

VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

Robert VanNatta, Editor

VOLUME 23

== Reports of Workmen's Compensation Cases ==

OCTOBER 1977 - MARCH 1978

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Published by Fred VanNatta

VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

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

PRICE FIFTY DOLLARS

OCTOBER 3, 1977

EMILY JENNE, CLAIMANT
David Haugeberg, 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 to it claimant's claim for compensation. The Fund contends that claimant was not a subject employee of the employer, Mr. Jenne, and that she is not entitled to benefits.

Claimant sustained severe injuries in an automobile accident while working for her husband on July 2, 1976. Claimant has been primarily a school teacher for the last 14 years while her husband has operated an oil distributorship almost entirely under his sole control. His main employees include a driver and a bookkeeper-secretary. On June 22, 1976 Mr. Jenne and his son left town to begin a cross-country bicycle trip. Claimant was left in complete control of the business. She was en route to Salem to get fire extinguishers refilled and checked when the accident occurred.

The Referee finds that claimant was a subject employee at the time of her accident for many reasons. Claimant was trained by her husband for approximately one week prior to his leaving the business in her hands. He still maintained control of the business by calling every two nights to give whatever assistance he could. The length of time claimant worked in this capacity would indicate more than just a casual or gratuitous arrangement. The employer had every intention of delegating the business responsibilities to his driver and paying him for the extra duties but the driver declined due to the responsibilities. The objection that claimant was not paid a salary did not concern the Referee. He found that the employer did not pay himself a salary and that by not paying his wife, the business would actually benefit and, in that respect, claimant would profit also. All their earnings went into a joint bank account and all expenses, both personal professional, were taken care of out of the one account.

The Board, after de novo review, concurs with the conclusions of the Referee and bases this upon the well-written, detailed brief of the respondent.

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 \$300, payable by the carrier.

WCB CASE NO. 74-3974

OCTOBER 3, 1977

WALLACE A. MITCHELL, CLAIMANT
Walter D. Nunley, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant has requested Board review of the Referee's order which found claimant entitled to an award of permanent total disability from and after the date of hearing in this matter.

A Determination Order dated September 19, 1974 granted claimant temporary total disability from June 12, 1973 to September 6, 1974 and 25% loss of the right foot. Claimant requested a hearing contending that his disability was total rather than merely a permanent partial loss of the right foot.

The Referee agreed that claimant was permanently and totally disabled but awarded those benefits from January 28, 1976 the date of the hearing. Claimant contends he was, in fact, permanently and totally disabled on September 6, 1974 and he is entitled to compensation from that date to January 28, 1976, the date the Referee found him to be permanently and totally disabled.

The Peterson, 7 Van Natta 12 (1971), Pyeatt, 9 Van Natta 8 (1972), and Zinn, 10 Van Natta 189 (1973) cases deal with the issue of when a permanent total disability award should commence. The Peterson case suggested that for reasons of administrative convenience, in the absence of a finding by the Referee as to when the workman became permanently totally disabled, the date of the Referee's order would control.

In reviewing the subsequent Pyeatt and Zinn cases, the Board concluded that procedural convenience should give way to reality in fixing the date a workman became permanently totally disabled and to that limited extent, overruled the Peterson holding.

The Board continues to believe that the actual date a workman becomes permanently and totally disabled should be controlling.

The Board, on de novo review, finds the medical evidence contained in the record demonstrates that claimant was permanently and totally disabled as of September 6, 1974.

ORDER

The order of the Referee, dated June 10, 1976, is hereby modified to award claimant permanent total disability compensation from September 6, 1974 onward.

Claimant's counsel is awarded as an attorney's fee, 25% of the additional compensation made payable by this order to a maximum of \$2300.

The State Accident Insurance Fund is hereby authorized to apply the payments made pursuant to the Determination Order award of permanent partial disability in satisfaction of the additional permanent total disability hereby imposed.

SAIF CLAIM NO. BC 95240 OCTOBER 3, 1977

ROY R. STOLTENBURG, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 19, 1977, the Board issued its Own Motion Order denying claimant's request for own motion relief.

On September 16, 1977, claimant's attorney again brought the medical reports of Dr. Fry to the attention of the Fund. He stressed the fact that Dr. Fry felt that the possibility of exploration of the claimant's back on the basis of the myelogram and neurologic changes could help the claimant. There was a 50-60% range of improving his condition and the claimant wanted to do what he could to better his physical condition.

The Fund, on September 23, 1977, informed the Board that it was willing to assume responsibility for this surgery if that was the concensus of opinion.

The Board concurs with both the claimant and the Fund in this matter and finds that claimant's claim should be reopened for the recommended surgery.

ORDER

Claimant's claim is hereby reopened for payment of temporary total disability compensation as of the date of entry into the hospital for the surgery recommended by Dr. Fry and will remain so until closure is authorized pursuant to ORS 656.278.

Claimant's attorney is allowed, as a reasonable attorney's fee, 25% of the temporary total disability granted by this order, not to exceed \$300.

OCTOBER 3, 1977

DAVID WILBURN, CLAIMANT
Santos & Schneider, 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 found the issue of extent of disability premature, the issue of failure to pay temporary total disability benefits also premature and that claimant's claim for seizures was not compensable. The claimant contends that he is entitled to temporary total disability benefits and that his seizure condition is compensable.

Claimant suffered a compensable injury on July 12, 1971 when his truck accidentally backed over an embankment at a garbage disposal site. The first Determination Order of January 18, 1972 granted temporary total disability only. The Second Determination Order of February 22, 1973 granted claimant 10% unscheduled neck disability. This Determination Order was appealed and after two hearings Referee Rode reached his decision on June 4, 1974. He determined that claimant was not medically stationary at that time and that he should be provided further care and treatment as recommended by Dr. Hickman. This order was not appealed. Claimant did request clarification of the June 1974 order which was received by the Board too late to do anything except treat it as a new request for hearing. The results of this hearing were outlined in the first paragraph of this order.

The Referee found that the issue of claimant's seizures was res judicata as it was decided in the first Opinion and Order of June 4, 1974 and never was appealed. Concerning the issue of entitlement to temporary total disability benefits, the Referee found that that must be determined by the Evaluation Division at the time the case is submitted for closure.

The Board, after de novo review, concurs with the Referee in respect to the compensability of claimant's seizures being res judicata. The Board does find, however, that claimant is entitled to temporary total disability benefits under ORS 656.268(1). Claimant was found by Referee Rode to be not medically stationary and that he was entitled to further care and treatment by Dr. Hickman in accordance with the doctor's recommendations. Claimant should be paid time loss commencing with the date of that order, June 4, 1974, until claim closure is authorized pursuant to ORS 656.268.

ORDER

The order of the Referee, dated January 4, 1977, is hereby modified.

Claimant is hereby awarded temporary total disability compensation from June 4, 1974 until claim 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 25% of the increased compensation granted by this order not to exceed \$1,000.

WCB CASE NO. 76-148

OCTOBER 3, 1977

RAY WILLIAMS, CLAIMANT
Galton & Popick, 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 penalties in the amount of 25% of temporary total disability benefits from June 10, 1976 to the date of the first payment of benefits together with 25% of all medical bills between those same two dates. The Fund is also appealing the attorney fee granted, contending that it is excessive.

Claimant suffered an industrial injury on January 31, 1974 which was diagnosed as lumbosacral sprain. He only missed three days from work. On August 29, 1974, Dr. Bump reported that claimant had seen him for pain in the left flank region of his original injury and that from all appearances, claimant's injury was probably worse than just lumbosacral sprain and his claim should be reopened.

On September 5, 1974, claimant underwent surgery for removal of the left kidney. The following day, the Determination Order was entered granting only temporary total disability. Claimant subsequently filed a claim as a result of this surgery which was denied by the Fund, but later ordered accepted by a Referee after hearing. On January 7, 1976 the Second Determination Order was issued granting additional temporary total disability only.

On May 28, 1976, Dr. Pearce stated that claimant was in need of a hydrocele repair, a condition which probably became present as a result of the earlier surgery. He stated that claimant's surgery was what contributed to his modified employment. The hydrocele surgery was performed on June 10, 1976 and Dr. Bump

confirmed that it was definitely connected with the surgery of September 5, 1974. On August 9, 1976, the Fund denied claimant's claim for reopening based on the additional treatment needed in connection with the hydrocele repair. On August 23, 1976, Dr. Reule indicated that he agreed with Drs. Bump and Pearse connecting the hydrocele condition with the earlier surgery.

The Fund denied claimant's claim on the basis of Dr. Hand's medical opinion that the left kidney operation done in September 1974 could not possibly be the cause of the hydrocele. It was not until after the hearing, on October 15, 1976, that the Fund received Dr. Hand's detailed report stating a change in his opinion and confirming the findings of Drs. Bump, Reule and Pearse. At that time, the Fund reopened claimant's claim retroactive to June 10, 1976.

The Referee found the Fund's untimely denial and its failure to pay temporary total disability to be unreasonable. There was other competent medical findings in the record to substantiate claimant's claim that the hydrocele repair was connected to the surgery of September 5, 1974.

The Board, after de novo review, concurs with the assessment of penalties for the failure of the Fund to pay temporary total disability benefits to claimant. They do not feel that the Fund issued its denial untimely since the earliest date on which compensation could be based is June 10, 1976 and the denial was issued on August 9, 1976, therefore within the 60-day time limit. The Board finds the attorney's fee granted by the Referee was reasonable.

ORDER

The order of the Referee, dated January 7, 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 Fund.

WCB CASE NO. 76-4905

OCTOBER 3, 1977

MARK J. WIRGES, CLAIMANT
Cash R. Perrine, Claimant's Atty.
Bryant, Erickson, Jaqua & Brown,
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 112° for 35% unscheduled disability. The

employer contends that the award of the Determination Order of 10% was adequate.

Claimant suffered a compensable injury on June 14, 1974, at the age of 23, when he fell from an 18-foot scaffold. He sustained a pedicle fracture of the 5th cervical vertebra. The fracture healed well after treatment.

The employer contends that the Referee did not apply the "loss of earning capacity" concept properly in claimant's case, resulting in over compensation. Claimant was a trained brick mason and quite close to achieving journeyman status at the time of his accident. After the accident, claimant was able to continue working at the same occupation, although he was not able to work as fast as he could previously. The Referee found claimant to be intelligent, energetic, ambitious and very determined. He felt it was quite possible claimant could return to some other employment that was less physically demanding than bricklaying, although it was noted claimant did not feel he could tolerate sedentary work. The Referee did not feel, however, that claimant could be retrained for an occupation which would pay him more than that he was earning as a brick mason. The employer contends that this is an unsubstantiated statement as far as the record is concerned, and that there are alternative employment opportunities available to claimant. The problem seems to be that claimant is unwilling to try another occupation. He had indicated an interest in the field of forestry and was enrolled in an authorized program in this field with the approval of the Workmen's Compensation Board. After spending some time in this program, he quit with the complaint that the courses were unsatisfactory.

In considering claimant's loss of earning capacity, age, intelligence, adaptability and work experience are all factors to be considered. The Board, on de novo review, concludes when the above criteria are applied to this case, it becomes apparent that the award given by the Referee was excessive.

ORDER

The order of the Referee, dated January 24, 1977, and amended February 2, 1977 is modified.

Claimant is hereby awarded 80° for 25% unscheduled disability, in lieu of, and not in addition to, that granted by the Determination Order of July 22, 1976.

OCTOBER 4, 1977

LEONE GIANNINI, CLAIMANT
Vincent Ierulli, 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 granted claimant 128° for 40% un-scheduled low 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. However, there is an error in the Referee's order which should be noted. The top line of page 2 of the order which reads "six days a week" should be corrected to state "six hours a day". The Board also notes that the Fund appealed the Referee's Opinion and Order in this case and then failed to submit a brief stating its argument.

ORDER

The order of the Referee, dated March 31, 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.

CLAIM NO. 541-CR-31683

OCTOBER 4, 1977

HELEN KELSO, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson &
Schwabe, Defense Atty.
Own Motion Order

On August 2, 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 October 10, 1968 contending that she is permanently and totally disabled from that injury. Claimant furnished the Board with four reports in support of her position which include: Dr. Spady's reports dated August 23, 1976 and December 16, 1976, Dr. Martens' report dated June 14, 1977, and Dr. Poulson's report dated June 16, 1977.

On August 8, 1977, the Board advised the carrier to respond within 20 days stating its position with respect to the claimant's request for own motion relief. The following day, the attorney for the carrier, Insurance Company of North America, called the Board to indicate that he would be representing the carrier in this case.

On September 22, 1977, the carrier, by and through its attorney, responded that, in its opinion, there is neither evidence nor allegations to indicate that claimant's condition has worsened since the April 14, 1977 Own Motion Determination. They stated that the medical reports attached to the request for own motion relief are untimely and they do not support claimant's contentions of further permanent disability.

The Board, after thorough consideration of the medical reports furnished by the claimant and the response made by the carrier, 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, under the provisions of ORS 656.278, is hereby denied.

SAIF CLAIM NO. GA 948722 OCTOBER 6, 1977

ROBERT B. BENNETT, CLAIMANT
David Guyett, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant first injured his back on December 20, 1961 while employed working on a green chain for Douglas Veneer. He also filed claims with respect to his back because of additional injuries on April 6, 1962, April 26, 1965, September 24, 1965 and January 25, 1967. Because of the destruction of the original file, it is hard to reconstruct what awards claimant actually received but it is thought that he was granted temporary total disability for each of these injuries with no award of permanent partial disability. His back continued to be intermittently troublesome and required treatment of physiotherapy and traction.

Claimant injured his neck on September 15, 1972 while working for Ross Island Sand & Gravel. A myelogram was done which revealed a large filling defect at the L4-5 interspace. Dr. Bernson, in his January 30, 1976 report, related this finding to the 1961 injury. On August 11, 1976, in a Board's Own Motion Order, this opinion was accepted and the Fund was ordered to pay compensation until closure was authorized pursuant to ORS 656.278.

A laminectomy was performed on September 13, 1976 at the L4-5 level. An earlier laminectomy was done on December 3, 1975 in respect to the injury of September 15, 1972. This file was closed on August 10, 1976 with an award of temporary total disability from November 17, 1975 through July 12, 1976 and claimant was granted 20% unscheduled disability for injury to his neck.

Claimant is now involved in a vocational rehabilitation program of Electronics Engineering. Dr. Bernson's comments on March 14, 1977 included that claimant is limited with respect to heavy lifting and bending and because of this is not able to return to his former occupation.

On August 9, 1977, the Fund requested the Board to issue a determination on this case. The Evaluation Division recommends claimant should be granted temporary total disability from July 13, 1976 through March 14, 1977, less time worked. They also find that, in their opinion, claimant has a disability equal to 30% and that since he was awarded 20% for his cervical complaints on August 10, 1976, his award should be 32% for 10% permanent partial disability. The Board concurs with the findings and conclusions of the Evaluation Division.

ORDER

Claimant is hereby awarded temporary total disability from July 13, 1976 through March 14, 1977, less time worked.

Claimant is also granted 32% for 10% unscheduled permanent partial disability for injury to his back.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in the amount of 25% of the compensation awarded by this order, not to exceed \$2,000.

SAIF CLAIM NO. EC 172227 OCTOBER 6, 1977

ALFRED BLAKER, CLAIMANT
Allen Owen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 1, 1977, claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for further treatment and hospitalization for an industrial injury sustained on January 31, 1969. The Fund responded to this request contending that it could not justify any further compensation for this case and recommended that a hearing be held to determine their responsibility.

By an order of the Board, dated May 13, 1977, claimant's request was referred to the Hearings Division with instructions to hold a hearing and determine whether claimant's medical treatment and hospitalization were related to his injury of January 31, 1969 and, if so, then what is the extent of claimant's permanent partial disability, if any.

