A. Elliott ---- 93
Reduced to 75%: G. Jones ---- 125
Reduced to 80%: L. Martin ---- 111
Reversed determination where unrelated disabilities: J. Combs---- 201
Reversed for foot injuries: E. Miller ---- 242
Sixty-seven year-old factory worker: E. Green ---- 122

Vol. 20

Affirmed increase from 70% for severe residuals: C. Perrigo ---- 54
Affirmed as odd-lot total: L. Scott ---- 157
Affirmed for broken back: R. Hollenbeck ---- 219
Aggravation of logger's claim: A. Trivett ---- 186
Allowed where prior award of 100%: M. Terry ---- 202
Allowed for arm and shoulder problem: R. Mapes ---- 236
Allowed by Board: E. Coons ---- 243
Denied where refuse retraining: M. Rice ---- 11
Denied over medical evidence to contrary: B. Cardwell ---- 212
Determination reduced to 60%: P. Rodenbaugh ---- 288
Hip repair will support because it is unscheduled: G. Davidson ---- 234
Odd-lot total at age 39: W. Nimtz ---- 48
Reduced to 10% of arm: R. Hart ---- 55
Reversal and reduction to 70%: A. Taylor ---- 215

Vol. 20, cont.

Reversed where light work urged: I. Lamberts ---------- 15
Reversed and reduced to 35% where limited motivation: A. Wert ---------- 60
Reversed determination after claimant's death: G. Logerwell ---------- 63
Reversed for moderate loss of back function: L. Conn ---------- 95
Reversed and reduced to 70%: A. Lewis ---------- 188
Severe spondylosis: G. Richard ---------- 286
Shoulder increased from 50%: H. Walker ---------- 114
Termination refused while in vocational rehabilitation program: C. Quenelle 76
Worn-out body: L. Johnson ---------- 269

TOTAL AND PERMANENT DISABILITY

Vol. 1

Additional disability from medical treatment compensable: F. Koch ---------- 44
Dissent would have allowed to old man: S. Fullerton ---------- 180
Elderly man's prior history no bar where previously employable: A. Wolverton 23
Failure to return to work not a prima facie test: A. Dewitt ---------- 43
Failure to return to work not conclusive as to inability: W. Smith ---------- 52
Functional overlay may be compensable: F. Koch ---------- 44
Functional element produced by serious injury and numerous associated surgical insults can be compensable factor in determining total disability: M. Tevepaugh ---------- 13
Hearing Officer award was overturned on review: T. Trent ---------- 131
Inability to return to former occupation insufficient: K. Seratt ---------- 1
Injury which will not yield to treatment plus inability of State of Oregon to find regular and suitable employment strong evidence of total disability: E. Storm ---------- 8
Mere belief that unemployable insufficient to establish same: C. Ellingson - 15
Must show that old longshoreman cannot do more sedentary type of work before can qualify for total disability: J. Oreskovich ---------- 20
Not allowed for 60% vital capacity of lungs: E. Gray ---------- 27

Vol. 3

Allowed for multiple injuries to face, head, right arm and neck: W. Benson 105
Award reduced by stipulation: D. Overhulse ---------- 211
Award reversed: J. Johnson ---------- 195
Case remanded for further evidence: J. Rush ---------- 196
Denied to longtime fireman with severe back problems: J. Leatham ---------- 97
Determination so allowing reversed: A. Swanson ---------- 201
Dissent would allow: G. Davis ---------- 143

Vol. 4

Allowed for back injury: W. Reed ---------- 47
Award reduced to 48 degrees: A. Luce ---------- 111
Award reduced to 115.2 degrees: R. Clower ---------- 137
Award reduced to 160 degrees for back problem: J. Bailey ---------- 207
Award reduced to 192 degrees in heart attack case: W. Sharp ---------- 150
Award reduced to 200 degrees: J. Matney ---------- 74
Eyes won't work: M. Rosenstengel ---------- 171

VOCATIONAL REHABILITATION

Vol. 16

California vocational rehabilitation ordered: W. Edmison ---- 175
Procedural handling: N. Shanklin ---- 289
Surgery refused no reason to refuse retraining: N. Shanklin ---- 213

Vol. 17

Rehabilitation by stipulation: R. Evans ---- 113

Vol. 18

Application procedure irregular: G. Ellis ---- 263
Denied where could work some jobs: T. Brady ---- 150
Denied to waitress: S. Espy ---- 234
Fifty per cent award set aside: J. Crook ---- 175
Injury during retraining: A. Wood ---- 245
Messed-up procedure: B. Moore ---- 299
Rehabilitation denied: N. Evenson ---- 197
Remand ordered: L. Anderson ---- 116
Remanded for vocational rehabilitation: M. Meacham ---- 72
Secretary who can't type not handicapped: S. Ott ---- 141

Vol. 19

Appeal denied until medically stationary: T. McCormick ---- 229
Moots appeal: D. Bennett ---- 162

Vol. 20

Benefits denied: J. Rosenberry ---- 204
Referee may not order retraining: J. Rosenberry ---- 249
Referral by hearings referee reversed: J. Shepard ---- 7

CUMULATIVE INDEX
ORS CITATIONS
Volume 1-20

Ch 70 O.L. 1971, Vol. 7 ---------109
Ch 265 Sec 43(2) O.L. 1965, Vol. 7--137
ORS 9.320, Vol. 7 ---------- 46
ORS 9.320, Vol. 7 ---------- 64
ORS 9.320, Vol. 9 ----------276
ORS 16.770, Vol. 11 ----------230
ORS 16.790, Vol. 5 ---------- 48
ORS 16.790, Vol. 6 ----------149
ORS 16.790, Vol. 7 ----------210
ORS 41.360(24), Vol. 10 ---------162
ORS 41.360(24), Vol. 14 ---------166
ORS 44.410, Vol. 8 ----------251
ORS 107.110, Vol. 5 ----------260
ORS 107.110(5), Vol. 5----------260
ORS 107.110(6), Vol. 5----------260
ORS 137.240, Vol. 3 ---------- 81
ORS 137.240, Vol. 8 ----------246
ORS 137.240, Vol. 12----------270
ORS 137.240(2), Vol. 12 ---------271
ORS 174.020, Vol. 15----------248
ORS 174.120, Vol. 4 ---------- 67
ORS 174.120, Vol. 6 ----------149
ORS 174.120, Vol. 9 ----------200
ORS 174.120, Vol. 11----------195
ORS 174.120, Vol. 12----------224
ORS 174.120, Vol. 13----------109
ORS 174.120, Vol. 13----------210
ORS 187.010, Vol. 11 ----------195
ORS 187.010, Vol. 13----------109
ORS 187.010(2), Vol. 20 ---------119
ORS 187.010(2), Vol. 20 ---------195
ORS 283.140, Vol. 11---------- 29
ORS 483.602, Vol. 5 ----------216
ORS 565.593, Vol. 12---------- 35
ORS 651.004, Vol. 10---------- 35
ORS 655.505, Vol. 15----------265
ORS 655.515, Vol. 7 ----------160
ORS 655.515, Vol. 15----------265
ORS 655.520, Vol. 17---------- 11
ORS 655.550, Vol. 15----------265
ORS 655.605, Vol. 18----------245
ORS 655.615, Vol. 18----------245
ORS 656.001, Vol. 5 ----------126
ORS 656.001 to 656.794, Vol. 13 --- 58
ORS 656.002, Vol. 8 ---------- 69
ORS 656.002, Vol. 11----------230
ORS 656.002(1), Vol. 10 ---------158
ORS 656.002(2), Vol. 6----------216
ORS 656.002(4), Vol. 4---------- 29
ORS 656.002(4), Vol. 7---------- 64
ORS 656.002(5), Vol. 4---------- 13
ORS 656.002(5), Vol. 4----------126
ORS 656.002(5), Vol. 9---------- 35
ORS 656.002(5), Vol. 9----------134
ORS 656.002(5), Vol. 14 ---------223
ORS 656.002(5), Vol. 15 ---------159
ORS 656.002(6), Vol. 3----------120
ORS 656.002(6), Vol. 13 ---------233
ORS 656.002(7), Vol. 7----------127
ORS 656.002(7), Vol. 8----------117
ORS 656.002(7), Vol. 11 ---------- 64
ORS 656.002(7), Vol. 11 ---------134
ORS 656.002(7)(a), Vol. 15 --------228
ORS 656.002(8), Vol. 14 ---------- 37
ORS 656.002(8), Vol. 16 ---------258
ORS 656.002(8), Vol. 17 ---------161
ORS 656.002(12), Vol. 7 ---------- 31
ORS 656.002(12), Vol. 7 ---------133
ORS 656.002(13), Vol. 15 --------- 93
ORS 656.002(16), Vol. 11 --------- 48
ORS 656.002(16), Vol. 11 ---------243
ORS 656.002(17), Vol. 12 ---------193
ORS 656.002(17), Vol. 12 ---------224
ORS 656.002(17), Vol. 14 --------- 80
ORS 656.002(17), Vol. 14 ---------243
ORS 656.002(17), Vol. 17 ---------161
ORS 656.002(20), Vol. 3 ----------244
ORS 656.002(20), Vol. 3 ----------111
ORS 656.002(20), Vol. 3 ---------- 10
ORS 656.002(20), Vol. 11 ---------279
ORS 656.002(21), Vol. 15 ---------117
ORS 656.002(22), Vol. 13 --------- 88
ORS 656.002(22), Vol. 17 ---------295
ORS 656.002(22), Vol. 19 ---------208
ORS 656.004, Vol. 13---------- 58
ORS 656.005(7), Vol. 19 ----------108
ORS 656.005(8), Vol. 19 ----------108
ORS 656.005(8) (b) (c), Vol. 19 ----258
ORS 656.005(27), Vol. 17 ---------179
ORS 656.005(9), Vol. 18 ----------248