A hearing was held on September 1, 1977 before Referee Rode, who found, based upon the lay testimony at the hearing and the medical reports, that claimant was entitled to an increase of 19° for the right arm and 16° for unscheduled neck disability. The total award claimant was entitled to, in the Referee's opinion, was 57° for approximately 30% of the right arm and 112° for 35% unscheduled neck disability.

The Board, after thorough consideration of the transcript, the medical evidence and the Referee's recommendation, finds that claimant is permanently and totally disabled and should receive the compensation to which he is entitled.

ORDER

Claimant is hereby awarded permanent total disability compensation for his injury sustained on January 31, 1969, commencing from the date of this order.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in the amount of 25% of the compensation granted by this order, not to exceed \$2000.

WCB CASE NO. 76-6528

OCTOBER 6, 1977

JAMES D. COLVIN, CLAIMANT
Hess & Hess, 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 a penalty of 25% of the temporary total disability compensation accrued prior to February 7, 1975. Claimant contends that he is entitled to temporary total disability benefits from December 12, 1975 through January 26, 1976 together with penalties and attorney's fees for the carrier's failure to pay such benefits.

Claimant suffered a compensable industrial injury on January 9, 1975. The diagnosis was chronic lumbosacral sprain complicated by gross obesity and hypertension. Claimant received

temporary total disability compensation up through December 12, 1975, which was not resumed until January 26, 1976.

On September 17, 1975, the Fund's claims representative filed a Form 802 requesting closure, basing this request on two medical reports in the record. The first, a report of the Orthopaedic Consultants dated August 7, 1975 (examination at the request of the Fund), stated that the claimant was medically stationary and his claim could be closed although he should be encouraged toward weight reduction as his weight problem is a major contributor to his ailment. Dr. Heusch's report of August 28, 1975 concurred with the findings and conclusions of the Orthopaedic Consultants, although he did not advise that claimant was medically stationary.

The Fund's request for closure stated that claimant's treating doctor had not approved claimant's return to work, but felt that he would be able to return and that he was medically stationary. No where can this be found in any reports except that of the Orthopaedic Consultants, who were not claimant's treating doctors. Apparently the Board did not take any action on this request of the Fund's and the request was again submitted on December 17, 1975, although it should be noted that claimant's temporary total disability benefits had been suspended five days earlier.

On January 20, 1976, the Evaluation Division of the Board advised the Fund that a determination could not be made as claimant had not been terminated from his authorized course of vocational rehabilitation. Upon receipt of the Form 1225 from Evaluation, the Fund then reinstated claimant's temporary total disability benefits.

The Board finds that the carrier erred in their handling of this case and that claimant is entitled to temporary total disability from December 12, 1975 through January 26, 1976. It is their opinion, however, that penalties are not in order as the carrier did make every effort to obtain current medical reports from the claimant's treating physician, Dr. Gail, but with very little success.

ORDER

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

Claimant is hereby granted temporary total disability benefits from, and including, December 12, 1975 through January 26, 1976, less time worked.

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 not to exceed \$500.

KATHLEEN HATTON, CLAIMANT
Ben T. Gray, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On March 5, 1965 claimant sustained a compensable injury to her left ring and index fingers. The claim was closed on December 1, 1966 with no permanent disability. After additional surgery, the claim was reopened and again closed on September 26, 1967 with an award of 75% loss of the left ring finger. By stipulation dated January 29, 1968 claimant received an additional 10% loss of function of the left arm which made a total award of 15-1/2%. Because the law at that time provided only two years aggravation rights, claimant's aggravation rights expired on December 1, 1968.

After the date of expiration of claimant's rights, she underwent several surgeries to the finger which eventually resulted in an amputation at the distal joint. On November 5, 1976, claimant again underwent surgery, this time for an amputation of the finger just distal to the metacarpo-phalangeal joint. On December 3, 1976, a stipulation was issued which reopened the claim and allowed temporary total disability from November 5, 1976 until claimant's condition became medically stationary. Dr. Coletti found claimant stationary in his report of August 12, 1977 and indicated that the disability was equivalent to the total loss of the ring finger.

On September 19, 1977, the State Accident Insurance Fund requested a determination of claimant's claim. The Evaluation Division of the Board recommended no further award for permanent partial disability be granted to claimant as a scheduled disability is based solely on loss of function and it found claimant has been adequately compensated for her total loss of function of her arm and ring finger by the awards of 22.5%. It was their further recommendation that claimant be granted compensation for temporary total disability from November 5, 1976 through August 12, 1977. The Board concurs with the conclusion of the Evaluation Division.

ORDER

Claimant is hereby granted temporary total disability from November 5, 1976 through August 12, 1977, less time worked.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in the amount of 25% of the temporary total disability benefits allowed by this order, not to exceed \$500.

HENRY I. McMAHON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his back on January 20, 1961 while lifting cases of bottles at Portland Bottling Company. A laminectomy was performed in April of that year. The claim was closed September 26, 1962 with an award of 50% for loss of function of an arm for unscheduled disability. On December 14, 1962 the State Industrial Accident Commission ordered the claim reopened for further medical treatment which took place at the Restorative Services Division. The claim was again closed on October 8, 1963, reinstating the award of September 26, 1962.

On October 1, 1974, claimant was examined by Dr. Groth who recommended that his claim be reopened. Claimant was hospitalized on October 14, 1974 at which time a laminectomy was performed. He returned to work on January 7, 1975. Dr. Groth, in his May 11, 1975 report, indicated that claimant was working six hours a day and had more permanent disability than he had previously. His June 2, 1975 report recommended an additional 15% unscheduled disability for a total of 65%. On July 14, 1975, this recommended amount was awarded the claimant.

Claimant was again hospitalized by Dr. Groth on November 1, 1976 and another laminectomy was performed at L4-5 and L5. The doctor related claimant's present problems to the industrial accident of January 28, 1961 and the claim was reopened voluntarily by the Fund. Claimant returned to work February 18, 1977 and on April 26, the doctor reported that claimant was gradually improving. The Orthopaedic Consultants examined claimant on August 3, 1977 finding that he was stationary but with a guarded prognosis. They felt his total loss of function had been adequately compensated for with the 65% award.

On September 13, 1977, the Fund requested a determination from the Board. The Evaluation Division recommends that, because claimant is continuing to have significant problems in spite of numerous surgeries performed, he should be granted an additional award of 10% unscheduled disability and more temporary total disability from November 1, 1976 through February 17, 1977. After thorough consideration, the Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability benefits from November 1, 1976 through February 17, 1977, less time worked for his industrial injury of January 20, 1961.

Claimant is also granted increased compensation equal to 32° for 10% unscheduled disability for a total award of 75%.

SAIF CLAIM NO. YA 594864 OCTOBER 6, 1977

CLARENCE MONTGOMERY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, at the age of 36, suffered a compensable injury on January 22, 1957 when he was struck by a falling tree. Three ribs and two vertebrae were fractured. After treatment, claimant was awarded 35% loss of function of an arm for unscheduled disability and the claim was closed on January 29, 1958.

After reopening of the claim on December 31, 1959, it was again closed with an additional award of 25% permanent partial disability for a total of 60% loss of function of an arm.

After receiving medical information indicating claimant was in need of further medical treatment, the State Industrial Accident Commission ordered the claim reopened on September 5, 1962 and ordered that the permanent partial disability payments be canceled because temporary total disability was to be reinstated. An order was issued on February 5, 1963 granting claimant temporary total disability and reinstating the permanent partial disability previously canceled.

By stipulation of December 12, 1963, claimant received an additional 40% loss of use of an arm, making the total award equal to 100%. On March 19, 1964, the claim was reopened on the Commission's own motion for additional medical treatment and the unpaid permanent partial disability again was canceled. These payments were again reinstated on August 18, 1964 as the case was again closed.

The claim was again reopened on October 25, 1965 for payment of temporary total disability compensation from August 31, 1965 through October 14, 1965.

On April 25, 1974, claimant was admitted to the Disability Prevention Division for a Back Consultation Clinic examination. A spinal fusion was performed at this time by Dr. Anderson. Claimant experienced increased weakness and partial paralysis of both lower legs after this surgery. Gradually the upper back pain diminished, but pain continued in the lower abdomen. He developed bilateral inguinal hernias which were repaired after which he developed increasing pain and weakness in both legs. He never attempted to return to his occupation of logging, but did try to operate a cleaning establishment with the help of his wife. This has become increasingly more difficult for him over the years.

In May, 1974, claimant underwent a myelogram which showed a defect at L4-5. He decided not to have surgery. The difficulty continued and another myelogram was done in May 1976. Claimant underwent the surgery on August 3, 1976 but reported little improvement after this.

Dr. Melgard, on June 15, 1977, reported that the neurolysis and decompression were not successful in helping claimant and that it was commendable that claimant still tried to work. The doctor did not suggest further surgery, stating that he could think of no neurosurgical procedures that could help claimant and indicated he felt claimant was permanently disabled.

On July 6, 1977, Dr. Poulson stated that claimant is permanently disabled and he will continue to experience a lot of difficulty as a result of his condition. On August 23, 1977, Dr. Harwood found claimant's condition to be stationary and recommended claim closure.

On June 29, 1977, the Fund requested a determination be issued in this case by the Board. The Evaluation Division recommends claimant be granted temporary total disability from August 3, 1976 through August 23, 1977, less time worked and that claimant be granted an award for permanent total disability effective August 24, 1977.

The Board, after thorough consideration, concurs with the Evaluation Division.

ORDER

Claimant is hereby granted temporary total disability compensation from August 3, 1976 through August 23, 1977, less time worked.

Claimant is also granted an award of permanent total disability effective August 24, 1977.

WCB CASE NO. 76-5042-B

OCTOBER 6, 1977

GERALDINE R. PEANEY, CLAIMANT
Robert M. Hagan, Sr., Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
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 remanded the claim to it for acceptance and payment of compensation as provided by law. The employer con-

tends that claimant's injury was actually an aggravation of an old injury and that the Fund should be responsible.

Claimant, age 48 at the time, slipped and fell at work on April 8, 1971. The results of the fall were traumatic aggravation of degenerative arthritis in the low back and degenerative lumbosacral disc disease. Dr. Klump found claimant medically stationary on January 24, 1972 and the claim was closed with an award of 16° for 5% unscheduled low back disability, payable by the State Accident Insurance Fund.

On May 2, 1972, claimant began working for R.L. Polk & Company. She worked without incident until May 14, 1976 when she picked up some papers weighing about ten pounds, twisted, and felt her low back become suddenly painful. During those four years, claimant had some symptoms but she had mostly "good days" until the incident on May 14 when she suffered a sudden and severe onset of symptoms. Dr. Eckhardt, after examining claimant, seemed uncertain whether claimant's physical condition was actually a new injury or was an aggravation of the 1971 injury.

The Referee concludes that claimant's injury of May 14, 1976 appears to have precipitated the deterioration of her low back condition that followed. He basically based his decision on claimant's credibility at the hearing and the fact that her condition was relatively stable for the better part of four years after the original injury of 1971.

The Board, after de novo review, concurs with the findings of the Referee which found Crawford & Company responsible for claimant's claim. The brief of the claimant's attorney was quite instrumental in persuading the Board in several points. The fact that claimant had worked for four years with very few symptoms of any significance until the incident in May of 1976 when her physical condition deteriorated to the point that she was no longer able to function and needed considerable medication to bear the pain of the injury, carries some weight in this case. Also, Dr. Eckhardt could give no definite opinion concerning whether claimant suffered an aggravation or sustained a new injury. The Board makes note of the accepted rule in cases such as this one which states:

"The 'last injurious exposure' rule in successive injury cases places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability."

". . . (I) f the second incident contributes independently to the injury, the second insurer is solely liable, even if the injury would have been much less severe in the absence of the prior condition. This is con-

sistent with general principal of compensability of the aggravation of a preexisting condition."

ORDER

The order of the Referee, dated March 15, 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, Crawford and Company.

WCB CASE NO. 76-522

OCTOBER 6, 1977

In the Matter of the Compensation
of the Beneficiaries of
JOHN PHILLIPS, DECEASED
Douglas A. Shepard, Claimant's Atty.
Merlin Miller, Defense Atty.
Order Approving Stipulation

On August 31, 1977, a Referee found that Nellie Sue McNeil was the legal beneficiary of the deceased workman and was entitled to compensation. At the same hearing, the Referee found Mrs. Mary Jane Phillips, by reason of her separation from the workman, not entitled to benefits and affirmed the carrier's denial of her claim. Mrs. Phillips, by and through her attorney, appealed to the Workers' Compensation Board for review of the Referee's order.

It now appearing that a bona fide dispute exists as to the existence or non-existence of a compensable claim with respect to Nellie Sue McNeil, the parties have agreed to fully settle and compromise any and all claims existing between Ms. McNeil and the employer, Desert Seed Company, and its carrier, The Travelers Insurance, for the sum of \$8,850.00 paid to Ms. McNeil. In addition, Ms. McNeil's attorney is awarded a reasonable attorney's fee in an amount not to exceed 25% of the amount payable herein.

The terms of the disposition of the claim appear to the Board to be a fair and equitable settlement. However, the Board takes exception to, and will not issue, an order approving the reversal of the Referee's order dated August 31, 1977. In all other respects, the stipulation, a copy of which is attached hereto, is approved on this 6th day of October, 1977

LEO J. TICE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on March 15, 1968 which resulted in a complete occlusion of the anterior descending coronary artery and consequent myocardial infarction. On April 14, 1968 he was considered medically stationary but cautioned to avoid excessive exertion. The claim was closed on May 6, 1969 with an award for 45% permanent partial disability of the heart.

The claim was reopened in July 1969 and claimant underwent surgery. He returned to work in January of 1970 complaining of fatigue after only moderate activity. On October 27, 1970, the claim was again closed with an additional award of 15% unscheduled disability. A stipulation issued on March 1, 1971 granted an increase of 10°. Claimant required additional treatment for arrhythmia and the claim was again reopened in 1976. Catherization and coronary angiogram revealed the same occlusion of the anterior descending vessel.

Dr. Bowman, in his closing report, indicates that claimant is clearly incapacitated and should be considered medically stationary. Claimant's condition of arrhythmia was still being treated with medication.

On June 22, 1977, the Fund requested a determination of claimant's claim. It is the opinion of the Evaluation Division of the Board that claimant is permanently and totally disabled and should receive compensation to which he is entitled by law. The Board concurs with this conclusion.

ORDER

Claimant is hereby granted an award of permanent total disability commencing June 2, 1977, the date of Dr. Bowman's letter.

WCB CASE NO. 75-3257 OCTOBER 7, 1977

CHARLES BERRY, CLAIMANT
Zafiratos & Roman, Defense 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 80° for 25% unscheduled disability for injury to the cervical-dorsal spine.

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 30, 1977, is affirmed.

WCB CASE NO. 76-6959

OCTOBER 7, 1977

DANIEL C. CAYO, CLAIMANT
James P. O'Neal, Claimant's Atty.
SAIF, Legal Services, Defense Atty
Request for Review by the Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of his aggravation 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 April 8, 1977, is affirmed.

WCB CASE NO. 76-471

OCTOBER 7, 1977

RALPH CRAWFORD, CLAIMANT
Flaxel & Todd, Claimant's Atty.
SAIF, Legal Services
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 160° for 50% un-scheduled permanent partial disability. The Fund contends that the order should be reversed.

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.

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 Fund.

WCB CASE NO. 76-3346

OCTOBER 7, 1977

JOHN D. DILWORTH, 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 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 for his heart condition.

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 \$450, payable by the Fund.

WCB CASE NO. 77-120

OCTOBER 7, 1977

JOHN ELLESER, CLAIMANT
Ringo, Walton & Eves, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Request for Review by Claimant

Reviewed by Board Member Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the Determination Order of December 27, 1976

which granted claimant 64° for 20% unscheduled low back disability. Claimant contends that he is entitled to a permanent partial disability award of at least 60%.

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 9, 1977, is affirmed.

WCB CASE NO. 76-6079

OCTOBER 7, 1977

In the Matter of the Complying Status
of FLYWAYS, INC., EMPLOYER
John S. Horton, Employer's Atty.
Order

On September 21, 1977, the Board received a letter from John S. Horton, Attorney for Flyways, Inc., requesting that the Order on Review entered August 16, 1977, be reissued, thus enabling Flyways, Inc. to appeal said Order.

The Board finds this request to be well taken in that the Order on Review, dated August 16, 1977, inadvertently omitted John S. Horton, Attorney for Flyways, Inc. from the list to whom copies of said Order on Review was to be mailed.

ORDER

The Order on Review dated August 16, 1977 is reissued and republished.

WCB CASE NO. 76-2317

OCTOBER 7, 1977

DALLAS O. GOTCHALL, CLAIMANT
Brown, Burt & Swanson, Claimant's Atty.
Rhoten, Rhoten & Speerstra, 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 105° for 70% loss of the right hand and 90° for 60% loss of the left hand. 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 April 7, 1977, is affirmed.

WCB CASE NO. 76-5272

OCTOBER 7, 1977

NEIL HUTCHINS, CLAIMANT
David W. James, Jr., 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 affirmed the September 20, 1976 Determination Order which awarded him 5% unscheduled disability for the neck and left shoulder.

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. 76-7173

OCTOBER 7, 1977

JOHN T. ILES, CLAIMANT
Emmons, Kyle, Kropp & Kryger, 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 from May 6, 1976 until the claim is closed. Penalties were also assessed in the amount of 15% of the temporary total disability compensation payable from May 6, 1976 through December 21, 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 April 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 \$50, payable by the Fund.

WCB CASE NO. 76-4682

OCTOBER 7, 1977

MELVEN LEEDY, CLAIMANT
Dye & Olson, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Gerald C. Knapp, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which reversed the carrier's denial of claimant's claim for compensability of his pseudoarthrosis condition. Claimant contends that he is also entitled to temporary total disability from May 31, 1976 until the day he is terminated from 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. However, the Board wishes to state that the claim was properly closed pursuant to OAR 61-030(1)(c) and therefore reinstatement of time loss has to occur under the provisions of OAR 61-050(4).

ORDER

The order of the Referee, dated March 23, 1977, is affirmed.

OCTOBER 7, 1977

RICHARD A. LEWIS, CLAIMANT
 Bloom, Chaivoe, Ruben, Marandas & Berg,
 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's attorney a reasonable attorney's fee in the amount of \$3,000.

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 March 31, 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 Fund.

OCTOBER 7, 1977

SAMUEL L. MOORE, CLAIMANT
 Dennis VavRosky, Claimant's Atty.
 R. Kenney Roberts, Defense Atty.
 Disputed Claim Settlement

It is hereby stipulated and agreed by and between Samuel Moore, through his attorney, Dennis VavRosky, and Widing Transportation through their insurer, Farmers Insurance Company, by and through R. Kenney Roberts of their attorneys, that claimant alleges that he experienced a lung condition which includes reversable and irreversable components. Claimant contends that this condition is a result of his employment. Claimant prevailed at the hearings level and the employer has appealed this matter to the Workmen's Compensation Board under WCB 76-3336. During the course of this appeal there was a question concerning whether claimant was temporarily and totally disabled during this time and entitled to temporary total disability benefits. Claimant requested a hearing which was designated Case WCB 77-3847. There being a bona fide dispute concerning the compensability of this claim and a dispute as to the amount of time loss, if any, payable pending this appeal;

It is hereby stipulated and agreed that this matter be compromised and settled subject to the approval of the Workmen's

Compensation Board by Farmers Insurance Company paying and claimant accepting the sum of \$12,000.00 on account of temporary total disability payable pending this appeal. This is a complete resolution of all issues raised or that could be raised in WCB 77-3847.

It is further agreed that claimant's claim for Workmen's Compensation benefits on account of a lung condition shall be compromised and settled for the sum of \$23,000.00. In consideration for this payment claimant agrees that his claim shall remain in its denied status and that he shall take no additional Workmen's Compensation benefits on account of this claim.

It is further agreed that this settlement constitutes a full and final settlement on a disputed basis of this claim for benefits and resolves all claims which have been made or could have been made against this employer.

Claimant further agrees to hold Farmers Insurance Company harmless from any and all medical expenses incurred as a result of this alleged injury.

It is further agreed that claimant's attorney shall receive an attorney's fee of \$4,000.00 payable out of this settlement and not in addition to it.

It is so ordered: and the Request for Review is dismissed with prejudice.

WCB CASE NO. 76-3432
WCB CASE NO. 76-4045

OCTOBER 7, 1977

MIKE MORROW, CLAIMANT
Kirkpatrick & Howe, 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 affirmed the carrier's denial of his back injuries.

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 1, 1977, is affirmed.

OCTOBER 7, 1977

THOMAS OTTENWESS, CLAIMANT
Babcock & Ackerman, Claimant's Atty.
A.C. Roll, 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 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.

ORDER

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

WCB CASE NO. 76-5620
WCB CASE NO. 76-5621

OCTOBER 7, 1977

ARLEN R. PHILLIPS, 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, Moore and Phillips.

Claimant seeks Board review of the Referee's order which dismissed claimant's requests for hearing. Claimant contends that he is entitled to temporary total disability subsequent to May 24, 1976 and until January 17, 1977.

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

ORDER

The order of the Referee, dated March 3, 1977, is affirmed.

Board Member Phillips dissents as follows:

The majority opinion must presume that claimant is medically stationary and not vocationally handicapped as a result of his injury. Something less is, of course, permissible so long as the employer is both willing and able to employ the claimant during his period of convalescence, making it possible for claimant to return to work with restrictions.

In this case, the employer was unable to employ claimant with the restrictions required in the medical report and, although he was unemployable as a result of those restrictions, he was not accepted into a vocational rehabilitation program until January of 1977.

This reviewer would reverse the Referee's decision and find claimant entitled to temporary total disability compensation from May 24, 1976 until January 17, 1977.

/s/ Kenneth V. Phillips, Board Member

WCB CASE NO. 76-2544

OCTOBER 7, 1977

EDWARD PRUITT, CLAIMANT
Harold W. Adams, 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 July 1, 1976 Determination Order which granted temporary total disability compensation, but found claimant's beneficiaries were not entitled to any further permanent partial disability than the 15% already awarded in connection with his condition before his death. Claimant's beneficiaries contend that claimant was permanently and totally disabled as a result of his industrial injury of June 3, 1973.

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 3, 1977, is affirmed.

OCTOBER 7, 1977

ROSCOE M. POLK, CLAIMANT
Robert Grant, 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 total disability. The Fund contends that the Determination Order which awarded claimant 75% unscheduled 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 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 Fund.

OCTOBER 7, 1977

DANIEL UTTERSON, CLAIMANT
A. C. Roll, Claimant's Atty.
A. Thomas Cavanaugh, 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 the date of injury until closure 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 15, 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. 76-6165

OCTOBER 10, 1977

CATHERINE (TRASK) ARCHER, CLAIMANT
Brown, Burt & Swanson, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, 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 Third Determination Order of September 23, 1976 which, along with two previous orders, granted no permanent partial disability. Claimant contends that an award of some permanent partial disability is appropriate.

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 29, 1977, is affirmed.

WCB CASE NO. 77-87

OCTOBER 10, 1977

WILLIS A. CROSBY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, 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 carrier's denial of claimant's aggravation 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 April 20, 1977, is affirmed.

DANA L. HAWKINS, 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 Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which increased claimant's award granted by the Determination Order to a total of 40% of the right foot and 80% of the left foot. The Fund contends that the award is too high and the Determination Order should be reinstated.

Claimant sustained a compensable injury to both feet on November 3, 1972 when he fell off a scaffold some 8 feet high and landed on a concrete surface. Dr. Logan examined claimant on November 8, 1972 and diagnosed fracture of os calcis. Dr. Logan saw claimant several times subsequent to the first visit, noting his complaints of pain and swelling, and found him not medically stationary each time.

Claimant was examined by Dr. Mason of the Disability Prevention Division in early 1974 who felt that claimant's condition would indicate a change of occupation to avoid climbing and walking on uneven ground, in addition to prolonged standing and walking which could improve with time. He did not recommend claim closure.

On December 2, 1974, Dr. Logan discussed the possibility of subastragular joint surgery, but claimant felt he was improving slightly and did not want surgery at that time. On February 19, 1975, claimant saw Dr. Logan with the same complaints and the doctor indicated his opinion that surgery would be necessary in the near future. Claimant underwent a subastragular fusion on the left with autogenous bone graft on March 19, 1975.

On June 4, 1976 claimant was examined by Dr. Pasquesi at the request of the Fund. He found claimant to be medically stationary and recommended claim closure. He rated the left foot in two areas: left foot subastragular arthrodesis at 25% and chronic moderate pain at 10%. The right foot impairment was rated at 10%.

On August 30, 1976, Dr. Logan noted that he had read Dr. Pasquesi's report and felt that it was not accurate. He felt that the ratings given claimant's impairment did not explain the total disability claimant was suffering. He stated that, in his opinion, claimant was totally disabled for the type of work he was used to doing.

Subsequent to this report by Dr. Logan, the Evaluation Division issued its Determination Order of July 14, 1976 granting claimant temporary total disability and 47.25° for 35% loss of the left foot and 13.50° for 10% loss of the right foot.

The Referee found that claimant had an exemplary work record prior to the date of his injury and that he seemed to be motivated to return to work. He found claimant's inability to return to work as a painter was an indication of the severity of his injuries, all of which were substantiated by his treating doctor, Dr. Logan. The Referee gave the most weight to the reports of Dr. Logan, rather than Dr. Pasquesi, and therefore, granted claimant an increase of 30% of the right foot and 45% of the left foot equal to 40% and 80%, respectively.

The Board, after de novo review, disagrees with the findings of the Referee. The basis for evaluating a scheduled member, such as the foot, is by determining the permanent loss of function of that member. The Referee seems to be, indirectly, taking into account claimant's loss of wage earning capacity. After Dr. Pasquesi's rating of claimant's permanent impairment of function in his June 10, 1976 letter, the Referee chose to give more weight to Dr. Logan, who stated that the rating just mentioned does not explain the total disability the claimant is suffering. The Board finds, after carefully studying the medical evidence and the testimony at the hearing, that the rating of the Evaluation Division was adequate to compensate claimant for his loss of function. The order of the Referee should be reversed and the Determination Order reinstated.

ORDER

The order of the Referee, dated February 24, 1977, is reversed.

The Determination Order of July 14, 1976, is hereby affirmed.

WCB CASE NO. 76-5302

OCTOBER 10, 1977

DOROTHY JOHNSTON, CLAIMANT
Malagon, Starr & Vinson, 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 carrier's denial of her claim for compensability of a back injury suffered on May 6, 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 April 27, 1977, is affirmed.

WCB CASE NO. 76-5787
WCB CASE NO. 76-4819

OCTOBER 10, 1977

JAY D. KINGSBURY, CLAIMANT
Kenneth W. Stodd, Claimant's Atty.
Tooze, Kerr, Peterson, Marshall &
Shenker, Defense 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 two denials of claimant's hernia claims.

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 April 13, 1977, is affirmed.

WCB CASE NO. 76-6057

OCTOBER 10, 1977

CAY McNABB, CLAIMANT
Cottle & Houser, 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 him 160° for 50% unscheduled permanent partial 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. However, the Disability Prevention Division is urged to thoroughly consider claimant's case and make an effort to assist him.

ORDER

The order of the Referee, dated April 6, 1977, is affirmed.

WCB CASE NO. 76-6944

OCTOBER 10, 1977

PAULINE MORGAN, CLAIMANT
Bailey, Welch, Bruun & Green,
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 of November 29, 1976 which granted temporary total disability and no further permanent partial disability above the 40% she had already been awarded. Claimant contends that she has suffered an aggravation of her injury since her last award of compensation in March of 1972 and that she 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 April 22, 1977, is affirmed.

WCB CASE NO. 76-5567
WCB CASE NO. 76-4830

OCTOBER 10, 1977

LARRY WHEDON, CLAIMANT
Herbert R. DeSelms, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense 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 payment of compensation as authorized by law until closure. The order also affirmed the denial issued by the General Adjustment Bureau and ordered the Fund to reimburse this carrier for all payments made as a result of the Order designating the paying agent pursuant to ORS 656.307. The Fund contends that the Referee's order should be reversed.

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 10, 1977, is affirmed.

WCB CASE NO. 76-3472

OCTOBER 10, 1977

GEORGE H. YOUNG, CLAIMANT
Bloom, Chaivoe, Ruben Marandas &
Berg, 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 remanded his claim to the employer's carrier to reopen as of January 7, 1977 with temporary total disability payable from and after that date. The employer was also ordered to provide claimant further medical care. Claimant contends that his claim should be reopened on a premature closing or aggravation basis from March 31, 1976. He contends that he should have been found permanently and totally disabled and that the defendant should be required to pay Dr. Hickman's bill for his

testimony at the hearing. Finally, the claimant protests the Referee's failure to find that the defendant had denied his claim of disability for compensable consequences of the otherwise compensable injury of March 8, 1974 and that the defendant should have been required to pay attorney fees for reason of the 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 May 4, 1977, is affirmed.

WCB CASE NO. 76-820

OCTOBER 11, 1977

MICHAEL BATORI, CLAIMANT
Bailey, Welch, Bruun & Green,
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 remanded claimant's claim to the carrier for acceptance of his claim for aggravation of his right knee injury and determined that claimant was medically stationary. Claimant contends that his back problems are also an aggravation of the original injury to the right knee.

Claimant, at the age of 26, suffered a compensable injury to his right knee on February 15, 1973 when it was struck by a boulder while employed as a landscape garden architect. The issues at hearing involved a claim for aggravation of the knee injury and the compensability of claimant's back problem resulting from the knee injury. The Referee found that a pre-existing "bump" on claimant's knee was not compensable but that the condition of chondromalacia in the right knee was an aggravation of claimant's original injury in 1973, and further found claimant had failed to prove the compensability of his back condition. The only issue on review is whether claimant is entitled to benefits for his back discomfort which resulted from his industrial injury to his knee.

The first mention of this problem is in Dr. Fagan's report of April 5, 1976 where he stated that the claimant came in to see him with complaints of hip, back and knee pain. The claimant gave a history of working at his landscaping and twisting his knee; in order to compensate for this, claimant began getting pain

in his right hip and back. Subsequently, because he had to limp to compensate for the knee pain, his back pain got progressively worse. The doctor diagnosed claimant's problem as acute lumbosacral strain, acute right hip strain and degenerative arthritis of the right knee. He felt that as long as claimant had to compensate for his knee problems he was going to have difficulty with the back and hip. In his June 17, 1976 report, Dr. Fagan again stated that claimant's back problems were definitely an aggravation of his knee injury in 1973. In the doctor's deposition, taken on August 3, 1976, he reiterated his position concerning claimant's low back strain. He also confirmed this at the hearing.

The Referee found Dr. Fagan's opinion of the relationship between claimant's original knee injury and his back problems was based on the history given to him by claimant. He did not feel this was enough to prove by a preponderance of the evidence that this condition is compensable. He also questioned claimant's credibility at the hearing and this had some bearing on his decision.

The Board, after de novo review, disagrees with the conclusion of the Referee in regard to the relationship between claimant's back condition and his knee injury. Dr. Fagan found a definite relationship and felt it was compensable. There is no controverting evidence in the record to support any other contention. It is the Board's opinion that claimant's claim for the low back strain is compensable. The Board affirms the order of the Referee in respect to the finding that the aggravation of the right knee is compensable and that claimant is medically stationary.