ORS 656.005(9), Vol. 20 ---------178
ORS 656.005(9), Vol. 20 ---------240
ORS 656.005(20), Vol. 20 -------- 5
ORS 656.005(28), Vol. 20 -------- 89
ORS 656.016, Vol. 4 ----------204
ORS 656.016, Vol. 4 ----------212
ORS 656.016, Vol. 4 ----------293
ORS 656.016, Vol. 5 ----------136
ORS 656.016, Vol. 5 ----------221
ORS 656.016, Vol. 6 ----------122
ORS 656.016, Vol. 6 ----------138
ORS 656.016, Vol. 13----------170
ORS 656.016, Vol. 16----------156
ORS 656.016(1) (a), Vol. 6 ------ 35
ORS 656.023, Vol. 4 ----------221
ORS 656.023, Vol. 10----------199
ORS 656.023, Vol. 14----------146
ORS 656.023, Vol. 16----------173
ORS 656.027, Vol. 5 ----------221
ORS 656.027, Vol. 13----------233
ORS 656.027, Vol. 14----------146
ORS 656.027(1), Vol. 6 ---------138
ORS 656.027(1), Vol. 13 ---------133
ORS 656.027(2), Vol. 3--------- 9
ORS 656.027(2) (3), Vol. 6 ------216
ORS 656.027(3), Vol. 3---------239
ORS 656.027(3), Vol. 4---------294
ORS 656.027(3), Vol. 8---------208
ORS 656.027(3), Vol. 16 ---------156
ORS 656.027(6), Vol. 3--------- 64
ORS 656.027(6), Vol. 7---------144
ORS 656.027(6), Vol. 8---------276
ORS 656.027(7), Vol. 15 ---------109
ORS 656.027(7), Vol. 16 ---------173
ORS 656.027(8), Vol. 7---------218
ORS 656.031, Vol. 3 ----------271
ORS 656.031, Vol. 16---------- 53
ORS 656.039, Vol. 5 ----------199
ORS 656.039, Vol. 5 ----------221
ORS 656.039, Vol. 7 ----------218
ORS 656.054, Vol. 3 ---------- 9
ORS 656.054, Vol. 3 ----------115
ORS 656.054, Vol. 3 ----------203
ORS 656.054, Vol. 4 ----------204
ORS 656.054, Vol. 4 ----------294
ORS 656.054, Vol. 5 ----------136
ORS 656.054, Vol. 5 ----------160
ORS 656.054, Vol. 6 ----------216
ORS 656.054, Vol. 7 ----------208
ORS 656.054, Vol. 8 ----------192
ORS 656.054, Vol. 9 ----------165
ORS 656.054, Vol. 10----------182
ORS 656.054, Vol. 10----------260
ORS 656.054, Vol. 10----------277
ORS 656.054, Vol. 11----------133
ORS 656.054, Vol. 11----------163
ORS 656.054, Vol. 12----------178
ORS 656.054, Vol. 13----------114
ORS 656.054, Vol. 15----------133
ORS 656.054, Vol. 15----------135
ORS 656.054, Vol. 15----------164
ORS 656.054, Vol. 15----------238
ORS 656.054, Vol. 16---------- 99
ORS 656.054, Vol. 16----------173
ORS 656.054, Vol. 16----------201
ORS 656.054, Vol. 17---------- 48
ORS 656.054, Vol. 20----------145
ORS 656.054(1), Vol. 16 ---------207
ORS 656.054(1), Vol. 16 ---------260
ORS 656.054(2), Vol. 11 ---------136
ORS 656.054(2), Vol. 11 ---------196
ORS 656.060 (1) (2), Vol. 7 -------133
ORS 656.110, Vol. 5 ----------260
ORS 656.126(1), Vol. 13 --------- 58
ORS 656.126(1), Vol. 15 ---------242
ORS 656.128, Vol. 3 ----------174
ORS 656.128, Vol. 3 ---------- 73
ORS 656.128, Vol.4 ---------- 8
ORS 656.128, Vol. 4 ----------100
ORS 656.128, Vol. 4 ----------220
ORS 656.128, Vol. 4 ----------221
ORS 656.128, Vol. 4 ----------300
ORS 656.128, Vol. 5 ---------- 11
ORS 656.128, Vol. 5 ----------100
ORS 656.128, Vol. 5 ----------126
ORS 656.128, Vol. 5 ----------199
ORS 656.128, Vol. 5 ----------227
ORS 656.128, Vol. 6 ----------284
ORS 656.128, Vol. 7 ----------136
ORS 656.128, Vol. 8 ---------- 31
ORS 656.128, Vol. 8 ----------112
ORS 656.128, Vol. 13----------170
ORS 656.128, Vol. 16---------- 42
ORS 656.128(3), Vol. 6----------246
ORS 656.156, Vol. 12---------- 20
ORS 656.156(1), Vol. 11 ---------245
ORS 656.201(1) (a), Vol. 19-------201
ORS 656.202, Vol. 13---------- 71
ORS 656.204, Vol. 4 ----------136
ORS 656.204, Vol. 5 ----------109
ORS 656.204, Vol. 5 ----------259
ORS 656.204, Vol. 7 ---------- 70
ORS 656.204, Vol. 9 ----------128
ORS 656.204, Vol. 12----------213
ORS 656.204, Vol. 13---------- 1
ORS 656.204, Vol. 13----------220
ORS 656.204, Vol. 15---------- 41
ORS 656.204, Vol. 15----------254

ORS 656.204, Vol. 16---------- 88
ORS 656.204(3), Vol. 7---------161
ORS 656.206, Vol. 3 ---------- 76
ORS 656.206, Vol. 5 ----------244
ORS 656.206, Vol. 6 ---------- 81
ORS 656.206, Vol. 8 ----------225
ORS 656.206, Vol. 8 ----------248
ORS 656.206, Vol. 10----------154
ORS 656.206, Vol. 12---------- 13
ORS 656.206, Vol. 12----------229
ORS 656.206, Vol. 14---------- 86
ORS 656.206, Vol. 15---------- 8
ORS 656.206, Vol. 15---------- 73
ORS 656.206, Vol. 15----------273
ORS 656.206, Vol. 16---------- 64
ORS 656.206, Vol. 16---------- 73
ORS 656.206, Vol. 16----------148
ORS 656.206, Vol. 16----------188
ORS 656.206, Vol. 17---------- 10
ORS 656.206, Vol. 17---------- 29
ORS 656.206, Vol. 17----------107
ORS 656.206, Vol. 20---------- 60
ORS 656.206(1), Vol. 10 --------- 67
ORS 656.206(1), Vol. 14 ---------182
ORS 656.206(1), Vol. 15 ---------172
ORS 656.206(1), Vol. 15 ---------211
ORS 656.206(1), Vol. 17 --------- 5
ORS 656.206(1), Vol. 20 --------- 55
ORS 656.206(1) (a), Vol. 8 ------223
ORS 656.206(1) (a), Vol. 11------216
ORS 656.206(1) (a), Vol. 15------ 39
ORS 656.206 (1) (a), Vol. 16 ----- 76
ORS 656.206(1), Vol. 19 ---------273
ORS 656.206(a), Vol. 19 ---------242
ORS 656.207(3), Vol. 15 --------- 11
ORS 656.208, Vol. 3 ---------- 76
ORS 656.208, Vol. 8 ---------- 59
ORS 656.208, Vol. 8 ----------180
ORS 656.208, Vol. 14----------149
ORS 656.208, Vol. 15----------254
ORS 656.208, Vol. 16---------- 88
ORS 656.208(a) (b), Vol. 16------ 88
ORS 656.210, Vol. 4 ---------- 30
ORS 656.210, Vol. 7 ----------180
ORS 656.210, Vol. 8 ----------213
ORS 656.210, Vol. 12----------223
ORS 656.210, Vol. 18----------179
ORS 656.210, Vol. 18----------284
ORS 656.210(1), Vol. 8---------134
ORS 656.210(1), Vol. 8--------- 13
ORS 656.210(1), Vol. 8---------204
ORS 656.210(2), Vol. 8---------197
ORS 656.210(2) (a), Vol. 14 ------172
ORS 656.210(3), Vol. 7 ----------163
ORS 656.210(3), Vol. 7----------165
ORS 656.210(11), Vol. 4 ---------136
ORS 656.210(12), Vol. 3 ---------111
ORS 656.212, Vol. 3 ---------- 27
ORS 656.212, Vol. 9 ----------183
ORS 656.212, Vol. 14----------261
ORS 656.212, Vol. 15----------106
ORS 656.212, Vol. 18----------284
ORS 656.212, Vol. 19----------241
ORS 656.214, Vol. 4 ---------- 80
ORS 656.214, Vol. 5 ----------164
ORS 656.214, Vol. 6 ----------263
ORS 656.214, Vol. 8 ---------- 95
ORS 656.214, Vol. 8 ----------131
ORS 656.214, Vol. 9 ----------251
ORS 656.214, Vol. 14----------261
ORS 656.214(1) (h), Vol. 4 -------297
ORS 656.214(1) (k), Vol. 5 -------206
ORS 656.214(2), Vol. 7----------268
ORS 656.214(2) (b), Vol. 4 -------226
ORS 656.214(2) (b), Vol. 5 -------130
ORS 656.214(2) (b), Vol. 5 -------220
ORS 656.214(2) (h) (i), Vol. 18-----104
ORS 656.214(2) (i), Vol. 8---------238
ORS 656.214(2) (i), Vol. 18 -------104
ORS 656.214 (3), Vol. 4 ----------176
ORS 656.214(3), Vol. 4----------226
ORS 656.214(3), Vol. 7----------168
ORS 656.214(4), Vol. 3----------200
ORS 656.214(4), Vol. 3---------- 42
ORS 656.214(4), Vol. 4---------- 5
ORS 656.214(4), Vol. 4---------- 62
ORS 656.214(4), Vol. 4----------263
ORS 656.214(4), Vol. 5---------- 95
ORS 656.214(4), Vol. 5----------118
ORS 656.214(4), Vol. 5----------265
ORS 656.214(4), Vol. 6---------- 70
ORS 656.214(4), Vol. 6---------- 88
ORS 656.214(4), Vol. 12 ---------241
ORS 656.214(4), Vol. 17 ---------- 18
ORS 656.214(5), Vol. 13 ---------224
ORS 656.214(5), Vol. 11 ---------185
ORS 656.214(5), Vol. 11 ---------189
ORS 656.214(5), Vol. 14 ---------249
ORS 656.214(5), Vol. 15 ---------136
ORS 656.214(f), Vol. 12 ---------253
ORS 656.214(f), Vol. 16 ---------102
ORS 656.214(f) (g), Vol. 19 ------- 20
ORS 656.214(g), Vol. 18 ---------- 80
ORS 656.215(g), Vol. 12 ---------253