ORDER

The order of the Referee, dated February 3, 1977, is modified.

It is hereby ordered that the defendant accept responsibility for claimant's back condition which has been determined to be a causal consequence of claimant's original knee 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 \$300, payable by the Fund.

MARCEL DEBORD, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
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 50% loss of the right hand, 75% loss of the left hand, and 50% unscheduled disability. The employer contends that the Determination Order should be reinstated as the Referee's award is excessive.

Claimant, 18 at the time, sustained a compensable injury on November 4, 1970 when he was involved in an explosion and fire while employed for H.B. Fuller Company. Dr. Parshley diagnosed third degree burns of the face, hands, legs and buttocks that same day. Claimant was admitted to the hospital immediately where he was debrided daily and received skin grafting at various intervals until his discharge on January 2, 1971.

In Dr. Parshley's February 9, 1971 report, he noted that claimant's hands were going to present a problem in the future. The fifth finger of the left hand was markedly deformed as a result of the burns and would require some type of corrective surgery in the near future. On March 16, 1971 Dr. Parshley assisted Dr. Eckhardt in surgery for the release of contractures, division of intrinsic tendons to the extensor mechanisms of all the fingers, and fusion of the distal interphalangeal joint of the middle finger. Afterwards, skin grafts were done on the defected areas.

Dr. Parshley reported on July 1, 1971 that any job requiring hard labor or an increased chance of trauma to his hands would not be satisfactory to him. He advised him to enter an institution of higher learning which claimant subsequently did. On January 13, 1972, the doctor noted that he was holding off doing any further surgical procedures so that his education would not be interrupted. In his May 22, 1972 report, the doctor indicated that claimant had undergone further surgery and that Dr. Eckhardt had amputated his deformed and non-functional fifth finger on the left hand. He felt that, as a result of the amputation, claimant's function of the left hand had improved.

After an examination by Dr. Hickman, psychologist, claimant was found to have a good prognosis for successful restoration and rehabilitation. Dr. Van Osdel, on September 13, 1972, found claimant's condition not stationary, found that he needed both surgery and rehabilitation and said that an accurate

estimation of claimant's disability was not, at that time, possible. Dr. Bieker, on January 4, 1973 seemed to agree with the other medical reports to date. Under his direction, claimant underwent several surgical procedures in late 1972 and early 1973.

On July 8, 1974, Dr. Parshley felt that claimant could return to manual labor but noted that he would be severely limited. He estimated that claimant could perform a job of manual labor with no more than 50% efficiency from his preburned state. On December 16, 1974, the doctor noted that claimant's major problems would be with his face and hands. A month or so later, Dr. Parshley found claimant's condition relatively stable although he felt further functional surgery would be done around the corners of his mouth.

In December of 1974, claimant left on a mission for his church for two years time, working with Native Americans in Arizona, New Mexico, Colorado and Utah. While there, Dr. Omer examined claimant and found his condition stationary, stating that claimant could return to light, manual labor at that time. Subsequently, on September 15, 1975, a Determination Order was issued granting claimant 30% loss of the right hand, 50% loss of the left hand, 10% loss of the left leg and 10% loss of the right leg, and finally, 25% unscheduled disability resulting from disfigurement.

Dr. Parshley saw claimant again on January 12, 1977, finding that his condition was basically the same with the exception of a 30% recurvatum of the index finger of the left hand. He did find, however, that claimant had a severe cosmetic deformity of the face and ear together with the functional deformity of the nares and mouth.

The Referee found that claimant did not need any further award for his legs. She found, however, that his hands had experienced quite severe injuries, leaving them scarred and disfigured. She found the claimant to be an extremely credible witness who tended to understate his problems. She felt he was entitled to an increase in compensation as noted in the first paragraph of this order. She noted claimant's extensive disfigurement of the face and ear as well as scarring on his back, stomach and other areas. She found that this would have an impact on claimant's future in the general labor market as far as obtaining and holding a job is concerned. In addition, claimant's physical condition in these areas make it necessary for him to avoid exposure to gasoline or solvents, extreme heat or cold or the probability of direct physical trauma. This would clearly, in her opinion, limit him in the type of jobs he could perform.

The Board, after de novo review, finds the increases in awards of permanent disability made by the Referee are excessive and cannot be justified by the medical evidence in the record.

Claimant's claim was closed after a personal interview by the Evaluation Division and after receipt of Dr. Omer's closing

examination. On January 1, 1977, Dr. Parshley agreed with Dr. Omer in his evaluation.

The Board concludes that, because of the additional finding that the index finger of claimant's left hand also has a 30% recurvatum, claimant is entitled to an award of 60% loss function of the left hand, which is an increase of 10% as awarded by the Determination Order and in all other respects the Determination Order dated September 15, 1975 should be reinstated.

ORDER

The order of the Referee, dated March 3, 1977, is modified.

Claimant is hereby granted an increase of 10% loss function of the left hand, for a total award of 90° for 60% scheduled disability.

In all other respects the Determination Order of September 15, 1975 is reinstated and 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 25% of the increased compensation granted from this order.

SAIF CLAIM NO. GC 154383 OCTOBER 11, 1977

FRANK J. ELLIS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his low back and right leg on November 3, 1968. At the time of closure there were no significant complaints relating to either of these areas, but rather claimant seemed to have sustained a soft tissue injury to the right foot. There was noticeable improvement when claimant obtained a longitudinal arch support and leather insole and the claim was closed August 4, 1969 with an award of 14° for 10% of the right foot, in addition to temporary total disability.

The claim was reopened when claimant had continuing foot problems together with back complaints, although he did keep working. The claim was again closed April 26, 1971 with an award of unscheduled low back disability equal to 5%.

In 1973 the claim was again reopened for further problems with the ankle and low back. The doctors at the Back Evaluation Clinic found marked tenderness on the dorsum of the right foot. The x-rays showed narrowing in the L5-S1 interspace. They

felt that his loss of function was mild and the claim was again closed with a 5% unscheduled disability award on August 28, 1973.

By stipulation dated March 25, 1974, claimant received an additional award for the right foot equal to 19.75° (approximately 15%) and an additional award of 5% unscheduled low back disability.

The carrier had the claim reopened in 1976. Claimant underwent an extensive laminectomy on June 23, 1976. On June 21, 1977, Dr. Pasquesi diagnosed chronic lumbar instability. He found claimant's range of motion was somewhat limited and that prior x-rays were read as normal.

On July 13, 1977, the Fund requested a determination. The Evaluation Division of the Board finds that, on the basis of claimant's work experience as a journeyman electrician and foreman and his past awards, he is entitled to an additional 20% for unscheduled low back disability. They also recommend that temporary total disability be paid from January 21, 1976 through June 17, 1977. The Board concurs with their conclusions.

ORDER

Claimant is hereby granted temporary total disability from January 21, 1976 through June 17, 1977, less time worked.

Claimant is also granted an increase of 20% unscheduled low back disability for a total award of 112° for 35%.

CLAIM NO. 403 C 12628

OCTOBER 11, 1977

FRANK L. LENGELE, CLAIMANT
Thomas Reeder, Claimant's Atty.
Collins, Velure & Heysell, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on January 31, 1968 when he slipped in the snow carrying boxes. Dr. Wilson diagnosed his injury as a severe lumbosacral sprain with possible disc. After a normal myelogram in December 1968, Dr. Wilson indicated the claimant's condition was medically stationary in his April 7, 1969 report. The claim was closed on April 18, 1969 with an award of 10% unscheduled disability.

Claimant's claim was reopened for time loss commencing November 9, 1970. A subsequent myelogram and laminectomy were performed by Dr. Wilson. In his report of April 7, 1972, the doctor stated that claimant's condition was stationary but that he could possibly need a fusion later. The Second Determination Order granted claimant an additional 20% unscheduled disability.

A Stipulation and Order of Settlement dated October 9, 1972 granted claimant an additional 43° for 13.4375%.

Claimant was unable to work for several months during 1975 and on November 17, 1975 he underwent a foramenotomy L4-5, L5-S1 with two level fusion. Claimant requested that his claim be reopened and an Own Motion Order dated February 9, 1976 referred the case to the Hearings Division. As a result of the findings by the Referee at the hearing, the Board reopened claimant's claim from October 30, 1973.

On August 23, 1977 Dr. Wilson stated that claimant's low back condition was now stationary and he had no further treatment to offer with the exception of an additional trial use of a transcutaneous stimulator. Claimant is now enrolled in a real estate course with the hopes of becoming a salesman in that field.

On August 30, 1977 the carrier requested a determination from the Board in this matter. The Evaluation Division recommends that claimant be granted additional temporary total disability from October 30, 1973 through August 23, 1977, less time worked. He also felt claimant was entitled to a permanent partial disability award of 55%, in lieu of and not in addition to, his prior awards. The Board concurs with this conclusion.

ORDER

Claimant is hereby awarded temporary total disability from October 30, 1973 through August 23, 1977, less time worked.

Claimant is also awarded 176° for 55% permanent partial disability, in lieu of, and not in addition to the awards granted previously.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in the amount of 25% of the increased compensation awarded by this order, not to exceed \$2,000.

SAIF CLAIM NO. DC 125772 OCTOBER 11, 1977

LEE ROY PARKER, CLAIMANT
Jones, Lang, Klein, Wolf & Smith,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered an injury on April 26, 1968 resulting in a "slightly twisted knee". An arthrotomy was performed along with removal of the medial cartilage by Dr. Clarke on May 21, 1968. On February 7, 1969, claimant received an award of 15% of the right leg.

The claim was reopened for additional treatment and time loss from February 5, 1970. He returned to work in October of that year and the claim was closed December 3, 1970 with an award of an additional 8°.

In 1971, while living in Ohio, claimant's treating doctor reported that the knee "will let him down" and that claimant fell fracturing his foot. Time loss was again commenced on November 8, 1971. Dr. Monger performed surgery on March 13, 1972 and on July 31, 1972 Dr. Karshner did an osteotomy for non-union of the right ankle fracture. On April 10, 1973, Dr. Kiest performed an arthrotomy removing the lateral meniscus of the right knee in addition to the removal of Steinmann pin from the right distal fibula. On July 25, 1973, the same doctor did a Slocum pes anserinus transfer of the right knee. Subsequently, the claim was closed by Determination Order of January 23, 1974 with an additional 30% right leg.

The Opinion and Order dated June 20, 1974 granted claimant a total award of 105° for 70%, in lieu of all previous awards.

In 1975 claimant's claim was reopened with time loss commencing November 15, 1975. Claimant was hospitalized by Dr. Kiest for arthroscopy but found no new pathology and advised claimant to wear a Lennox-Hill knee brace. An arthrotomy was suggested by Dr. Larson and performed by Dr. Kiest on March 17, 1976. Claimant then returned to Ohio, at which time Dr. Thaler recommended an arthroplasty. This was done by Dr. Kiest on February 10, 1977. On May 27, 1977, Dr. Kiest stated that claimant had done quite well after his arthroplasty and that his condition was stationary.

On June 15, 1977, the Fund requested a determination of this matter. The Evaluation Division of the Board found that claimant had received a total award of 70% of his right leg and there was no disability in excess of that. It is their recommendation that claimant be granted no additional award for scheduled disability. They feel claimant should be granted temporary total disability from November 15, 1975 through May 27, 1977, less time worked. The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability from November 15, 1975 through May 27, 1977, less time worked.

OCTOBER 11, 1977

LENNA VAN CAMP, CLAIMANT
Hugh K. Cole, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Supplemental Order

On September 27, 1977 the Board issued an Order on Review reversing a Referee's order which affirmed the Fund's denial of claimant's claim for compensation. We allowed an attorney's fee payable by the State Accident Insurance Fund of \$1,250 for the services of claimant's attorney at the hearing and Board review.

On October 3, 1977 the Board received a request from claimant's attorney for a larger fee than that awarded. In support of that request, claimant's attorney contended that ". . . the nature of this case, its difficulty, the extensive medical research involved, the taking of Dr. Baker's deposition for which that extensive research was necessary, together with the very extensive briefing required both to the Referee and the Workers' Compensation Board . . ." justified, in his opinion, a fee of not less than \$1,750.

We have reexamined the record and conclude that claimant's attorney is entitled to a fee of \$1,750.

IT IS THEREFORE ACCORDINGLY ORDERED that claimant's attorney be and he is hereby awarded an additional \$500, payable by the State Accident Insurance Fund for his services in this matter.

OCTOBER 13, 1977

MELVIN H. HUBER, 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 carrier's denial of claimant's claim for occupational disease.

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 24, 1977, is affirmed.

WCB CASE NO. 76-5788

OCTOBER 13, 1977

DONALD L. KNIPPEL, CLAIMANT
Sanford Kowitt, 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 October 11, 1976 Determination Order which granted temporary total disability from January 6, 1973 through March 15, 1975 and no permanent partial disability. Claimant contends that he is entitled to an 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 March 15, 1977, is affirmed.

WCB CASE NO. 76-3502

OCTOBER 13, 1977

WILLIAM C. MORGAN, CLAIMANT
Carl E. Wilcox, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order on Remand

The Opinion and Order of Referee McLeod dated February 1, 1977 in the above entitled matter is hereby set aside and the matter is remanded to Referee McLeod to complete the record in compliance with the affidavit of Carl E. Wilcox, a copy of which is attached and, by this reference, made a part hereof.

Upon completion of the hearing, the Referee shall issue a final and appealable order.

IT IS SO ORDERED.

OCTOBER 13, 1977

ROBERTA L. WINTER, CLAIMANT
Hugh K. Cole, 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 seeks Board review of the Referee's order which found claimant to be permanently and totally disabled. The Fund contends that the two determination orders which granted claimant 32° for 10% low back disability and 48° for 15% emotional disability were adequate.

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 March 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 \$400, payable by the carrier.

Board Member Moore dissents as follows:

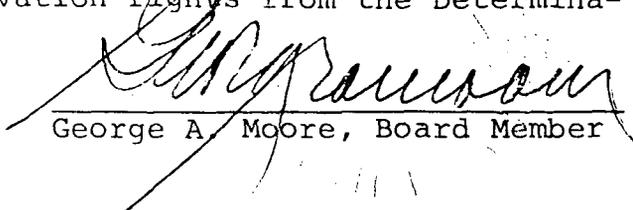
I respectfully dissent from the majority opinion for the following reasons:

From an orthopedic standpoint, the evidence is clear that there is little, if anything, wrong with claimant's back. The report of the Orthopaedic Consultants opines that claimant could return to her previous occupation, and rated the loss of function of her back due to the injury as minimal.

Following the reopening of claimant's claim pursuant to Referee Fitzgerald's order of November 26, 1973, claimant received counseling from 1973 until the summer of 1976 from Dr. Floy Jack Moore. In his closing evaluation of May 7, 1976, Dr. Moore states his psychiatric diagnosis remained essentially the same, that being passive-dependent personality with a hysterical neurosis conversion type. He reaffirmed that the claimant had a severe degree of predisposition towards emotional illness. In summary, he rated her permanent impairment as between 10% and 45%. He did not express an opinion that she was unable to return to work. In fact, throughout the time of his treatment he encouraged claimant to go to school and to seek rehabilitation. Claim-

ant did attend a community college on a regular basis and received her GED within a year's time. She had only had an 8th grade education.

Considering the above, this reviewer concludes claimant's psychological impairment is less than total and combined with the little, if any, physical disability claimant has, does not exceed the 32° awarded for her low back by the Determination Order dated May 18, 1973 and the 48° for emotional disability awarded by the second Determination Order dated July 1, 1976. I would affirm the Referee in his establishing aggravation rights from the Determination Order of July 1, 1976.


George A. Moore, Board Member

WCB CASE NO. 77-2808

OCTOBER 14, 1977

MICHAEL R. CORBETT, CLAIMANT
Ringo, Walton & Eves, 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. 76-7086

OCTOBER 14, 1977

JAMES GARRETT, CLAIMANT
Harold W. Adams, 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 of his June 4, 1975 low back injury.

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 26, 1977, is affirmed.

WCB CASE NO. 76-4762

OCTOBER 14, 1977

RICHARD L. HERRINGTON, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
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 him an additional 10% disability, for a total of 80% for 25% unscheduled low back disability. Claimant contends he is entitled to at least 50% 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 April 13, 1977, is affirmed.

WCB CASE NO. 77-3098

OCTOBER 14, 1977

ROY A. JEFFS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Atty.
Jaqua & Wheatley, 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.

OCTOBER 14, 1977

DAVID KOSTRIKIN, CLAIMANT
Brown, Burt & Swanson, 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 Determination Order of January 15, 1976, which granted temporary total disability only, and affirmed the carrier's denial of claimant's claim for aggravation. Claimant contends that his claim should be reopened for temporary total disability, or, in the alternative, an 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 April 22, 1977, is affirmed.

OCTOBER 14, 1977

WESLEY NELSON, CLAIMANT
Richard C. Bemis, 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 affirmed the carrier's denial of his aggravation 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. The Board would, however, like to point out that aggravation claims are to be treated as claims in the first instance and either be accepted or denied. The Board expects all insurance carriers to comply with this requirement.

ORDER

The order of the Referee, dated May 12, 1977, is affirmed.

CLAIM NO. 8509959

OCTOBER 14, 1977

BENJAMIN NICHOLS, CLAIMANT
Allen T. Murphy, Claimant's Atty.
James Gidley, Defense Atty.
Own Motion Order

On March 23, 1977, claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an injury sustained in August, 1970. The Fund responded to this request contending that it could not justify reopening claimant's claim as his aggravation rights had expired. The Board, after due consideration, concluded that it could not accurately make a decision on the matter and referred it to the Hearings Division with instructions to "hold a hearing and take evidence on the issue of whether claimant's present condition is related to his industrial injury in August, 1970 and, if so, whether claimant's condition has worsened since the last award or arrangement of compensation."

A hearing was held on September 2, 1977 by Referee Leahy, who found that, based on the testimony of claimant and his treating physician, Dr. Lahti, claimant's present condition is related to the injury of August, 1970. It is his recommendation that the claim be reopened.

The Board is now in receipt of an order issued on October 10, 1977 by Referee Leahy after hearing, remanding the above entitled claim to the carrier and employer, for payment of compensation, pursuant to law. Since the identical issues are present in both proceedings, and the order of the Referee carries appropriate appeal rights, the request for own motion relief is hereby dismissed.

WCB CASE NO. 77-2382

OCTOBER 17, 1977

NORMAN Z. ANLAUF, CLAIMANT
Malagon, Starr & Vinson, 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.

OCTOBER 17, 1977

LAURA A. BENAFEL, CLAIMANT
Malagon, Starr & Vinson, 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.

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 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 \$350, payable by the Fund.

OCTOBER 17, 1977

HAYWOOD BUSBY, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's
Atty.
Keith D. Skelton, 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 32° for a total award of 112° for 35% unscheduled back disability. Claimant contends that he is entitled to a much greater 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 February 28, 1977, is affirmed.

ARTHUR J. COX, CLAIMANT

Doblie, Bischoff & Murray, Claimant's Atty.

Gearin, Cheney, Landis, Aebi & Kelley,

Defense Atty.

Own Motion Order

On December 30, 1976, claimant, by and through his attorney, petitioned the Board to exercise its own motion jurisdiction and award claimant compensation for permanent total disability as a result of an industrial injury suffered on March 1, 1968. The employer responded to this request on January 26, 1977 urging the Board not to exercise its own motion jurisdiction in this matter. The employer took the position that "there is a distinction between an initial wrong which is to be corrected, the wrong having occurred more than five years prior to the seeking of relief by the aggrieved party, and the seeking of relief more than five years after the initial Determination Order because of changes in conditions and circumstances which have occurred subsequent to the expiration of the five year aggravation period".

The Board, after due consideration, concluded that it could not accurately make a decision on this case because the evidence available was insufficient. Therefore, the matter was referred to the Hearings Division with instructions to hold a hearing for the purpose of determining whether claimant's condition has worsened since the last arrangement of compensation and, if so, whether this worsened condition is directly attributable to the March 1, 1968 industrial injury.

A hearing was held on June 16, 1977 by Referee Mulder, who found, based upon the lay testimony at the hearing and the medical reports, that claimant is, in fact, permanently and totally disabled as a result of the industrial injury of March 1, 1968.

The Board, after thorough consideration of the transcript, the medical evidence and the Referee's recommendation, concurs with the findings and conclusion of the Referee.

ORDER

Claimant is hereby awarded permanent total disability compensation for his injury sustained on March 1, 1968, commencing on the date of this order.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in the amount of 25% of the compensation granted by this order, not to exceed \$2,000.

OCTOBER 17, 1977

PAUL C. DOUGHARTY, CLAIMANT
Carey & Joseph, 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 Fund contends that claimant is entitled to a greater award than that granted by the Determination Order in the amount of 10% unscheduled disability, but it also feels that permanent total disability is excessive.

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 \$400, payable by the Fund.

OCTOBER 17, 1977

JOHN G. DUARTE, CLAIMANT
Dye & Olson, 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 ordered it to provide claimant with the psychiatric treatment recommended by Drs. Hickman and Beals. The Fund was to pay claimant temporary disability from April 1, 1976 until the time claimant began receiving temporary disability under the re-opening for vocational rehabilitation. Finally, the Fund was to pay for the examinations and reports of Drs. Hickman and Beals in addition to penalties and attorney fees. The Fund contends that the Referee's order should be reversed.

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 3, 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 Fund.

WCB CASE NO. 76-3194
WCB CASE NO. 76-3195

OCTOBER 17, 1977

JERRY F. FOSTER, CLAIMANT
Flaxel & Todd, 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 granted him an increase of 15% disability for his October 20, 1973 back injury and affirmed the Determination Order with its 10% award for his February 5, 1973 injury, making claimant's total award equal to 65% low back disability. Claimant contends that this award is 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 14, 1977, is affirmed.

WCB CASE NO. 75-3338

OCTOBER 17, 1977

KATHERINE JONES, CLAIMANT
Doblie, Bischoff & Murray, 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 affirmed the July 29, 1975 Determination Order which awarded claimant temporary total disability and no permanent

disability. Claimant contends that she is entitled to some permanent partial disability 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.

WCB CASE NO. 76-245

OCTOBER 17, 1977

ROBERT L. REED, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
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 claimant's claim to it for acceptance and payment of compensation. The Fund contends claimant's multiple sclerosis is not job related.

Claimant alleges that the work activity while employed at Hull Oakes Lumber Company between May 1974 and July 1975, resulted in permanent exacerbation of a pre-existing multiple sclerosis, or permanent exacerbation of the symptomatology stemming from the underlying multiple sclerosis.

The first evidence of claimant's disease came after a motorcycle accident in June 1964, which resulted in multiple abrasions, a sprained neck, and some brain damage. After this incident claimant began noticing a difficulty with depth perception. Abnormal bladder and bowel urgency was experienced a couple of years later and in 1967 he began suffering from hearing loss.

From 1968 to 1972, claimant operated a Western Auto store. In 1972, he noticed that he was talking out of the side of his mouth. That same year, he sold the store and started work in a rock quarry. He worked there approximately two years and during that time developed some blurring of vision, along with more of the same symptoms connected with the depth perception difficulties and bladder and bowel urgency.

In May 1974, claimant went to work for Hull Oakes, performing a job which involved a great amount of physical labor with frequent exposure to heat, cold and wet working conditions. In

the fall of that year, claimant also took on a full schedule of courses at Oregon State University.

In January 1975, claimant stepped on a loose board while working, which flipped up and hit him in the face, causing him to fall with his leg going through the floor. Subsequent to this, he noticed his hearing getting worse and "cricket" sounds in his ears. He had increasing difficulty concentrating on his assignments. At night, he noticed jerkiness in his legs and coordination problems when he walked. Persistent headaches developed for which he could find no relief. The bowel and bladder problem became more severe and his nervousness increased along with a noticeable irritability with his family. Around April 1975, he began stammering and slurring his speech.

Dr. Knox advised claimant to quit his job in July of 1975. In his June 28, 1976 report, he stated that claimant's job was not a direct cause of his multiple sclerosis, but was a definite source of aggravation to the pre-existing condition.

Claimant was examined by Dr. Carter, a neurologist, at the request of the Fund. The doctor described multiple sclerosis as an impairment of the insulation of the nerves of the spinal cord and brain which short circuits electric impulses. He testified that physical exertion cannot aggravate or speed up this condition. He did say, however, that symptoms can become aggravated with fatigue and also that hot weather or high temperature increases symptomatology. Dr. Carter felt that if claimant had not worked at all his condition would have progressed, but at a slower rate, due to the nature of the disease.

Dr. Knox, in his deposition testimony, stated that multiple sclerosis is a disease with remissions and exacerbations, but each exacerbation leaves residual damage. He noted that there are certain things that aggravate multiple sclerosis, such as influenza, trauma, emotional upset, severe fatigue and extreme heat. He felt that claimant's work activities caused his symptoms to get worse, especially the exposure to high temperature. He indicated that in his opinion the employment at Hull Oakes was responsible for only the new exacerbations which increased difficulty with coordination, tremulousness of the hand, some blurring of vision, and numbness and tingling of the left lower extremity.

The Referee found that where the work activity aggravates a pre-existing disease condition, the resulting disability is compensable. He found the testimony of the claimant fully credible and compatible with the doctor's findings. Based on the testimony of the claimant and both Dr. Carter and Dr. Knox, the Referee found the Fund responsible for claimant's aggravated condition of his pre-existing multiple sclerosis.

The Board, after de novo review, concurs with the findings of compensability by the Referee. However, we would modify by limiting the Fund's responsibility to those episodes of exacerbation which were attributable to the employment and identified by Dr. Knox.

In his deposition (pg.20), Dr. Knox testified the new symptoms which arose from the work related exacerbation were coordination problems, tremors, some blurring of vision and numbness and tingling in the left lower extremity. At the time the deposition was taken, November 12, 1976, Dr. Knox indicated claimant had, in fact, shown slight improvement. Therefore, this is the only period of time and only conditions for which the Fund is responsible, their responsibility ending November 12, 1976.

ORDER

The order of the Referee, dated March 16, 1977, is modified.

Claimant's claim for an aggravation of his underlying multiple sclerosis disease is hereby remanded to the Fund for the period of temporary exacerbation commencing with claimant's employment with this employer in May of 1974 until the date of Dr. Knox's deposition, November 12, 1976, when claimant's condition again went into a state of remission.

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 Fund.

WCB CASE NO. 76-286

OCTOBER 17, 1977

RICHARD W. SCOTT, CLAIMANT
Day & Brian, 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 him an additional 96° for a total award of 256° for 80% unscheduled low back 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 December 17, 1976, is affirmed.

OCTOBER 19, 1977

JOHN A. ADAMS, CLAIMANT
Don G. Swink, 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 claimant's 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 April 21, 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.

OCTOBER 19, 1977

JAMES E. BUTLER, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimants' 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 dismissed the request for hearing as claimant's claim was closed under the provisions of ORS 656.278 and is therefore not appealable by the 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 June 27, 1977, is affirmed.

OCTOBER 19, 1977

WILBUR CRIM, CLAIMANT
Enver Bozgoz, 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 increase of 20% loss of the right leg for a total award of 75° for 50% loss of function. The claimant contends that he is entitled to an award of 150° for 100% loss of function of the right leg.

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, 1977, is affirmed.

OCTOBER 19, 1977

WAYLAND DUNCAN, CLAIMANT
Douglas S. Green, Claimant's Atty.
Kottkamp & O'Rourke, 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 unscheduled neck, left shoulder and right shoulder disability equal to 35%, in addition to 30% loss of the left arm for a total award of 128° for 40% unscheduled disability and 30% loss of the left arm and 30% loss of the right arm. The employer contends that this award is excessive and questions the compensability of the left arm.

Claimant sustained a compensable injury when he fell from a scaffold on March 19, 1975. The original diagnoses were dislocation of the right shoulder, fracture of the greater tuberosity of the right humerus and C6-7 nerve damage of the right upper extremity. Claimant came under the care and treatment of Dr. Thrasher and exhibited gradual, but definite, improvement. On September 22, 1975, Dr. Thrasher found that claimant was still suffering some weakness in the right hand and wrist, but his shoulder and arm strength were normal. He recommended claim closure at that time.

In March of 1976, claimant went to Dr. Thrasher with complaints of pain in both shoulders and an inability to do heavy lifting overhead together with some nervousness and irritability. The doctor did not believe that all of claimant's complaints were related to the industrial injury and stated that only the problems in his right arm and hand could be causally related to the injury.

The Determination Order of December 11, 1975 was issued with an award of 5% unscheduled disability and 30% loss of the right arm.

In January of 1977, claimant was seen by Dr. Rusch who found a significant injury to the soft tissues of both the shoulder girdles.

Dr. Thrasher indicated in his testimony at the hearing that he had no hint of any injury to claimant's left shoulder until one year after the industrial injury. He did feel that there was a possibility that claimant's neck complaints were connected to the injury, but could not give a definite opinion on that. The problems claimant was experiencing with lack of strength and inability to lift overhead was probably related to the injury of March 1975.

The Referee found claimant to be a credible witness as well as other witnesses who testified at the hearing. He found the opinion of Dr. Thrasher to be ambiguous and seemed to rely on the fact that Dr. Rusch did connect claimant's left extremity problems to the incident in 1975. He could find no other reasonable explanation for claimant's complaints and therefore opined that he was entitled to a substantial increase in compensation.

The Board, after de novo review, finds the medical evidence and the testimony of Dr. Thrasher is thoroughly persuasive. There is no mention of any left extremity problems in the record until one year later, and the doctor treated claimant frequently during that year. It is the finding of the Board that claimant's left extremity condition is not related to the injury. The Board would reverse the Referee and reinstate the Determination Order.

ORDER

The order of the Referee, dated May 3, 1977, is reversed.

The Determination Order dated December 11, 1975, which granted claimant 16° for 5% unscheduled disability resulting from injury to the right shoulder and 57.6° for 30% loss of the right arm, is hereby reinstated and affirmed.

CLAIM NO. 428-C-01297
(Great American Ins.)
CLAIM NO. 05-X-025591
(Argonaut Ins.)

OCTOBER 19, 1977

KENNETH LARSON, CLAIMANT
Allan Coons, Claimant's Atty.
R. Kenney Robert, Defense Atty.
Charles Paulson, Defense Atty.
Own Motion Order

On December 16, 1976, claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for further permanent disability and a referral to the Division of Vocational Rehabilitation. It is claimant's contention that his present condition is related to an industrial injury to his left knee of November 22, 1966.

On January 17, 1977, a hearing was requested by the claimant on the denial by Argonaut Insurance Company for an injury suffered on December 20, 1976. The hearing was set for April 8, 1977. It was the conclusion of the Board that the issue of whether claimant's present condition is the result of an aggravation of the November 22, 1966 injury could be properly raised at the April 8, 1977 hearing by consolidation and that the Referee could determine which carrier was responsible for claimant's present condition.

On April 7, 1977, the Board referred claimant's own motion request to the Hearings Division with instructions to hold a hearing and determine which carrier is responsible for claimant's condition, based upon whether his condition arose out of a new injury in 1976 or was an aggravation of his industrial injury of 1966.

A hearing was held on April 8, 1977 by Referee Fitzgerald, who found, based upon the medical evidence, that claimant's present condition was an aggravation of his November 22, 1966 industrial injury and was the responsibility of Great American Insurance Company. He recommended that the Board grant relief to the claimant under its own motion jurisdiction.