ORS 656.214(i), Vol. 9 ----------251
ORS 656.214(h), Vol. 9 ----------251
ORS 656.215(2) (j) (k), Vol. 4 ----226
ORS 656.216, Vol. 8 ----------213
ORS 656.216(l), Vol. 4 ---------- 27
ORS 656.217(1) (c), Vol. 8 ------ 30
ORS 656.218, Vol. 4 ---------- 28
ORS 656.218, Vol. 4 ----------149
ORS 656.218, Vol. 5 ---------- 63
ORS 656.218, Vol. 8 ----------177
ORS 656.218, Vol. 11----------242
ORS 656.218, Vol. 15---------- 41
ORS 656.218, Vol. 15----------248
ORS 656.218, Vol. 15----------254
ORS 656.218(3), Vol. 16 -------- 31
ORS 656.218(3), Vol. 17 --------283
ORS 656.220, Vol. 3 ---------- 30
ORS 656.220, Vol. 4 ----------249
ORS 656.220, Vol. 5 ---------- 15
ORS 656.220, Vol. 5 ---------- 94
ORS 656.220, Vol. 5 ----------167
ORS 656.220, Vol. 6 ---------- 6
ORS 656.220, Vol. 7 ---------- 31
ORS 656.220, Vol. 7 ---------- 76
ORS 656.220, Vol. 7 ----------250
ORS 656.220, Vol. 9 ----------155
ORS 656.220, Vol. 9 ---------- 48
ORS 656.220, Vol. 10---------- 35
ORS 656.220, Vol. 10---------- 82
ORS 656.220, Vol. 11----------248
ORS 656.220, Vol. 14---------- 13
ORS 656.222, Vol. 3 ---------- 90
ORS 656.222, Vol. 3 ----------161
ORS 656.222, Vol. 3 ----------250
ORS 656.222, Vol. 4 ---------- 5
ORS 656.222, Vol. 4 ---------- 62
ORS 656.222, Vol. 4 ----------100
ORS 656.222, Vol. 5 ---------- 1
ORS 656.222, Vol. 5 ---------- 73
ORS 656.222, Vol. 5 ---------- 82
ORS 656.222, Vol. 5 ----------133
ORS 656.222, Vol. 5 ----------190
ORS 656.222, Vol. 5 ----------251
ORS 656.222, Vol. 5 ----------273
ORS 656.222, Vol. 6 ---------- 92
ORS 656.222, Vol. 6 ----------131
ORS 656.222, Vol. 6 ----------153
ORS 656.222, Vol. 6 ----------188
ORS 656.222, Vol. 6 ----------196
ORS 656.222, Vol. 6 ----------230
ORS 656.222, Vol. 7 ----------118
ORS 656.222, Vol. 7 ----------140
ORS 656.222, Vol. 7 ----------150
ORS 656.222, Vol. 7 ----------186
ORS 656.222, Vol. 7 ----------193
ORS 656.222, Vol. 7 ----------221
ORS 656.222, Vol. 7 ----------226
ORS 656.222, Vol. 7 ----------240
ORS 656.222, Vol. 7 ----------244
ORS 656.222, Vol. 8 ---------- 33
ORS 656.222, Vol. 8 ---------- 69
ORS 656.222, Vol. 8 ---------- 90
ORS 656.222, Vol. 8 ---------- 93
ORS 656.222, Vol. 8 ----------104
ORS 656.222, Vol. 10----------151
ORS 656.222, Vol. 11----------185
ORS 656.222, Vol. 11----------188
ORS 656.222, Vol. 11----------213
ORS 656.222, Vol. 11----------216
ORS 656.222, Vol. 12----------152
ORS 656.222, Vol. 13----------235
ORS 656.222, Vol. 15----------136
ORS 656.222, Vol. 17----------269
ORS 656.226, Vol. 6 ---------- 49
ORS 656.226, Vol. 8 ----------125
ORS 656.228, Vol. 3 ---------- 76
ORS 656.228, Vol. 7 ---------- 49
ORS 656.228(3), Vol. 3----------179
ORS 656.230, Vol. 3 ---------- 76
ORS 656.230, Vol. 5 ---------- 67
ORS 656.230, Vol. 7 ----------246
ORS 656.230, Vol. 16----------237
ORS 656.230, Vol. 17---------- 36
ORS 656.230, Vol. 20----------202
ORS 656.230(1), Vol. 11 ---------- 67
ORS 656.230(1), Vol. 17 ----------202
ORS 656.230(2), Vol. 4---------- 27
ORS 656.230(2), Vol. 5----------245
ORS 656.230(3), Vol. 5---------- 5
ORS 656.230(3), Vol. 6---------- 25
ORS 656.232(1), Vol. 18 ----------281
ORS 656.234, Vol. 5 ---------- 1
ORS 656.236, Vol. 7 ---------- 63
ORS 656.236, Vol. 11---------- 75
ORS 656.236, Vol. 11----------117
ORS 656.236, Vol. 16----------274
ORS 656.236(1), Vol. 3---------- 76
ORS 656.236(1), Vol. 11 ---------- 67
ORS 656.236(1), Vol. 18 ---------- 92
ORS 656.245, Vol. 4 ---------- 70
ORS 656.245, Vol. 4 ----------146
ORS 656.245, Vol. 4 ----------179
ORS 656.245, Vol. 5 ----------159
ORS 656.245, Vol. 5 ----------175