The Board, after thorough consideration of the transcript, the medical evidence and the Referee's recommendation, concurs with the findings and conclusions of the Referee.

ORDER

Claimant's claim for aggravation of an injury suffered November 22, 1966 is hereby remanded to Great American Insurance Company for payment of compensation 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 compensation granted by this order, not to exceed the sum of \$500.

WCB CASE NO. 76-5396

OCTOBER 19, 1977

ROBERT MCFARREN, 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 Phillips.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of claimant's aggravation claim for his condition of contact dermatitis.

Claimant sustained a compensable occupational disease while working for the City of Portland Sewer Department in the form of contact dermatitis of both hands. By Second Determination Order claimant was granted 15% loss of the right forearm and 15% loss of the left forearm. Claimant appealed this order and, after a hearing on June 18, 1976, the Referee found claimant's claim should not be reopened for further medical care and time loss, but granted an additional award for a total of 65% loss of the right forearm and 65% loss of the left forearm. The Opinion and Order entered as a result of this hearing was not appealed.

Claimant filed a claim for aggravation of his condition with the Fund which was denied on November 4, 1976. All of the medical evidence offered at the hearing was in the record at the June 1976 hearing with the exception of Dr. Dahl's deposition of June 15, 1976. Claimant was examined by Dr. Dahl over a period of years and in April 1975 he stated that claimant's disease was still active, but that his condition was stationary. Claimant suffered an exacerbation when he returned to his regular occupation and subsequently, upon the advice of his treating physician, quit his job.

In a report from Dr. Dahl, dated April 6, 1976, claimant's hands were found to be in the best condition they had ever been since the doctor had started treating him. On May 5, 1976, claimant went to work for the employer concerned in this case. On June 1, 1976, claimant returned to Dr. Dahl with a severe exacerbation of his dermatosis and was advised to discontinue working at that occupation.

The Referee found that possibly claimant was not aware of his shoveling duties before accepting the job with Washington County and Dr. Dahl had given his consent to take this job. The Referee would not bar claimant from relief on the grounds that claimant should have quit the job as soon as he was assigned to the shoveling duties. He found that claimant chose to submit evidence of his Washington County disability at the City of Portland hearing and, therefore, he was barred from relitigating the same evidence to prove entitlement of benefits from Washington County. He found that during his employment with Washington County, he did not meet the requirements of the Occupational Disease Law ORS 656.802(1) which says that aggravation is not proven since claimant's job did not present any conditions to which claimant was not ordinarily subjected or exposed other than during a period of regular actual employment. He found that wearing gloves is a commonplace part of everyday life.

The Board, after de novo review, concurs with the findings of the Referee and the conclusion wherein he approved the denial. They would point out that claimant did not prove a new occupational disease with Washington County. It was an established fact that claimant's contact dermatitis was causally related to his work for the City of Portland. Since he did not prove a new disease, he cannot claim an aggravation with Washington County of an occupational disease which originated with another employer. Therefore, the Board affirms the order of the Referee.

ORDER

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

WCB CASE NO. 76-5397

OCTOBER 19, 1977

DONALD OULLETTE, CLAIMANT
Dye & Olson, Claimant's Atty.
Ragen & Roberts, 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 July 29, 1976 which granted no permanent partial disability and also affirmed the carrier's denial of his aggravation 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 April 28, 1977, is affirmed.

WCB CASE NO. 77-2229

OCTOBER 19, 1977

DOROTHY PENKAVA, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
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 dismissed the request for hearing as claimant's claim was closed under the provisions of ORS 656.278 and is therefore not appealable by the 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 June 27, 1977, is affirmed.

WCB CASE NO. 76-6416

OCTOBER 19, 1977

KEITH J. WILKEN, CLAIMANT
Carlotta H. Sorensen, 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 him a total of 80° for 25% unscheduled low back disability. Claimant contends that his loss of earning capacity is far greater than this award would indicate.

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. However, the Board suggests that claimant apply to the Disability Prevention Division for a hoist and any other equipment necessary for him to succeed in his own business.

ORDER

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

WCB CASE NO. 76-6661

OCTOBER 19, 1977

JILL M. ZIEBERT, CLAIMANT
Murley M. Larimer, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by EBI Co.

Reviewed by Board Members Wilson and Phillips.

EBI Company seeks Board review of the Referee's order which remanded the claim to it for acceptance and payment of compensation commencing September 9, 1976 until claim closure is authorized. In the same order the denial of the Fund was affirmed.

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 25, 1977, is affirmed.

WCB CASE NO. 76-6176

OCTOBER 21, 1977

BILL CARVELLO, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & L'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 until closure 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 March 24, 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 \$50, payable by the Fund.

WCB CASE NO. 75-244

OCTOBER 21, 1977

BILL CAVAN, CLAIMANT
Burns & Lock, 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.

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 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 \$50, payable by the Fund.

WCB CASE NO. 76-6710

OCTOBER 21, 1977

MARILYN CLEMONS, CLAIMANT
Doblie, Bischoff & Murray,
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 of November 3, 1976 which granted claimant 10% unscheduled neck disability. The

claimant contends that this 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 March 25, 1977, is affirmed.

WCB CASE NO. 76-5408

OCTOBER 21, 1977

JAMES A. CURLEY, CLAIMANT
Bradley & Haws, Claimant's Atty.
Bemis & Breathouwer, Defense 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 payment of medical services under ORS 656.245. The denial of claimant's aggravation claim was affirmed and the denial of a new injury claim issued by Mission Insurance Company was also affirmed. The Fund contends that it should not be held responsible for claimant's condition.

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. However, it should be noted that there is an error on page 2 of the Referee's order. The Referee makes the statement "Claimant's claim was closed with the above award", but failed to make any mention of this award in the preceding paragraphs.

ORDER

The order of the Referee, dated May 19, 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. 76-6683

OCTOBER 21, 1977

ROY DOSTER, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Atty.
SAIF, Legal Services
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 temporary total disability benefits from October 21, 1976 to December 3, 1976. The Fund contends that claimant is not entitled to time loss in a non-valid claim, such as this 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 May 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 \$250, payable by the carrier.

WCB CASE NO. 76-173

OCTOBER 21, 1977

RONALD KISLER, CLAIMANT
Harold Adams, Claimant's Atty.
Roger A. Luedtke, Defense Atty.
Joint Petition and Order of
Bona Fide Dispute Settlement

FACTS

RONALD KISLER, while employed by Libby, McNeil & Libby allegedly suffered a low back injury while carrying out his duties between December of 1972 and December of 1974. He sustained no actual traumatic injury but complained of a gradual onset of symptoms. Mr. Kisler, who has a serious obesity problem, had

PETITION

Claimant, Ronald Kisler, in person and by his attorney, Harold Adams, and respondents, Insurance Company of North America, by their attorney, Roger A. Luedtke (Souther, Spaulding, Kinsey, Williamson & Schwabe), now make this joint petition to the board and state:

1. Ronald Kisler and Insurance Company of North America, private insurance carrier for Libby, McNeil & Libby, have entered into an agreement to dispose of this claim for the total sum of \$13,000 said sum to include all benefits and attorney fees.

2. The parties agree that the employer/carrier shall not be responsible for medical expenses related to the disputed condition and that the claimant shall hold the employer/carrier harmless for any such expenses.

3. The parties further agree that from the settlement proceeds \$2,000 shall be paid to Harold Adams as a reasonable and proper attorney fee. All payments are to be made in a lump sum.

4. 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.

5. All parties understand that if this payment is approved by the Board and payment made thereunder, said payment in full, final, and complete settlement of all claims which claimant 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 said award as being final.

6. It is expressly understood and agreed by all parties that this is a settlement of a doubtful and disputed claim and is not an admission of liability on the part of the respondents, by whom liability is expressly denied; that it is a settlement of any and all claims, whether specifically mentioned herein or not, under the Worker's Compensation Law.

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.

OCTOBER 21, 1977

LAVENA LINCOLN, CLAIMANT
Dye & Olson, 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 granted claimant an award of permanent total disability for her low back injury of November 8, 1972. The Fund contends this award far exceeds claimant's actual loss of wage earning capacity.

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 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 \$450, payable by the carrier.

OCTOBER 21, 1977

HERCEL W. MERCHANT, CLAIMANT
Frohnmayr & Deatherage, 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 an additional 10% for a total of 96% for 30% unscheduled low back 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 25, 1977, is affirmed.

CHARLES W. NOVICKI, CLAIMANT

Rhoten, Rhoten & Speerstra, 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 increased award of 20% for a total of 192° for 60% unscheduled low back disability. The Fund contends that the 40% award of the October 12, 1976 Determination Order was adequate.

Claimant, at age 51, suffered a compensable low back injury on January 4, 1974 while lifting frames. In March of 1974, Dr. Poulson indicated that on February 7, claimant's back condition was considered static without impairment. All of his back symptoms had subsided completely. Subsequent to this time, claimant continued to see Dr. Poulson with complaints of back pain. The doctor felt there was a considerable neurotic overlay in claimant's condition and recommended that the case not be closed. In June of that year, Dr. Poulson found a recent myelogram to be negative, but thought that claimant was extremely sensitive to pain and that he had almost convinced himself that he would be unable to ever work again. In August of 1974, the doctor found a permanent partial impairment equal to 9% of the whole man.

On May 2, 1975, claimant underwent a laminectomy and fusion. On October 28, 1975, Dr. Poulson found claimant's impairment in the neighborhood of 15-20%, a good part of which was due to his lack of ability to withstand pain. The doctor's closing evaluation found claimant with 24% impairment of the whole man. On October 12, 1976, the Determination Order was issued granting temporary total disability and 40% unscheduled disability.

The Fund contends that claimant's regular bowling activities would indicate that his disability is not as high as the Referee found it to be. Dr. Poulson, in his deposition, stated that he was aware of claimant's bowling and very definitely condoned it. He noted that while claimant is bowling with friends, he is in a very relaxed state and tends to forget his pain and feels a lot better. It was the doctor's opinion that claimant's work conditions were such as to cause him mental stress as he was in a situation that was not enjoyable to him. Because of this, and the fact that claimant undeniably has a very low threshold of pain, claimant's back pain makes it impossible for him to function at work.

Claimant has a high school education and further training in physical education and civil engineering. He has a variety of work experience, such as cab driving, working in a service station, performing maintenance work and working in steel mills and a foundry.

The Referee found claimant to be essentially credible as to his physical condition. He did feel that there was work claimant could perform and that he had many productive years left. Because he felt that there was a significant portion of the general labor market precluded to him when considering his age, training, experience and physical condition, the Referee granted claimant an additional 20% unscheduled disability for a total award of 60%.

The Board, after de novo review, finds that the award of the Referee was excessive. Its contention is that the medical evidence does not support that great a disability. Claimant is obviously not motivated to return to work and his complaints at the hearing are inconsistent with his regular bowling activities. Based on this conclusion, the Board would reverse the Referee's order and reinstate the Determination Order of October 12, 1976.

ORDER

The order of the Referee, dated March 31, 1977, is reversed.

The Determination Order of October 12, 1976, granting claimant 128° for 40% unscheduled disability is hereby reinstated and reaffirmed.

WCB CASE NO. 76-5856 OCTOBER 25, 1977

EDDY C. KOLB, CLAIMANT
Kirkpatrick & Howe, 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 him 16° for 5% unscheduled upper spine disability. Claimant contends that this award is 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 May 4, 1977, is affirmed.

WCB CASE NO. 77-71

OCTOBER 25, 1977

HERBERT R. LAMISON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary.
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 December 1, 1976 Determination Order which granted him 40% unscheduled low back disability. Claimant contends that he is entitled to a greater award or, in the alternative, 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 April 15, 1977, is affirmed.

WCB CASE NO. 76-3656

OCTOBER 25, 1977

SHIRLEY MALONE, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's
Atty.
Keith D. Skelton, 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 a total award of 176° for 55% unscheduled low back disability and 18.5° for 20% loss of function of the right leg. Claimant contends that her condition is not medically stationary and should be reopened for medical care and treatment, or, in the alternative, she 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. However, claimant is entitled to psychiatric treatment, if she desires, under the provisions of ORS 656.245.

ORDER

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

WCB CASE NO. 76-3510

OCTOBER 25, 1977

ROBERT E. SCHAUB, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Atty.
Philip A. Mongrain, 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 June 25, 1976 which granted claimant an award of 10% unscheduled disability. The claimant contends he is entitled to a greater award of permanent disability.

On June 27, 1969 claimant suffered a compensable injury when he was struck in the face by a metal crane hook. He was hospitalized briefly. The initial diagnosis by Dr. Casey was multiple lacerations of the left upper eye lid. He was released for regular work on July 21, 1969 and found to be medically stationary.

Claimant saw Dr. Raaf on December 30, 1974 with complaints of excessive drainage from the left nostril, a tic in the left eyelid, a crawling sensation in the left forehead, and difficulty driving at night. The doctor found that his difficulty with driving at night was not a result of his industrial injury. He told claimant that the crawling sensation in the left forehead was probably permanent and was due to the injury of the left supraorbital nerve. The tic had not bothered claimant for some time and was of relatively little importance. Claimant's complaint of excessive drainage of mucous from the left nostril was found to be his major complaint. The doctor didn't think surgery was necessary, but gave him the option of consulting another doctor in this matter. Claimant's loss of his sense of smell on the left side was probably permanent as far as the doctor was concerned.

Dr. Panian, on March 17, 1975, found that claimant did have a nasal deformity which could be secondary to the injury,

although he did not feel that claimant's drainage problems were related. Dr. Melgard felt that claimant had a possible cerebrospinal fluid leak which was confirmed after tests were done in the hospital. Claimant underwent a bifrontal craniotomy to repair this problem on March 31, 1975. He continued under the care of Dr. Melgard and seemed to progress satisfactorily, although he still had complaints of loss of energy, loss of libido and difficulty with taste and smell. Dr. Melgard noted that claimant's loss of smell was a potential hazard in that he would be unable to detect fumes in his work as a welder in a high pressure tank. He was found to be stationary, but his inability to smell would have to be taken into consideration in returning to work. Dr. Peterson, on October 30, 1975, noted the same symptoms that Dr. Melgard referred to and connected these with the psychological letdown, depression and adjustment that claimant was understandably going through as a result of the chain of events connected with his injury.

In 1973 or 1974, claimant began farming for a living. He raises wheat, oats and some hay along with sheep and a few calves. He complained at the hearing of recurring headaches and nose drainage which is a result of working around pollen and dust. He becomes exhausted after three hours of tractor work or chopping wood. His wife does a large share of the farm work. Because of his inability to smell, he no longer is able to do welding.

The Referee found that claimant seems capable of performing most of the duties on his farm and did not feel that his apparent loss of energy was substantiated in the medical reports. Although it is obvious that claimant is unable to return to his former occupation of welding, he seems to be quite capable of performing his farming duties and therefore, his loss of earning capacity is not overly serious. He found claimant had been granted an adequate award for his disability and affirmed the Determination Order which granted an award of 10% unscheduled disability.

The Board, after de novo review, finds that the award of the Referee was somewhat low. Claimant is not only unable to return to his former occupation, he is also having some trouble keeping up his farm. His wife performs a lot of the duties on the farm because claimant is unable to do so. He has also had help from his neighbors who have cared for his hay in exchange for his help with the combine work. It is the finding of the Board, based on the medical evidence and lay testimony at the hearing, that claimant is entitled to a larger award.

ORDER

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

Claimant is hereby granted an increase of 15% unsched-

uled disability for a total award of 80° for 25% unscheduled disability resulting from post traumatic periferial nerves and loss of smell and taste.

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 increased compensation granted by this order, not to exceed \$2,300.