ORS 656.245, Vol. 5 ----------229
ORS 656.245, Vol. 5 ----------283
ORS 656.245, Vol. 6 ----------190
ORS 656.245, Vol. 6 ----------213
ORS 656.245, Vol. 6 ----------247
ORS 656.245, Vol. 6 ----------292
ORS 656.245, Vol. 7 ---------- 27
ORS 656.245, Vol. 7 ---------- 41
ORS 656.245, Vol. 7 ----------142
ORS 656.245, Vol. 7 ----------159
ORS 656.245, Vol. 7 ----------255
ORS 656.245, Vol. 7 ----------261
ORS 656.245, Vol. 8 ---------- 97
ORS 656.245, Vol. 8 ----------107
ORS 656.245, Vol. 8 ----------119
ORS 656.245, Vol. 8 ----------129
ORS 656.245, Vol. 8 ----------191
ORS 656.245, Vol. 8 ----------252
ORS 656.245, Vol. 9 ---------- 10
ORS 656.245, Vol. 9 ---------- 48
ORS 656.245, Vol. 10---------- 41
ORS 656.245, Vol. 10---------- 95
ORS 656.245, Vol. 10----------131
ORS 656.245, Vol. 10----------264
ORS 656.245, Vol. 11----------170
ORS 656.245, Vol. 12---------- 78
ORS 656.245, Vol. 12----------128
ORS 656.245, Vol. 12----------180
ORS 656.245, Vol. 12----------192
ORS 656.245, Vol. 13---------- 12
ORS 656.245, Vol. 13----------135
ORS 656.245, Vol. 13----------271
ORS 656.245, Vol. 14---------- 58
ORS 656.245, Vol. 14----------151
ORS 656.245, Vol. 14----------175
ORS 656.245, Vol. 14----------209
ORS 656.245, Vol. 14----------246
ORS 656.245, Vol. 15---------- 23
ORS 656.245, Vol. 15---------- 90
ORS 656.245, Vol. 15----------160
ORS 656.245, Vol. 15----------191
ORS 656.245, Vol. 15----------287
ORS 656.245, Vol. 16---------- 39
ORS 656.245, Vol. 16----------191
ORS 656.245, Vol. 17---------- 8
ORS 656.245, Vol. 18---------- 6
ORS 656.245, Vol. 18---------- 74
ORS 656.245, Vol. 18---------- 85
ORS 656.245, Vol. 18----------110
ORS 656.245, Vol. 18----------145
ORS 656.245, Vol. 18----------191
ORS 656.245, Vol. 18----------249
ORS 656.245, Vol. 19---------- 7
ORS 656.245, Vol. 19----------165
ORS 656.245, Vol. 19----------183
ORS 656.245, Vol. 19----------246
ORS 656.245, Vol. 19----------277
ORS 656.245, Vol. 19----------287
ORS 656.245, Vol. 20---------- 40
ORS 656.245, Vol. 20---------- 78
ORS 656.245, Vol. 20---------- 93
ORS 656.245, Vol. 20----------153
ORS 656.245, Vol. 20----------160
ORS 656.245, Vol. 20----------166
ORS 656.245, Vol. 20----------236
ORS 656.245, Vol. 20----------270
ORS 656.245(1), Vol. 13 ----------121
ORS 656.245(1), Vol. 14 ----------210
ORS 656.245(1), Vol. 15 ---------- 23
ORS 656.245(1), Vol. 15 ---------- 76
ORS 656.245(1), Vol. 16 ----------292
ORS 656.245(2), Vol. 5----------182
ORS 656.245(2), Vol. 7---------- 21
ORS 656.245(2), Vol. 11 ----------256
ORS 656.245(2), Vol. 16 ----------292
ORS 656.262, Vol. 5 ----------209
ORS 656.262, Vol. 5 ----------273
ORS 656.262, Vol. 6 ----------196
ORS 656.262, Vol. 8 ----------237
ORS 656.262, Vol. 14----------172
ORS 656.262, Vol. 19----------290
ORS 656.262(1), Vol. 4 ---------- 70
ORS 656.262(1), Vol. 5----------272
ORS 656.262(1), Vol. 6---------- 21
ORS 656.262(1), Vol. 6----------260
ORS 656.262(1), Vol. 7----------126
ORS 656.262(1), Vol. 8----------265
ORS 656.262(1), Vol. 9---------- 31
ORS 656.262(1), Vol. 14 ----------243
ORS 656.262(1) and (3), Vol. 14 ----166
ORS 656.262(1), Vol. 16 ----------207
ORS 656.262(2), Vol. 15 ----------189
ORS 656.262(2), Vol. 16 ----------258
ORS 656.262(2), Vol. 19 ----------260
ORS 656.262(3), Vol. 5----------126
ORS 656.262(3) (d), Vol. 3 -------136
ORS 656.262(4), Vol. 4---------- 70
ORS 656.262(4), Vol. 4----------227
ORS 656.262(4), Vol. 7---------- 37
ORS 656.262(4), Vol. 11 ----------288
ORS 656.262(4), Vol. 13 ----------166
ORS 656.262(4), Vol. 12 ----------231
ORS 656.262(4), Vol. 15 ----------103
ORS 656.262(4), Vol. 15 ----------127
ORS 656.262(4), Vol. 15 ----------190
ORS 656.262(4), Vol. 15 ----------275

ORS 656.262(4), Vol. 15 ---------295
ORS 656.262(4), Vol. 16 --------- 92
ORS 656.262(4), Vol. 16 ---------127
ORS 656.262(4), Vol. 16 ---------201
ORS 656.262(4), Vol. 18 ---------101
ORS 656.262(4), Vol. 18 ---------248
ORS 656.262(4), Vol. 19 ---------108
ORS 656.262(5), Vol. 4 ---------- 13
ORS 656.262(5), Vol. 8 ---------- 10
ORS 656.262(5), Vol. 13 ---------166
ORS 656.262(5), Vol. 17 ---------176
ORS 656.262(5), Vol. 19 ---------108
ORS 656.262(5) (8), Vol. 16 -------127
ORS 656.262(6), Vol. 3 ---------- 34
ORS 656.262(6), Vol. 4 ---------- 67
ORS 656.262(6), Vol. 4 ----------172
ORS 656.262(6), Vol. 5 ----------199
ORS 656.262(6), Vol. 6 ----------204
ORS 656.262(6), Vol. 6 ----------251
ORS 656.262(6), Vol. 7 ----------276
ORS 656.262(6), Vol. 8 ----------231
ORS 656.262(6), Vol. 8 ----------144
ORS 656.262(6), Vol. 17 ---------272
ORS 656.262(7), Vol. 3 ---------- 31
ORS 656.262(7), Vol. 6 ---------- 20
ORS 656.262(8), Vol. 3 ----------158
ORS 656.262(8), Vol. 4 ---------- 44
ORS 656.262(8), Vol. 4 ---------- 95
ORS 656.262(8), Vol. 4 ----------211
ORS 656.262(8), Vol. 4 ----------252
ORS 656.262(8), Vol. 5 ----------115
ORS 656.262(8), Vol. 5 ----------177
ORS 656.262(8), Vol. 6 ---------- 7
ORS 656.262(8), Vol. 6 ---------- 25
ORS 656.262(8), Vol. 6 ---------- 95
ORS 656.262(8), Vol. 7 ---------- 14
ORS 656.262(8), Vol. 7 ----------179
ORS 656.262(8), Vol. 7 ----------275
ORS 656.262(8), Vol. 8 ----------117
ORS 656.262(8), Vol. 8 ---------- 52
ORS 656.262(8), Vol. 9 ---------- 7
ORS 656.262(8), Vol. 9 ---------- 94
ORS 656.262(8), Vol. 10 --------- 54
ORS 656.262(8), Vol. 10 ---------198
ORS 656.262(8), Vol. 11 ---------169
ORS 656.262(8), Vol. 12 --------- 90
ORS 656.262(8), Vol. 12 ---------159
ORS 656.262(8), Vol. 13 --------- 34
ORS 656.262(8), Vol. 13 ---------145
ORS 656.262(8), Vol. 13 ---------166
ORS 656.262(8), Vol. 13 ---------254
ORS 656.262(8), Vol. 14 ---------209
ORS 656.262(8), Vol. 15 --------- 72
ORS 656.262(8), Vol. 15 ---------217
ORS 656.262(8), Vol. 15 ---------285
ORS 656.262(8), Vol. 16 ---------- 19
ORS 656.262(8), Vol. 16 ---------- 46
ORS 656.262(8), Vol. 16 ---------- 95
ORS 656.262(8), Vol. 16 ----------127
ORS 656.262(8), Vol. 16 ----------207
ORS 656.262(8), Vol. 16 ----------279
ORS 656.262(8), Vol. 16 ----------282
ORS 656.262(8), Vol. 17 ---------- 55
ORS 656.262(8), Vol. 17 ----------161
ORS 656.262(8), Vol. 17 ----------272
ORS 656.262(8), Vol. 17 ----------300
ORS 656.262(8), Vol. 18 ---------- 18
ORS 656.262(8), Vol. 18 ---------- 41
ORS 656.262(8), Vol. 18 ---------- 67
ORS 656.262(8), Vol. 18 ----------125
ORS 656.262(8), Vol. 18 ----------137
ORS 656.262(8), Vol. 18 ----------248
ORS 656.262(8), Vol. 18 ----------284
ORS 656.262(8) (a), Vol. 16 -------152
ORS 656.263, Vol. 12 ------------193
ORS 656.265, Vol. 3 ------------ 48
ORS 656.265, Vol. 3 ------------110
ORS 656.265, Vol. 3 ------------188
ORS 656.265, Vol. 4 ------------ 3
ORS 656.265, Vol. 4 ------------164
ORS 656.265, Vol. 4 ------------198
ORS 656.265, Vol. 4 ------------271
ORS 656.265, Vol. 5 ------------ 79
ORS 656.265, Vol. 5 ------------126
ORS 656.265, Vol. 5 ------------183
ORS 656.265, Vol. 6 ------------ 8
ORS 656.265, Vol. 7 ------------ 13
ORS 656.265, Vol. 7 ------------ 38
ORS 656.265, Vol. 8 ------------ 61
ORS 656.265, Vol. 8 ------------163
ORS 656.265, Vol. 9 ------------ 35
ORS 656.265, Vol. 11 ------------246
ORS 656.265, Vol. 15 ------------122
ORS 656.265, Vol. 16 ------------177
ORS 656.265, Vol. 17 ------------264
ORS 656.265, Vol. 20 ------------ 41
ORS 656.265(1), Vol. 11 ----------135
ORS 656.265(1), Vol. 13 ----------233
ORS 656.265(1), Vol. 13 ----------273
ORS 656.265(1), Vol. 15 ----------228
ORS 656.265(1), Vol. 16 ---------- 46
ORS 656.265(4), Vol. 4 ----------258
ORS 656.265(4), Vol. 5 ----------267
ORS 656.265(4), Vol. 7 ---------- 58
ORS 656.265(4), Vol. 3 ----------188
ORS 656.265(4), Vol. 9 ----------134