WCB CASE NO. 76-5179

OCTOBER 25, 1977

BETTY SHULTZ, CLAIMANT
M. Elliott Lynn, Claimant's Atty.
Merlin Miller, Defense Atty.
Stipulation and Order

This matter coming on regularly before the Worker's Compensation Board upon the stipulation of the parties, Betty Shultz, Claimant-Appellant, in person and through her attorney, M. Elliott Lynn, and the employer and carrier acting by and through their attorney, Merlin L. Miller, and it appearing that issues raised at the hearing and appeal to the Board, having been fully resolved and settled between the parties and that this order may now be entered, therefore,

It is hereby ordered that claimant be and she is hereby awarded additional temporary partial disability in the amount of \$162.00.

It is further ordered that out of the compensation made payable by this order, the carrier shall pay claimant's attorney an amount not to exceed 25% of the compensation payable herein as and for a reasonable attorneys fee.

It is further ordered that claimant's Request for Review is hereby dismissed with prejudice.

It is so stipulated.

WCB CASE NO. 77-659

OCTOBER 25, 1977

DAN WASHBURN, CLAIMANT
David R. Vandenberg, 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 carrier's denial of January 14, 1977 for his alleged knee injury.

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 June 17, 1977, is affirmed.

SAIF CLAIM NO. KA 924217 OCTOBER 26, 1977

EUGENE L. ANDERSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable low back injury on May 8, 1962 when he was struck in the back by a board. A two level L4-5-S1 fusion was performed. Claimant was retrained as an aircraft mechanic, returned to work in this capacity and the claim was eventually closed. Because the original file was destroyed, the following facts are part of a reconstructed file compiled by the Fund.

Claimant's condition worsened in 1968 or 1969 and further surgery was performed, after which he again returned to his aircraft mechanic job. The closing orders are not available, but the information submitted shows that claimant received a total award of 50% unscheduled disability.

Claimant's condition necessitated further medical care and treatment by September 13, 1973, although claimant continued working. He was forced to quit work on July 1, 1976 and was hospitalized on July 14. On July 22, 1976 nerve root decompressions were accomplished through the solid fusion mass. This surgery only temporarily helped claimant, but he did return to work on April 1, 1977.

Dr. Corrigan, in his August 16, 1977 closing report, noted claimant's complaints of continuing low back pain with left leg radiation and weakness. He felt claimant's physical impairment was greater than the 50% permanent partial disability already awarded and found claimant's condition stationary. Claimant continued working during this period of time and was hoping to get into flying.

The Fund, on October 5, 1977, requested a determination

of this matter. It is the recommendation of the Evaluation Division of the Board that claimant's loss of wage earning capacity does not exceed the 50% already awarded. Claimant has worked in the same occupation for over 12 years and is anticipating improving his earning status in the future. The recommendation is that claimant be awarded temporary total disability from July 1, 1976 through August 16, 1977, less time worked, and no compensation for permanent partial disability above that already granted. The Board concurs with this recommendation.

ORDER

Claimant is hereby awarded temporary total disability from July 1, 1976 through August 16, 1977, less time worked.

WCB CASE NO. 76-6272

OCTOBER 26, 1977

DONALD BECKWITH, CLAIMANT
Hayes P. Lavis, Claimant's Atty.
Lawrence Dean, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which dismissed the claimant's request for hearing on the ground that the issue of penalties and attorney's fees for delay in the payment of temporary total disability ordered by the Determination Order of January 6, 1976 was improperly before the Referee. The same Determination Order had been appealed earlier and a hearing held on July 13, 1976 with all the same evidence submitted at that 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 April 6, 1977, is affirmed.

ANTHONY BRUGATO, CLAIMANT
Galton, Popick & Scott, 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 77° for 70% loss of the right leg and 90% un-scheduled permanent partial disability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee as amended, a copy of which is attached hereto and, by this reference, is made a part hereof. However, it should be noted that in the Second Amended Opinion and Order dated May 31, 1977, paragraph 1, line 5, the date "November 1, 1974" should be corrected to read "November 1, 1964".

ORDER

The order of the Referee, dated April 28, 1977, as amended on May 4, 1977 and on May 31, 1977, is affirmed.

WCB CASE NO. 76-832 OCTOBER 26, 1977
WCB CASE NO. 76-5471

GLEN HENSLEY, CLAIMANT
Galton, Popick & Scott, 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 affirmed the Determination Order of February 10, 1976 granting no permanent partial disability for his cyst but reversed the Determination Order of October 5, 1976 and granted claimant permanent total disability for his low back condition.

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 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. 76-1878

OCTOBER 26, 1977

W.B. HICKMAN, CLAIMANT

Emmons, Kyle, Kropp & Kryger, Claimant's
Atty.

Souther, Spaulding, Kinsey, Williamson
& Schwabe, 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 additional 25% unscheduled disability for a total award of 192° for 60% low back disability. Claimant contends he is permanently and totally disabled, or, in the alternative, he should be granted a greater award.

Claimant, at age 62, suffered a compensable injury at work on October 1, 1975 when his office chair broke under him and he fell backwards striking his low back against a protruding electrical outlet. Claimant went to the hospital where Dr. Haffner's initial diagnosis was lumbar strain with possible sciatic irritation. Claimant had suffered two back injuries prior to this incident, one in 1970 for which he underwent a laminectomy and one in July 1975 when he slipped and sprained his back while on a camping trip.

Claimant saw Dr. Eusterman in November of 1975 for low back pain which came about after a bus trip to Seattle to see his son. At this time Dr. Bonnländer found recurrent low back pain with possible chronic degenerative discogenic changes at L4-5 and L5-S1. A myelogram was performed by Dr. Ellison on December 30, 1975. The history given to Dr. Ellison at this time was that he had a laminectomy in 1971 after which he had intermittent difficulties, although he was still able to function until the episode connected with the bus trip to Seattle in November of 1975.

On February 12, 1976, Dr. Ellison found claimant to be medically stationary and recommended closure. He did not advise any further treatment, but did feel that claimant had a significant permanent disability which would preclude him from working consistently at any job requiring prolonged sitting, frequent stooping or bending, standing on hard surfaces for a prolonged period of time, or lifting any weight.

The Determination Order was issued on April 2, 1976.

with an award of temporary total disability and 112° for 35% unscheduled low back disability.

Dr. Martens, on April 19, 1976, found claimant totally disabled from his manager job. He attributes claimant's condition to the job-related incident in October 1975 by history.

On June 11, 1976, Mr. Hitt, rehabilitation counselor, did not feel claimant was a good candidate for vocational rehabilitation due to his age and disability.

On July 26, 1976, claimant was examined by the Orthopaedic Consultants who found chronic lumbar strain and degenerative osteoarthritic changes of the lumbar spine, commensurate with his age. They felt his condition was stationary and no further treatment was necessary. It was their opinion that claimant could continue with his regular occupation with limitations. They found his loss of function to be mildly moderate and his loss of function due to the injury, mild.

Claimant returned to work on November 24, 1975, during which time he trained his replacement for his March 1, 1976 retirement. He has sought no further employment, except for asking about a part time job in a hardware store. He plays golf and has gone on two extended fishing trips to Canada. It was his testimony that he couldn't do things around the house such as washing his car or hoeing his garden, but films were shown at the hearing that showed claimant doing these things for long periods of time with no evidence of disability. The manager of the claimant testified at the hearing of a job available for claimant that would allow him to work only the hours he was able physically at an hourly wage. There was another retired worker working for the employer on this kind of system and it was a very satisfactory arrangement for both the workman and the employer. Claimant did not want to attempt this.

The Referee found claimant was not permanently and totally disabled. The films indicated that claimant could perform any sedentary type sales position. The Referee felt he did not attempt to find work that he could handle and that his intelligence and abilities were such that there were several possibilities open to him. He finds that claimant wants retirement and that he has magnified his complaints somewhat. However, the Referee found claimant had suffered a valid industrial injury on October 1, 1975 and he has a sizeable loss of earning capacity. He allowed claimant an award of 192° for 60% unscheduled low back disability.

The Board, after de novo review, finds that the Referee's award was far too generous. Claimant has obviously retired and has no motivation to get a job he can handle. The medical evidence does not support the amount of disability claimant alleges and he has been offered a job with the same employer with conditions that claimant can more than handle according to the medi-

cal reports, the testimony at the hearing and the evidence in the films. The Board, therefore, concludes that the award of the Referee was excessive and that the Determination Order should be reinstated.

ORDER

The order of the Referee, dated April 26, 1977, is reversed.

The Determination Order of April 2, 1976, which awarded claimant 112° for 35% unscheduled low back disability, is reaffirmed and ratified.

WCB CASE NO. 76-7039

OCTOBER 26, 1977

ROBERT B. LEACH, CLAIMANT
Vernon Cook, 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 claimant's claim for his knee condition.

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 12, 1977, is affirmed.

WCB CASE NO. 76-5341

OCTOBER 26, 1977

DONALD STOTZ, 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 affirmed the August 13, 1976 Determination Order which granted him 20.25° for 15% loss of the left foot. Claimant

contends this award is not adequate and, in addition, that he is entitled to an award for the right foot.

Claimant saw Dr. Anderson on February 1, 1974 with complaints of pain of the plantar fascia attachment to the os calcis bilaterally which had been progressing gradually over a period of 5 years. An examination revealed point tenderness in the region of the plantar fascia attachment to the os calcis which was equal in both the left and right. Claimant was advised to get the ripple sole on his work shoes along with a heel pad. In March of 1974, Dr. Anderson performed a plantar fasciitis release and noted a gradual improvement after that.

Claimant continued seeing Dr. Anderson and in December of 1974, the doctor found his condition to be worse than it was before surgery. He had good and bad days and his first few steps in the morning were the worst. An examination revealed persistent tenderness. The doctor had no recommendation other than to continue controlling his activities.

On February 26, 1974, the Fund issued its denial. On April 30, 1974 Dr. Anderson indicated that he could not, at that time, relate claimant's condition to his occupation, but there was no doubt in his mind that claimant's plantar fasciitis could be aggravated from his job since it required prolonged standing and walking on cement. Claimant appealed this denial and Referee Daron, on March 3, 1975, found claimant's condition compensable as an occupational disease.

Claimant continued to have symptoms in June of 1976, but Dr. Anderson was unable to do anything to improve his condition. On July 15, 1976, Dr. Anderson stated that claimant's symptoms had not changed over a period of years and therefore his condition could be considered stationary. On August 13, 1976 the Determination Order in question was entered with an award of 20.25% for 15% loss of the left foot.

Claimant saw Dr. Cronk on December 7, 1976 with complaints of heel pain. The doctor diagnosed bilateral calcineal bone spurs, status post-excision on the left side with residual tender scar formation. He recommended that claimant wear a higher heeled shoe and use a felt insert.

Claimant attempted to return to work but had to quit because of his foot problems. He opened his own repair shop in August of 1974. He complained that after sitting, he has a hard time standing on his left foot, it throbs at night, walking prolonged distances causes pain as does standing for over a half hour. He is having some trouble with his right foot because he throws additional weight from his left foot to the right foot. He often limps on his left leg, especially in the morning. His present job is somewhat lighter than his duties before he quit to open this repair shop, and he has missed no time from work,

although he often must quit early because of his feet. Claimant's activities have been restricted such as hunting and fishing. He has trouble going down stairs as well as climbing ladders.

The Referee, based on claimant's ability to work and his remaining functional capabilities, finds claimant is not entitled to a greater award than that already granted him in the Determination Order.

The Board, after de novo review, concludes claimant is entitled to a greater award. The Board finds that the pain, swelling, and discomfort claimant must endure each day is disabling to him and constitutes a definite loss of function.

ORDER

The order of the Referee, dated May 6, 1977, is modified.

Claimant is hereby granted an increased award of 5% disability of the left foot for a total award of 27° for 20% loss of function.

Claimant is also granted an award of 13.5° for 10% loss of function of the right foot.

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 increased compensation, not to exceed \$2,300.

WCB CASE NO. 76-2450
WCB CASE NO. 76-4151

OCTOBER 26, 1977

REX TUCKER, CLAIMANT

Carl H. Brumund, Claimant's Atty.

Jones, Lang, Klein, Wolf & Smith,

Defense Atty.

SAIF, Legal Services, Defense Atty.

Request for Review by EBI

Reviewed by Board Members Moore and Phillips.

The Employee Benefits Insurance Company seeks Board review of the Referee's order which found claimant had sustained a new injury to his low back on April 27, 1976 and remanded the claim to Employee Benefits Insurance Company for acceptance and payment of compensation. The denial of the State Accident Insurance Fund was affirmed.

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.

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 Employee Benefits Insurance Company.

WCB CASE NO. 76-5491

OCTOBER 26, 1977

DAVID WARD, CLAIMANT
Roger Leo, 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 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. 76-2237

OCTOBER 27, 1977

WCB CASE NO. 76-4067

ALEX AGALZOFF, CLAIMANT
Allen T. Murphy, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Samuel R. Blair, 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 found claimant's complaints to constitute an aggravation of his September 5, 1973 injury and remanded the claim to the Fund for reopening, effective March 30, 1976, with temporary total disability benefits to commence on that date and terminate when he is declared to be medically stationary. The denial of the Farmers Insurance Group with respect to a new injury was affirmed and the Fund was ordered to reimburse Farmers the sum of \$1,261.19, advanced by Farmers to claimant for the period from March 25, 1976 through May 13, 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.

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 Fund.

WCB CASE NO. 76-4069

OCTOBER 27, 1977

GAILORD M. CRUM, CLAIMANT
Myrick, Coulter, Seagraves &
Nealy, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appeal by Claimant

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Referee's order which awarded claimant 80% for 25% unscheduled low back disability. The Fund contends that this award far exceeds that to which claimant is actually entitled. The claimant, on cross-request, contends that he is vocationally handicapped and the non-referral to vocational rehabilitation should be reversed. In addition, claimant is entitled to a larger permanent disability award.

Claimant, at age 39, suffered a compensable low back strain on October 18, 1974 while carrying boxes. Dr. Mackie, three days later, diagnosed a "sacrolumbar sprain". On February 10, 1975, Dr. Renaud found lumbosacral sprain, subacute, with the possibility of carpal tunnel syndrome. On March 14, 1975, Dr. Renaud mentioned, for the second time, the employer's letter to claimant stating that claimant was welcome to return to work but not until he had been completely cured of his back symptoms. The doctor told him he should return, but claimant was reluctant to do so.

On July 1, 1975, the Orthopaedic Consultants noted very little in the way of objective physical findings. They recommended a psychological examination and felt that if the case was subsequently closed because of a poor psychological prognosis, then claimant's total loss of function, at that time and due to the injury, was minimal.

On November 19, 1975, Dr. Maier found claimant had a significant emotional disturbance secondary to his physical disability and recommended psychotherapy. Dr. Wilson, on March 16, 1976, found no evidence of nerve root irritation or compression and did not feel any further medical treatment was necessary. He

felt it was possible claimant's complaints could be secondary to lumbosacral instability which was secondary to the degenerative disc disease present. He recommended that claimant participate in a vocational rehabilitation program for a lighter, sedentary type of work, which claimant indicated he did not want to do. On May 20, 1976, Dr. Maier felt that claimant was not ready for full-time physical work, but did feel that claimant should begin exploring the possibility of training for an alternative occupation.

The Determination Order of July 22, 1976 granted claimant time loss benefits only.

Dr. Blosser, on August 13, 1976, found x-rays of claimant's cervical and lumbar spine to be normal and found no evidence of nerve root pressure. He felt that it would be very difficult to get claimant to return to gainful employment because of the fact that he has been off work for 1-1/2 years and his type of personality dictated against doing so. The doctor found no reason why claimant could not return to his regular job, if he had the desire to do so.

Dr. Pruitt, on September 20, 1976, found that claimant had some damage to the lumbosacral disc which was probably responsible for his lower back distress, but he felt that it was a result of an injury which occurred six months prior to the industrial injury at issue here. It was his opinion that claimant could not take on full time employment of any kind until the cause of his problems could be located and removed.