ORS 656.265(4), Vol. 15 ---------113
ORS 656.265(4), Vol. 15 ---------178
ORS 656.265(4), Vol. 18 ---------160
ORS 656.265(4), Vol. 18 ---------168
ORS 656.265(4), Vol. 19 --------- 40
ORS 656.265(4), Vol. 19 ---------208
ORS 656.265(4), Vol. 20 --------- 45
ORS 656.265(4), Vol. 20 --------- 68
ORS 656.265(4) (a), Vol. 8 -------254
ORS 656.265(4) (a), Vol. 9 ------- 35
ORS 656.265(4) (a), Vol. 11 ------134
ORS 656.265(4) (b), Vol. 11 ------134
ORS 656.265(4) (c), Vol. 3 ------- 56
ORS 656.265(4) (c), Vol. 15 ------228
ORS 656.265(4) (c), Vol. 20 ------291
ORS 656.268, Vol. 5 ----------- 36
ORS 656.268, Vol. 13 ----------178
ORS 656.268, Vol. 14 ---------- 19
ORS 656.268, Vol. 15 ---------- 40
ORS 656.268, Vol. 16 ---------- 9
ORS 656.268, Vol. 16 ---------- 28
ORS 656.268, Vol. 16 ----------127
ORS 656.268, Vol. 17 ---------- 66
ORS 656.268, Vol. 17 ---------- 96
ORS 656.268, Vol. 17 ----------104
ORS 656.268, Vol. 17 ----------261
ORS 656.268, Vol. 20 ----------249
ORS 656.268(1), Vol. 5 ---------180
ORS 656.268(1), Vol. 9 ---------144
ORS 656.268)1), Vol. 12 --------- 3
ORS 656.268(1), Vol. 15 ---------167
ORS 656.268(1), Vol. 16 ---------113
ORS 656.268(2), Vol. 14 --------- 16
ORS 656.268(2), Vol. 10 --------- 42
ORS 656.268(2), Vol. 13 ---------302
ORS 656.268(2), Vol. 18 ---------281
ORS 656.268(3), Vol. 6 ---------- 25
ORS 656.268(3), Vol. 7 ----------240
ORS 656.268(3), Vol. 8 ---------- 42
ORS 656.268(3), Vol. 14 --------- 26
ORS 656.268(3), Vol. 14 --------- 99
ORS 656.268(3), Vol. 15 --------- 93
ORS 656.268(3), Vol. 16 ---------296
ORS 656.268(3), Vol. 18 ---------105
ORS 656.268(3), Vol. 19 ---------138
ORS 656.268(4), Vol. 5 ---------140
ORS 656.268(4), Vol. 8 ---------185
ORS 656.268(4), Vol. 9 ---------159
ORS 656.268(4), Vol. 11 ---------286
ORS 656.268(4), Vol. 16 ---------197
ORS 656.268(4), Vol. 16 ---------269
ORS 656.268(4) (b), Vol. 3 ------ 31
ORS 656.268(8), Vol. 8 ----------259
ORS 656.268(8), Vol. 14 ---------170
ORS 656.268(8), Vol. 17 ---------236
ORS 656.271, Vol. 3 ----------- 14
ORS 656.271, Vol. 4 ----------- 33
ORS 656.271, Vol. 4 ----------- 70
ORS 656.271, Vol. 4 ----------115
ORS 656.271, Vol. 4 ----------179
ORS 656.271, Vol. 4 ----------203
ORS 656.271, Vol. 4 ----------192
ORS 656.271, Vol. 4 ----------262
ORS 656.271, Vol. 5 ----------- 36
ORS 656.271, Vol. 5 ----------- 93
ORS 656.271, Vol. 5 ----------193
ORS 656.271, Vol. 5 ----------213
ORS 656.271, Vol. 5 ----------229
ORS 656.271, Vol. 5 ----------233
ORS 656.271, Vol. 5 ----------247
ORS 656.271, Vol. 5 ----------255
ORS 656.271, Vol. 5 ----------281
ORS 656.271, Vol. 5 ----------286
ORS 656.271, Vol. 6 ----------- 90
ORS 656.271, Vol. 6 ----------- 97
ORS 656.271, Vol. 6 ----------151
ORS 656.271, Vol. 6 ----------181
ORS 656.271, Vol. 6 ----------207
ORS 656.271, Vol. 6 ----------222
ORS 656.271, Vol. 6 ----------247
ORS 656.271, Vol. 6 ----------290
ORS 656.271, Vol. 7 ----------- 33
ORS 656.271, Vol. 7 ----------- 55
ORS 656.271, Vol. 7 ----------101
ORS 656.271, Vol. 8 ----------162
ORS 656.271, Vol. 8 ----------- 69
ORS 656.271, Vol. 8 ----------- 48
ORS 656.271, Vol. 8 ----------283
ORS 656.271, Vol. 9 ----------172
ORS 656.271, Vol. 11 ---------- 86
ORS 656.271, Vol. 14 ---------- 66
ORS 656.271(1), Vol. 3 ---------246
ORS 656.271(1), Vol. 4 ---------- 51
ORS 656.271(1), Vol. 7 ---------143
ORS 656.271(1), Vol. 9 ---------111
ORS 656.271(1), Vol. 10 --------- 31
ORS 656.271(1), Vol. 11 ---------257
ORS 656.271(1), Vol. 12 --------- 3
ORS 656.271(1), Vol. 12 --------- 56
ORS 656.271(1), Vol. 14 --------- 66
ORS 656.271(1), Vol. 14 ---------205
ORS 656.271(2), Vol. 3 ----------131
ORS 656.271(2), Vol. 5 ----------241
ORS 656.271(2), Vol. 12 --------- 3
ORS 656.273, Vol. 12 ----------141
ORS 656.273, Vol. 12 ----------143

ORS 656.273, Vol. 12----------153
ORS 656.273, Vol. 12----------229
ORS 656.273, Vol. 13---------- 10
ORS 656.273, Vol. 14---------- 25
ORS 656.273, Vol. 14----------222
ORS 656.273, Vol. 15---------- 93
ORS 656.273, Vol. 15----------132
ORS 656.273, Vol. 15----------183
ORS 656.273, Vol. 15----------217
ORS 656.273, Vol. 17---------- 66
ORS 656.273, Vol. 17----------171
ORS 656.273(1), Vol. 17 -------- 96
ORS 656.273(2), Vol. 15 --------295
ORS 656.273(2), Vol. 17 --------300
ORS 656.273(3), Vol. 12 --------200
ORS 656.273(3), Vol. 13 -------- 13
ORS 656.273(3), Vol. 14 -------- 99
ORS 656.273(3), Vol. 17 -------- 96
ORS 656.273(3) (a), Vol. 14------ 26
ORS 656.273(3), (b), Vol. 13 ----- 92
ORS 656.273(3) (b), Vol. 16------ 87
ORS 656.273(4), Vol. 14 -------- 66
ORS 656.273(4), Vol. 14 -------- 95
ORS 656.273(4), Vol. 14 --------182
ORS 656.273(4), Vol. 14 --------209
ORS 656.273(4), Vol. 14 --------240
ORS 656.273(4), Vol. 15 --------132
ORS 656.273(4), Vol. 15 --------139
ORS 656.273(4), Vol. 15 --------195
ORS 656.273(5), Vol. 14 -------- 66
ORS 656.275(4), Vol. 13 --------149
ORS 656.276, Vol. 10---------- 44
ORS 656.276(1), Vol. 9--------- 38
ORS 656.276(2), Vol. 5--------- 55
ORS 656.276(2), Vol. 15 -------- 23
ORS 656.276(3), Vol. 5--------- 87
ORS 656.278, Vol. 3 ----------164
ORS 656.278, Vol. 3 ----------179
ORS 656.278, Vol. 3 ----------244
ORS 656.278, Vol. 4 ---------- 27
ORS 656.278, Vol. 4 ---------- 51
ORS 656.278, Vol. 5 ---------- 5
ORS 656.278, Vol. 5 ----------188
ORS 656.278, Vol. 7 ----------137
ORS 656.278, Vol. 8 ---------- 74
ORS 656.278, Vol. 8 ---------- 98
ORS 656.278, Vol. 11----------112
ORS 656.278, Vol. 13----------197
ORS 656.278, Vol. 14----------149
ORS 656.278, Vol. 14----------182
ORS 656.278, Vol. 17---------- 66
ORS 656.278, Vol. 18----------128
ORS 656.278(1), Vol. 13 --------264
ORS 656.278(1), Vol. 19 ---------138
ORS 656.278(1), Vol. 20 ---------119
ORS 656.278(2), Vol. 6----------281
ORS 656.278(2), Vol. 15 --------- 23
ORS 656.278(3), Vol. 10 ---------292
ORS 656.278(3), Vol. 13 ---------264
ORS 656.278(3), Vol. 12 --------- 62
ORS 656.278(3), Vol. 15 --------- 23
ORS 656.281(1), Vol. 18 ---------133
ORS 656.282, Vol. 9 ----------269
ORS 656.282, Vol. 15---------- 23
ORS 656.283, Vol. 4 ----------172
ORS 656.283, Vol. 10----------258
ORS 656.283, Vol. 11----------117
ORS 656.283, Vol. 12---------- 4
ORS 656.283, Vol. 13---------- 13
ORS 656.283, Vol. 14---------- 66
ORS 656.283, Vol. 14----------243
ORS 656.283, Vol. 16----------119
ORS 656.283, Vol. 16----------175
ORS 656.283, Vol. 18----------150
ORS 656.283(1), Vol. 4----------211
ORS 656.283(1), Vol. 10 ---------190
ORS 656.283(1), Vol. 14 --------- 66
ORS 656.283(1), Vol. 16 --------- 61
ORS 656.283(1), Vol. 17 ---------161
ORS 656.283(2), Vol. 9---------- 6
ORS 656.283(3), Vol. 9----------104
ORS 656.283(6), Vol. 7---------- 31
ORS 656.283(6), Vol. 10 ---------114
ORS 656.284, Vol. 10----------233
ORS 656.284(6), Vol. 5---------- 87
ORS 656.284(6), Vol. 20 ---------200
ORS 656.286(2), Vol. 14 --------- 72
ORS 656.289, Vol. 5 ----------105
ORS 656.289, Vol. 6 ----------149
ORS 656.289, Vol. 7 ----------210
ORS 656.289, Vol. 11----------117
ORS 656.289, Vol. 18----------196
ORS 656.289, Vol. 20----------199
ORS 656.289(3), Vol. 5---------- 12
ORS 656.289(3), Vol. 5---------- 48
ORS 656.289(3), Vol. 8---------- 61
ORS 656.289(3), Vol. 8----------153
ORS 656.289(3), Vol. 9----------200
ORS 656.289(3), Vol. 10 ---------184
ORS 656.289(3), Vol. 11 --------- 40
ORS 656.289(3), Vol. 11 ---------195
ORS 656.289(3), Vol. 13 ---------109
ORS 656.289(3), Vol. 13 ---------210
ORS 656.289(3), Vol. 13 ---------213
ORS 656.289(3), Vol. 12 ---------224
ORS 656.289(3), Vol. 14 ---------243

ORS 656.289(3), Vol. 15 -------- 62
ORS 656.289(3), Vol. 15 -------- 99
ORS 656.289(3), Vol. 17 -------- 20
ORS 656.289(3), Vol. 17 -------- 82
ORS 656.289(3), Vol. 17 --------140
ORS 656.289(3), Vol. 18 --------141
ORS 656.289(3), Vol. 18 --------196
ORS 656.289(3), Vol. 18 --------251
ORS 656.289(3), Vol. 19 -------- 2
ORS 656.289(3), Vol. 19 -------- 5
ORS 656.289(3), Vol. 19 -------- 35
ORS 656.289(3), Vol. 19 --------105
ORS 656.289(3), Vol. 20 -------- 89
ORS 656.289(3), Vol. 20 --------195
ORS 656.289(4), Vol. 15 -------- 53
ORS 656.289(4), Vol. 15 --------100
ORS 656.289(4), Vol. 3---------- 76
ORS 656.289(4), Vol. 5----------163
ORS 656.289(4), Vol. 5----------247
ORS 656.289(4), Vol. 6---------- 56
ORS 656.289(4), Vol. 6----------274
ORS 656.289(4), Vol. 7---------- 69
ORS 656.289(4), Vol. 8----------169
ORS 656.289(4), Vol. 8----------215
ORS 656.289(4), Vol. 10 -------- 18
ORS 656.289(4), Vol. 11 -------- 67
ORS 656.289(4), Vol. 11 -------- 75
ORS 656.289(4), Vol. 11 --------116
ORS 656.289(4), Vol. 11 --------219
ORS 656.289(4), Vol. 18 --------218
ORS 656.295, Vol. 4 ----------167
ORS 656.295, Vol. 5 ---------- 48
ORS 656.295, Vol. 5 ----------258
ORS 656.295, Vol. 6 ----------149
ORS 656.295, Vol. 7 ----------210
ORS 656.295, Vol. 8 ----------140
ORS 656.295, Vol. 10---------- 86
ORS 656.295, Vol. 10---------- 94
ORS 656.295, Vol. 10----------251
ORS 656.295, Vol. 11---------- 40
ORS 656.295, Vol. 11----------195
ORS 656.295, Vol. 11----------245
ORS 656.295, Vol. 12----------113
ORS 656.295, Vol. 12----------189
ORS 656.295, Vol. 12----------193
ORS 656.295, Vol. 14---------- 21
ORS 656.295, Vol. 14----------243
ORS 656.295, Vol. 17---------- 20
ORS 656.295, Vol. 17---------- 82
ORS 656.295, Vol. 18----------196
ORS 656.295, Vol. 18----------244
ORS 656.295, Vol. 20---------- 76
ORS 656.295(2), Vol. 10 --------125
ORS 656.295(2), Vol. 11 --------- 57
ORS 656.295(2), Vol. 11 ---------196
ORS 656.295(2), Vol. 11 ---------214
ORS 656.295(2), Vol. 11 ---------230
ORS 656.295(2), Vol. 12 --------- 88
ORS 656.295(2), Vol. 12 ---------269
ORS 656.295(2), Vol. 12 ---------224
ORS 656.295(2), Vol. 14 --------- 80
ORS 656.295(2), Vol. 17 --------- 60
ORS 656.295(2), Vol. 19 --------- 2
ORS 656.295(2), Vol. 19 --------- 4
ORS 656.295(2), Vol. 19 --------- 5
ORS 656.295(2), Vol. 19 --------- 35
ORS 656.295(2), Vol. 20 --------- 52
ORS 656.295(5), Vol. 11 ---------100
ORS 656.295(5), Vol. 14 ---------216
ORS 656.295(5), Vol. 15 --------- 84
ORS 656.295(5), Vol. 17 ---------120
ORS 656.295(5), Vol. 17 ---------166
ORS 656.295(5), Vol. 17 ---------183
ORS 656.295(5), Vol. 17 ---------290
ORS 656.295(5), Vol. 19 ---------192
ORS 656.295(5), Vol. 20 ---------239
ORS 656.295(6), Vol. 11 ---------135
ORS 656.295(2), Vol. 13 ---------109
ORS 656.295(2), Vol. 13 ---------213
ORS 656.295(5), Vol. 3----------180
ORS 656.295(5), Vol. 4---------- 19
ORS 656.295(5), Vol. 4----------226
ORS 656.295(5), Vol. 5---------- 9
ORS 656.295(5), Vol. 5---------- 59
ORS 656.295(5), Vol. 5----------140
ORS 656.295(5), Vol. 5----------241
ORS 656.295(5), Vol. 5----------261
ORS 656.295(5), Vol. 6----------113
ORS 656.295(5), Vol. 6----------143
ORS 656.295(5), Vol. 6----------207
ORS 656.295(5), Vol. 6----------229
ORS 656.295(5), Vol. 7---------- 23
ORS 656.295(5), Vol. 7---------- 82
ORS 656.295(5), Vol. 7----------144
ORS 656.295(5), Vol. 7----------238
ORS 656.295(5), Vol. 8----------173
ORS 656.295(5), Vol. 10 --------- 63
ORS 656.295(5), Vol. 10 ---------165
ORS 656.295(6), Vol. 9----------278
ORS 656.295(8), Vol. 4----------185
ORS 656.295(8), Vol. 15 --------- 35
ORS 656.298(1), Vol. 6----------154
ORS 656.301, Vol. 14 ---------- 72
ORS 656.304, Vol. 3 ----------182
ORS 656.304, Vol. 5 ----------245
ORS 656.304, Vol. 6 ----------202

ORS 656.304, Vol. 7 ----------246
ORS 656.304, Vol. 8 ---------- 58
ORS 656.304, Vol. 8 ----------189
ORS 656.304, Vol. 10----------122
ORS 656.304, Vol. 11---------- 7
ORS 656.307, Vol. 4 ----------211
ORS 656.307, Vol. 5 ---------- 1
ORS 656.307, Vol. 6 ----------129
ORS 656.307, Vol. 7 ----------110
ORS 656.307, Vol. 7 ----------225
ORS 656.307, Vol. 9 ---------- 91
ORS 656.307, Vol. 10----------204
ORS 656.307, Vol. 11----------167
ORS 656.307, Vol. 13----------214
ORS 656.307, Vol. 14----------117
ORS 656.307, Vol. 15---------- 56
ORS 656.307, Vol. 15----------205
ORS 656.307, Vol. 15----------240
ORS 656.307, Vol. 16---------- 80
ORS 656.307, Vol. 16----------277
ORS 656.307, Vol. 16----------295
ORS 656.307, Vol. 17----------193
ORS 656.307, Vol. 17----------251
ORS 656.307, Vol. 18----------184
ORS 656.307, Vol. 19----------115
ORS 656.307, Vol. 19----------275
ORS 656.307, Vol. 19----------291
ORS 656.307, Vol. 20----------125
ORS 656.307, Vol. 20----------134
ORS 656.307, Vol. 20----------208
ORS 656.307(1), Vol. 11 --------127
ORS 656.307(1), Vol. 11 --------228
ORS 656.307(1), Vol. 13 --------230
ORS 656.307(1), Vol. 17 --------278
ORS 656.307(1), Vol. 18 --------242
ORS 656.307(1), Vol. 19 --------162
ORS 656.307(1), Vol. 19 --------164
ORS 656.307(1) (b), Vol. 11------284
ORS 656.310, Vol. 3 ---------- 14
ORS 656.310, Vol. 7 ---------- 31
ORS 656.310, Vol. 12---------- 66
ORS 656.310(1) (a), Vol. 14------166
ORS 656.310(2), Vol. 4--------- 14
ORS 656.310(2), Vol. 6--------- 90
ORS 656.310(2), Vol. 7---------153
ORS 656.310(2), Vol. 8--------- 69
ORS 656.310(2), Vol. 8--------- 90
ORS 656.310(2), Vol. 12 --------151
ORS 656.310(b), Vol. 15 --------135
ORS 656.313, Vol. 3 ---------- 27
ORS 656.313, Vol. 3 ---------- 78
ORS 656.313, Vol. 4 ----------136
ORS 656.313, Vol. 4 ----------227
ORS 656.313, Vol. 5 ----------170
ORS 656.313, Vol. 6 ---------- 7
ORS 656.313, Vol. 6 ----------145
ORS 656.313, Vol. 7 ---------- 37
ORS 656.313, Vol. 7 ----------117
ORS 656.313, Vol. 7 ----------127
ORS 656.313, Vol. 7 ----------275
ORS 656.313, Vol. 8 ---------- 86
ORS 656.313, Vol. 8 ----------122
ORS 656.313, Vol. 13----------290
ORS 656.313, Vol. 11----------169
ORS 656.313, Vol. 12---------- 51
ORS 656.313, Vol. 12----------237
ORS 656.313, Vol. 14---------- 88
ORS 656.313, Vol. 16----------258
ORS 656.313, Vol. 17----------227
ORS 656.313, Vol. 18----------248
ORS 656.313, Vol. 20---------- 24
ORS 656.313, Vol. 20----------178
ORS 656.313(1), Vol. 9---------259
ORS 656.313(1), Vol. 11 --------- 64
ORS 656.313(1), Vol. 14 --------- 37
ORS 656.313(1), Vol. 16 ---------258
ORS 656.313(1), Vol. 18 --------- 87
ORS 656.319, Vol. 4 ----------198
ORS 656.319, Vol. 4 ----------202
ORS 656.319, Vol. 4 ----------220
ORS 656.319, Vol. 5 ---------- 24
ORS 656.319, Vol. 6 ----------247
ORS 656.319, Vol. 7 ---------- 13
ORS 656.319, Vol. 7 ---------- 38
ORS 656.319, Vol. 7 ---------- 58
ORS 656.319, Vol. 8 ---------- 61
ORS 656.319, Vol. 8 ----------163
ORS 656.319, Vol. 13----------109
ORS 656.319, Vol. 11----------133
ORS 656.319, Vol. 14---------- 66
ORS 656.319, Vol. 14----------291
ORS 656.319, Vol. 15----------207
ORS 656.319, Vol. 15----------248
ORS 656.319, Vol. 15----------254
ORS 656.319, Vol. 16---------- 61
ORS 656.319, Vol. 16----------197
ORS 656.319, Vol. 17---------- 11
ORS 656.319, Vol. 18----------133
ORS 656.319, Vol. 18----------150
ORS 656.319, Vol. 18----------179
ORS 656.319, Vol. 19----------290
ORS 656.319(1), Vol. 4---------164
ORS 656.319(1), Vol. 5---------- 80
ORS 656.319(1), Vol. 5---------267
ORS 656.319(1), Vol. 6---------- 33
ORS 656.319(1), Vol. 7----------133

ORS 656.319(1), Vol. 8 ---------- 10
ORS 656.319(1), Vol. 8 ---------- 27
ORS 656.319(1), Vol. 11 ---------135
ORS 656.319(1), Vol. 18 ---------211
ORS 656.319(1) (a), Vol. 9 ------ 34
ORS 656.319(1) (b), Vol. 4 ------105
ORS 656.319(1) (b), Vol. 5 ------ 36
ORS 656.319(1) (b), Vol. 5 ------213
ORS 656.319(1) (b), Vol. 6 ------206
ORS 656.319(1) (c), Vol. 5 ------ 36
ORS 656.319(2), Vol. 4---------- 14
ORS 656.319(2), Vol. 5----------267
ORS 656.319(2), Vol. 6---------- 8
ORS 656.319(2), Vol. 6---------- 33
ORS 656.319(2), Vol. 6----------251
ORS 656.319(2), Vol. 7----------167
ORS 656.319(2), Vol. 7----------276
ORS 656.319(2), Vol. 8---------- 11
ORS 656.319(2), Vol. 8---------- 60
ORS 656.319(2), Vol. 8----------231
ORS 656.319(2), Vol. 9----------101
ORS 656.319(2), Vol. 9----------159
ORS 656.319(2), Vol. 11 ---------135
ORS 656.319(2), Vol. 14 ---------149
ORS 656.319(2) (a), Vol. 3 ------ 58
ORS 656.319(2) (a), Vol. 4 ------ 67
ORS 656.319(2) (a), Vol. 8 ------ 82
ORS 656.319(2) (a), Vol. 9 ------ 35
ORS 656.319(2) (a), Vol. 15------103
ORS 656.319(2) (a), Vol. 15------189
ORS 656.319(2) (a), Vol. 19------260
ORS 656.319(2) (a) (b), Vol. 4 ----264
ORS 656.319(2) (a) (b), Vol. 7 ----106
ORS 656.319(2) (a) (b), Vol. 16 --- 93
ORS 656.319(2) (b), Vol. 4 ------ 77, 78
ORS 656.319(2) (b), Vol. 6 ------285
ORS 656.319(2), (b), Vol. 8------185
ORS 656.319(2) (c), Vol. 13------ 13
ORS 656.319(2) (c), Vol. 13------261
ORS 656.319(2) (c), Vol. 14------ 12
ORS 656.319(2) (c), Vol. 14------ 66
ORS 656.319(a), Vol. 16 ---------177
ORS 656.319(b), Vol. 8----------239
ORS 656.325, Vol. 5 ----------182
ORS 656.325, Vol. 6 ----------245
ORS 656.325, Vol. 7 ----------173
ORS 656.325, Vol. 10---------- 59
ORS 656.325, Vol. 13----------216
ORS 656.325, Vol. 11----------260
ORS 656.325, Vol. 14---------- 58
ORS 656.325, Vol. 14----------275
ORS 656.325, Vol. 17----------294
ORS 656.325(1), Vol. 9---------- 44
ORS 656.325(2), Vol. 4---------- 69
ORS 656.325(2), Vol. 4----------190
ORS 656.325(2), Vol. 4----------287
ORS 656.325(2), Vol. 5----------256
ORS 656.325(2), Vol. 7----------171
ORS 656.325(2) and (3), Vol. 13 ---- 40
ORS 656.325(2), Vol. 17 ---------- 31
ORS 656.325(2), Vol. 17 ----------192
ORS 656.325(2), Vol. 17 ----------256
ORS 656.325(3), Vol. 9----------121
ORS 656.325(3), Vol. 9----------182
ORS 656.325(3) (4), Vol. 16--------119
ORS 656.381(1), Vol. 17 ----------164
ORS 656.382, Vol. 3 ---------- 9
ORS 656.382, Vol. 3 ---------- 46
ORS 656.382, Vol. 3 ----------136
ORS 656.382, Vol. 5 ---------- 10
ORS 656.382, Vol. 5 ----------215
ORS 656.382, Vol. 5 ----------273
ORS 656.382, Vol. 6 ---------- 42
ORS 656.382, Vol. 6 ---------- 95
ORS 656.382, Vol. 6 ----------211
ORS 656.382, Vol. 6 ----------301
ORS 656.382, Vol. 7 ---------- 21
ORS 656.382, Vol. 7 ----------156
ORS 656.382, Vol. 8 ---------- 86
ORS 656.382, Vol. 8 ----------106
ORS 656.382, Vol. 8 ----------137
ORS 656.382, Vol. 10----------183
ORS 656.382, Vol. 13---------- 34
ORS 656.382, Vol. 13----------254
ORS 656.382, Vol. 15---------- 92
ORS 656.382, Vol. 17----------300
ORS 656.382, Vol. 18----------137
ORS 656.382(1), Vol. 3---------- 31
ORS 656.382(1), Vol. 7---------- 15
ORS 656.382(1), Vol. 10 --------- 54
ORS 656.382(1), Vol. 11 ---------169
ORS 656.382(1), Vol. 13 ---------145
ORS 656.382(1), Vol. 15 --------- 44
ORS 656.382(1), Vol. 15 ---------217
ORS 656.382(1), Vol. 15 ---------285
ORS 656.382(1), Vol. 15 ---------245
ORS 656.382(1), Vol. 16 --------- 19
ORS 656.382(1), Vol. 16 --------- 46
ORS 656.382(1), Vol. 16 --------- 92
ORS 656.382(1), Vol. 16 --------- 95
ORS 656.382(1), Vol. 16 ---------207
ORS 656.382(1), Vol. 16 ---------258
ORS 656.382(1), Vol. 17 ---------236
ORS 656.382(1), Vol. 17 ---------272
ORS 656.382(1), Vol. 18 ---------281

ORS 656.382(1), Vol. 20 ---------132
ORS 656.382(1), Vol. 20 ---------232
ORS 656.382(2), Vol. 3 --------- 6, 39
ORS 656.382(2), Vol. 3 --------- 18
ORS 656.382(2), Vol. 5 --------- 47
ORS 656.382(2), Vol. 6 --------- 85
ORS 656.382(2), Vol. 11 ---------243
ORS 656.382(2), Vol. 11 ---------243
ORS 656.382(2), Vol. 12 --------- 72
ORS 656.382(2), Vol. 12 ---------204
ORS 656.382(2), Vol. 15 --------- 35
ORS 656.382(2), Vol. 15 ---------286
ORS 656.382(2), Vol. 16 --------- 61
ORS 656.382(2), Vol. 17 --------- 81
ORS 656.382(2), Vol. 17 ---------133
ORS 656.382(2), Vol. 20 ---------231
ORS 656.382(2), Vol. 20 ---------232
ORS 656.383(2), Vol. 12 --------- 90
ORS 656.382(2), Vol. 19 ---------281
ORS 656.386, Vol. 3 ---------- 9
ORS 656.386, Vol. 3 ---------- 31
ORS 656.386, Vol. 3 ---------- 37
ORS 656.386, Vol. 3 ----------243
ORS 656.386, Vol. 6 ----------152
ORS 656.386, Vol. 7 ---------- 14
ORS 656.386, Vol. 7 ---------- 21
ORS 656.386, Vol. 7 ----------128
ORS 656.386, Vol. 8 ---------- 86
ORS 656.386, Vol. 11----------101
ORS 656.386, Vol. 14----------186
ORS 656.386, Vol. 18---------- 41
ORS 656.386, Vol. 18---------- 67
ORS 656.386, Vol. 18---------- 74
ORS 656.386(1), Vol. 4--------- 12
ORS 656.386(1), Vol. 4---------246
ORS 656.386(1), Vol. 13 ---------166
ORS 656.386(1), Vol. 16 ---------127
ORS 656.386(1), Vol. 16 ---------177
ORS 656.386(1), Vol. 16 ---------191
ORS 656.386(1), Vol. 18 --------- 61
ORS 656.386(1), Vol. 18 ---------137
ORS 656.386(2), Vol. 8----------109
ORS 656.388, Vol. 3 ----------243
ORS 656.388, Vol. 6 ---------- 95
ORS 656.388, Vol. 7 ----------157
ORS 656.388, Vol. 11----------274
ORS 656.388, Vol. 14---------- 56
ORS 656.388, Vol. 14---------- 72
ORS 656.388(1), Vol. 10 ---------129
ORS 656.388(1), Vol. 11 ---------142
ORS 656.388(1), Vol. 17 ---------120
ORS 656.388(2), Vol. 3----------157
ORS 656.388(2), Vol. 8---------- 44
ORS 656.388(2), Vol. 8----------108
ORS 656.388(2), Vol. 8----------276
ORS 656.388(2), Vol. 11 ---------163
ORS 656.388(2), Vol. 14 ---------154
ORS 656.388(2), Vol. 18 ---------221
ORS 656.388(3), Vol. 8----------109
ORS 656.388(3), Vol. 11 ---------142
ORS 656.389(3), Vol. 20 --------- 76
ORS 656.401, Vol. 4 ----------127
ORS 656.405, Vol. 13----------170
ORS 656.405, Vol. 16---------- 42
ORS 656.417(1) (c), Vol. 3 -------158
ORS 656.417(1) (c), Vol. 7 ------- 23
ORS 656.442, Vol. 6 ---------- 35
ORS 656.442(1), Vol. 12 ---------139
ORS 656.444, Vol. 6 ---------- 35
ORS 656.446, Vol. 6 ---------- 35
ORS 656.504(2), Vol. 13 ---------170
ORS 656.505, Vol. 7 ---------- 27
ORS 656.506, Vol. 3 ----------171
ORS 656.520(3), Vol. 7---------- 27
ORS 656.525, Vol. 7 ----------160
ORS 656.578, Vol. 9 ---------- 95
ORS 656.578, Vol. 13---------- 1
ORS 656.580(2), Vol. 9---------- 96
ORS 656.583(2), Vol. 13 --------- 1
ORS 656.593, Vol. 6 ----------226
ORS 656.593, Vol. 13----------136
ORS 656.593, Vol. 12---------- 8
ORS 656.593, Vol. 20----------231
ORS 656.593(1) (a), Vol. 5 -------166
ORS 656.593(1) (a) & (b), Vol. 13 --- 1
ORS 656.593(1) (c), Vol. 5 ------- 68
ORS 656.593(1) (c), Vol. 6 -------227
ORS 656.593(3), Vol. 9---------- 96
ORS 656.593(3), Vol. 5----------166
ORS 656.593(3), Vol. 11 ---------183
ORS 656.593(3), Vol. 13 --------- 73
ORS 656.615(1), Vol. 11 ---------127
ORS 656.622, Vol. 6 ----------200
ORS 656.622, Vol. 6 ---------- 54
ORS 656.622, Vol. 16---------- 99
ORS 656.622, Vol. 17----------216
ORS 656.622(2), Vol. 18 --------- 65
ORS 656.636, Vol. 13----------220
ORS 656.636(4), Vol. 7----------137
ORS 656.638, Vol. 6 ---------- 54
ORS 656.726, Vol. 8 ----------270
ORS 656.726(2), Vol. 9---------- 38
ORS 656.726(4), Vol. 5----------188
ORS 656.728, Vol. 16---------- 9
ORS 656.728, Vol. 16----------113

ORS 656.728, Vol. 20 ---------- 7
ORS 656.728, Vol. 20 ----------204
ORS 656.728, Vol. 20 ----------249
ORS 656.728(1), Vol. 18 ---------141
ORS 656.735(3), Vol. 18 ---------206
ORS 656.752(1), Vol. 13 ---------170
ORS 656.794, Vol. 5 ----------126
ORS 656.802, Vol. 8 ----------237
ORS 656.802, Vol. 11 ---------- 48
ORS 656.802, Vol. 12 ---------- 65
ORS 656.802, Vol. 16 ---------- 26
ORS 656.802, Vol. 16 ----------243
ORS 656.802(1), (a), Vol. 3 ------120
ORS 656.802(1) (a), Vol. 13 ------ 71
ORS 656.802(1) (b), Vol. 14 ------287
ORS 656.802(1) (b), Vol. 15 ------203
ORS 656.802(1) (b), Vol. 16 ------193
ORS 656.802(2), Vol. 12 ---------209
ORS 656.802(2), Vol. 14 ---------154
ORS 656.802(2), Vol. 14 ---------287
ORS 656.804(1), Vol. 10 ---------265
ORS 656.807, Vol. 12 ----------148
ORS 656.807, Vol. 16 ---------- 26
ORS 656.807, Vol. 16 ----------108
ORS 656.807, Vol. 16 ----------125
ORS 656.807, Vol. 17 ----------264
ORS 656.807, Vol. 20 ----------158
ORS 656.807(1), Vol. 12 ---------107
ORS 656.807(1), Vol. 13 ---------146
ORS 656.807(1), Vol. 13 ---------147
ORS 656.807(1), Vol. 14 --------- 45
ORS 656.807(1), Vol. 14 ---------166
ORS 656.807(1), Vol. 15 ---------251
ORS 656.807(1), Vol. 17 ---------138
ORS 656.807(1), Vol. 17 ---------196
ORS 656.807(4), Vol. 6 ---------- 17
ORS 656.807(4), Vol. 9 ---------- 73
ORS 656.807(4), Vol. 14 ---------166
ORS 656.808, Vol. 3 ----------106
ORS 656.808, Vol. 4 ----------162
ORS 656.808, Vol. 5 ----------239
ORS 656.808, Vol. 9 ----------294
ORS 656.808, Vol. 10 ----------169
ORS 656.808, Vol. 20 ----------129
ORS 656.810, Vol. 10 ----------186
ORS 656.810, Vol. 13 ----------114
ORS 656.810(2), Vol. 4 ----------291
ORS 656.812, Vol. 4 ----------162
ORS 656.812, Vol. 6 ---------- 62
ORS 656.812, Vol. 8 ----------148
ORS 656.812(d) (e), Vol. 4 ------291
ORS 656.814, Vol. 5 ----------116
ORS 656.814, Vol. 6 ---------- 62
ORS 656.814, Vol. 6 ----------134
ORS 656.814, Vol. 8 ----------116
ORS 656.814, Vol. 8 ---------- 64
ORS 656.814, Vol. 10 ----------119
ORS 656.814, Vol. 11 ---------- 39
ORS 656.814, Vol. 12 ---------- 73
ORS 656.914, Vol. 3 ----------120
ORS 675.060, Vol. 6 ----------180
ORS 675.060, Vol. 7 ---------- 31
ORS 743.792(4) (c), Vol. 12 ------ 7
OAR 83-810(c), Vol. 16 ---------- 56
OAR 436-61-005(4), Vol. 16 ------ 9
OAR 436-61-010(2), Vol. 16 ------ 9
OAR 436-61-050(1) (b), Vol. 16 ---- 9