On December 2, 1976, the Disability Prevention Division issued a non-referral for vocational rehabilitation on the grounds that claimant's past job experience in selling should enable him to get a job in a related field.

The Referee found that claimant did not prove that he was vocationally handicapped. He found that claimant has saleable skills. He noted that claimant was offered a job in Medford at a \$2 an hour cut in pay, which he refused, but the evidence indicated that if he had been offered a comparable job in Grants Pass he would have taken it. Claimant's goal of working in criminal justice was commendable, but too remote in time to expect to have several years of post-high school level work provided to him as a result of his back injury. He found claimant entitled to additional compensation equal to 80° for 25% unscheduled low back disability.

The Board, after de novo review, concludes that the award granted by the Referee is excessive when considered in light of claimant's age, education, intelligence and past experience. The Board relies on Dr. Blosser's report of August 1976 which stated, "At this time I can see absolutely no reason why he should not be able to work at his usual job, if he so desires". The Board

feels that claimant, if properly motivated, could return to gainful employment or, more specifically, his regular job. Therefore, it is the opinion of the Board, that claimant's disability benefits should be 10% unscheduled disability rather than the 35% awarded by the Referee.

ORDER

Claimant is hereby granted 32° for 10% low back disability for his industrial injury suffered on October 18, 1974.

WCB CASE NO. 76-3576

OCTOBER 27, 1977

MARC A. DAILEY, CLAIMANT
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 claimant's alleged industrial injury.

Claimant, at age 27, alleged that he suffered a back injury sometime during the week of April 12, 1976 or, more specifically, April 19, 1976. He had suffered an injury to the neck and possibly the back in August, 1975, which he testified had healed completely. On April 19, 1976 claimant told Glen Walker that his back "snapped" while the two men were installing a 50-foot section of gutter on a roof. Claimant also testified at the hearing that he woke up one morning previous to this incident with a stiff and sore back, but he could not remember the exact date. On the day in question, claimant finished his work and returned to the office. He informed the manager and owner of his injury and requested a claim form to fill out. Because he had hurt his back in the past and it had healed, he decided to wait and see if it would heal this time and didn't take the claim form.

At this point, the Referee expands on an altercation between claimant and the manager, Mr. Grebs, which resulted in claimant's termination. The Board finds this account, with its conflicting reports, to be totally irrelevant to the case at hand. Whether or not claimant suffered a back injury while installing gutter as he reported is what has to be decided. There is no medical evidence in the record to substantiate claimant's complaints and the lay testimony was too vague and conflicting to contribute anything of worth in the evidence.

The Referee found he didn't know who to believe and felt that claimant was feeling put down because of being fired

and wanted to get even. He did not feel that claimant had borne his burden of proof.

The Board, after de novo review, concurs with the findings of the Referee.

ORDER

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

WCB CASE NO. 77-90

OCTOBER 27, 1977

GEORGE DOTY, CLAIMANT
Kennedy, King & McClurg, 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 denied claimant's request for a determination of his permanent partial disability for want of timeliness.

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 25, 1977, is affirmed.

WCB CASE NO. 75-453

OCTOBER 27, 1977

In the Matter of the Compensation
of the Beneficiaries of
PEGGY ESTABROOK, CLAIMANT
Galton & Popick, Claimant's Atty.
Gearin, Cheney, Landis, Aebi &
Kelly, Defense Atty.
Request for Review by the Beneficiaries

Reviewed by Board Members Wilson and Moore.

The Beneficiaries of Peggy Estabrook seek Board review of the Referee's order which affirmed the carrier's denial of

February 20, 1976 of claimant's request for reopening. The order also affirmed the Determination Order of October 10, 1974 which awarded no permanent disability and claimant's request for penalties and attorney's fees was denied.

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 29, 1977, is affirmed.

WCB CASE NO. 76-3890 OCTOBER 27, 1977

BETTY LUCAS, CLAIMANT
Emmons, Kyle, Kropp & Kryger, 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 granted an award of 160° for 50% unscheduled back and neck disability along with temporary total disability benefits from May 27, 1976 to July 2, 1976. Claimant contends that the award of permanent partial disability is 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,

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 April 25, 1977, is affirmed.

OCTOBER 27, 1977

GERALD W. MESSINGER, CLAIMANT
A. C. Roll, Claimant's Atty.
Gearin, Cheney, Landis, Aebi & Kelly,
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.

OCTOBER 27, 1977

JAMES F. SMITH, CLAIMANT
Ringo, Walton & Eves, Claimant's Atty.
Jaqua & Wheatley, 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 increased award of 45% low back disability for a total award of 192° for 60% unscheduled disability. The employer contends that the award of the February 26, 1975 Determination Order of 15% was adequate to compensate claimant's loss of wage earning capacity.

On January 1, 1973, claimant stepped on a piece of veneer and slipped and fell striking his buttocks and tailbone. Claimant underwent treatment and surgery with several doctors. The order of the Referee is quite detailed with regard to the numerous medical reports submitted in this case. For this reason, the Board will not mention these again, but will, instead, attach the Referee's order to this Order on Review as it finds the Referee's treatment of claimant's history is very complete.

The Referee finds claimant's physical impairment to be substantial. He concludes that it would be difficult for claimant to find a job outside of Georgia-Pacific because of his condition, his age, his education, and his limited work experience. The Referee found claimant and his wife to be fully credible and, therefore, felt his loss of wage earning capacity to be equal to 192° for 60% unscheduled low back disability.

The Board, after de novo review, concludes the award of the Referee is excessive. After studying the medical evidence,

the testimony at the hearing and the briefs, the Board finds that claimant's loss of wage earning capacity is not as great as the Referee's order would indicate. After the 1973 work-related injury, claimant was off work for approximately 3 months, but was then able to return to his job as a dryer tender. Claimant is now doing the exact same work as he was when he got hurt and, seemingly, with very little difficulty. He not only has lost very little time from work, he also works overtime on a regular basis. Claimant obviously is suffering from back pain, but he is able to work with that pain quite adequately. Dr. Tiley, in his report of January 4, 1977, states that claimant has improved since his laminectomy in 1974 and he feels claimant's symptoms are consistent with degenerative disc disease at the present time. He notes that claimant does have some low back discomfort which is related not only to his job, but to outside activities as well. It would seem to the Board that the award granted claimant was excessive and should be reduced to 30% unscheduled low back disability.

ORDER

The order of the Referee, dated March 4, 1977, is modified.

Claimant is hereby granted an increased award of 15% low back disability for a total award of 96° for 30% unscheduled permanent partial disability.

WCB CASE NO. 76-440 OCTOBER 28, 1977

CHARLES BRUNNER, CLAIMANT
Roger Gould, Claimant's Atty.
Newhouse, Foss, Whitty & 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 remanded the claim to it for acceptance and payment of compensation commencing from May 8, 1975 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. However, the Board questions the accuracy of the statement on page 4, second paragraph, last line, which states that the claimant was first informed of his disability in May of 1975. It was at that time that Dr. Adams related claimant's condition to his job duties, but nowhere does his report indicate that he informed the claimant of this.

ORDER

The order of the Referee, dated December 21, 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 \$400, payable by the carrier.

WCB CASE NO. 77-184

OCTOBER 28, 1977

KATHLEEN CAMPBELL, CLAIMANT
Marvin S. Nepom, Claimant's Atty.
Merten & Saltveit, 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 award of 80° for 25% unscheduled low back disability. The employer contends this award is excessive.

Claimant, at age 31, sustained an injury to her back while lifting a box of Avon merchandise on February 19, 1974. The original diagnosis was lumbosacral strain with rotary subluxation of L4-5. After manipulative treatment by Dr. Tilden for a period of about three months, claimant was released from his care on May 13, 1974 with her condition being asymptomatic at that time.

She didn't return to a doctor until July 1975 when she saw Dr. Keizer with complaints of pain and discomfort. After only two visits, claimant again did not return to a doctor until May 1976, when she requested treatment for low back pain from Dr. Tilden.

On August 2, 1976 Dr. Keizer examined claimant, finding no objective findings to support her complaints and determining that she was medically stationary. Dr. Stevens, in November 1976, could find very little of any significance on which to base her complaints. On November 29, 1976 Dr. Keizer indicated that claimant had again complained to him that her problems were not improving at all, but he could still find nothing in the way of permanent impairment. The only impairment would be based on claimant's chronic low back pain which would restrict her from prolonged weight-bearing, standing or walking and other activities which aggravate her pain.

Dr. Winthrop, on December 2, 1976, found claimant might have chronic low back syndrome although he was basing this opinion only on her complaints. Based on her descrip-

tion of her present occupation, the doctor felt it would be better if she did not perform that job as it would probably aggravate her symptoms. The Determination Order of December 29, 1976 granted claimant no temporary total disability and no permanent partial disability.

Claimant received notification of non-referral for vocational rehabilitation assistance on March 7, 1977. It is noted in the record that the major reason she quit her Avon job was not because of her back pain, but because of a move to a new location made by her family at the time.

The Referee found claimant to be completely credible as well as a friend who testified in her behalf. He noted that claimant was now working at a lower paying occupation. At the hearing, she had made complaints of an inability to perform certain activities such as bowling, golfing and water skiing, which she was able to do prior to the injury. She also noticed increased pain and discomfort when doing certain household duties. The Referee concluded that her age, education, experience, potential and adaptability gave her far more earning potential than, for example, a laborer who has done nothing else. He did find, however, that there were jobs precluded to her, such as her Avon work, and that she was entitled to an award of 25% unscheduled disability for injury to the low back.

The Board, after de novo review, finds that the award of the Referee was excessive. Claimant is relatively young, has a high school education, and has good experience in supervisory and managerial positions. The reason her job at the present time is lower paying than the Avon job is because she chose to take this new job when her family moved, not because she couldn't physically handle the job she was in prior to the injury. There is no medical evidence in the record to support her contentions that she cannot do the work she did previously. The doctors could find no objective findings of any significance and ended up treating her complaints. The Board finds that an award of 10% unscheduled disability is adequate.

ORDER

The order of the Referee, dated April 25, 1977, is modified.

Claimant is hereby granted an award of 32° for 10% unscheduled low back disability for her injury of February 19, 1974.

OCTOBER 28, 1977

VERNON L. GIBBS, 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 remanded his claim to the Fund for acceptance and payment of compensation. Claimant contends that the Fund is responsible for his heart condition after he returned to work on March 8, 1972.

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. However, the Fund is to reimburse the private carrier the temporary total disability benefits it paid to claimant through March 8, 1972 and is to extend the compensation for temporary total disability to April 8, 1972, less time worked, as claimant only returned to part time work on March 8, 1972.

ORDER

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

OCTOBER 28, 1977

EARL HOOK, CLAIMANT
Lindsay, Nahstoll, Hart & Krause,
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 found claimant had failed to prove entitlement to temporary total disability or to an aggravation and dismissed the request for hearing. Claimant contends that the closing order of July 15, 1976 should have been vacated and his claim reopened retroactive to June 2, 1976. He also contends that the Fund failed to process his claim for aggravation and that he is entitled to penalties and attorney's fees.

Claimant suffered a compensable low back injury on August 6, 1974 while working in an iron and steel foundry. On September 3, 1974 Dr. Boyden diagnosed chronic low back strain

with history compatible with intermittent sciatica. He was admitted into the hospital at this time for traction and physical therapy. A subsequent myelogram found no definite herniated intervertebral disc.

On December 9, 1974 Dr. Grewe found that claimant had a high annulus fibrosis at L4-5. He felt it would be best if claimant could be rehabilitated to light work, but if not, the only alternative was surgery. On January 29, 1975 a laminectomy and decompression and removal of the L4-5 disc was performed. In April of that year, Dr. Grewe found claimant progressing satisfactorily and noted that claimant had been accepted for vocational rehabilitation with plans to go into truck driving. Claimant's symptoms continued in the low back and left lower extremity and on September 15, 1975 Dr. Boyden found claimant still disabled with recovery uncertain. In late October, Dr. Boyden recommended referral to the Pain Center.

On November 11, 1975, Dr. Boyden wrote to the Fund stating that claimant's automobile accident in August had nothing to do with the doctor's referral to the Pain Center. Claimant was admitted to the Pain Center in February of 1976, but because of poor motivation and a skeptical attitude from the beginning it is doubtful that he received any benefit from the program. He asked for a discharge shortly after being admitted.

On March 16, 1976 Dr. Grewe found claimant to be totally disabled at that point and his future was still indefinite. On April 22, 1976 the Orthopaedic Consultants found claimant to be medically stationary, recommended job placement and considered his loss of function in the back due to the industrial injury to be mild. On June 1, 1976 Dr. Grewe stated that he had not, at that time, seen the Orthopaedic Consultants report and indicated that claimant had shown an interest in working in the furniture business with his brother.

On July 15, 1976 the Determination Order was issued awarding claimant temporary total disability from August 27, 1974 through June 1, 1976 and 32% for 10% unscheduled low back disability compensation.

On August 2, 1976 Dr. Grewe indicated that he had still not seen the report of the Orthopaedic Consultants and he felt claimant would probably undergo a further myelogram and possibly a spinal fusion. Claimant underwent a myelogram on September 10, 1976 with positive results.

On September 15, 1976 claimant's attorney asked Dr. Boyden several questions which revealed that, in the doctor's opinion, claimant was not medically stationary and it was not certain when he would be. On September 23, the attorney wrote the Fund, enclosing the handwritten comments of Dr. Boyden and a stipulation designed to set aside the Determination Order of July 15,

1976 as premature. The Fund requested further medical reports and proof that the results of the myelogram were causally related to the industrial injury.

Dr. Boyden saw claimant on November 12, 1976 and felt the rigid brace he was wearing afforded some relief, but it was the doctor's opinion that the claim should be reopened for medical coverage and time loss. On December 16, 1976 the Orthopaedic Consultants again reported claimant was medically stationary and that further surgery was not recommended because claimant's condition indicated the need for a three level fusion and the odds against a successful fusion are high. They recommended a 10% increase in the total loss of function since the last examination and recommended referral to the Division of Vocational Rehabilitation.

On February 4, 1977, Dr. Boyden indicated his complete agreement with the most recent report of the Orthopaedic Consultants and reiterated his feeling that claimant should be retrained. On May 28, 1977, Dr. Boyden informed the Fund that he would rate claimant's disability as mildly moderate. On March 18, 1977 claimant was found eligible for vocational rehabilitation and referred for retraining.

The Referee found the issue of aggravation premature. He felt claimant's claim did not need to be reopened as further diagnostic studies of his condition could be carried out under ORS 656.245. He found claimant had failed to prove by a preponderance of the evidence that he was entitled to further temporary total disability or to benefits by reason of his claim for aggravation.

The Board, after de novo review, found that claimant's claim was closed prematurely. The Fund had no report from claimant's treating doctors indicating he was medically stationary. They chose to submit the claim for closure on the basis of the one report from the Orthopaedic Consultants without the medical opinion of either Dr. Boyden or Dr. Grewe. Claimant is entitled to temporary total disability from June 2, 1976, the date payments were terminated by the Determination Order, until his referral to the Division of Vocational Rehabilitation on March 18, 1977. Claimant is also entitled to penalties payable by the Fund from September 23, 1976, the date claimant's attorney informed them that Dr. Boyden, claimant's treating physician, did not find claimant medically stationary, until his DVR referral. The order of the Referee is reversed.

ORDER

Claimant is hereby awarded temporary total disability from June 2, 1976 through March 17, 1977, less time worked.

Claimant is also awarded an amount equal to 25% of the compensation granted during the period from September 23,

1976 through March 17, 1977 as a penalty.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of \$750, payable by the Fund.

WCB CASE NO. 77-548

OCTOBER 28, 1977

ARNOLD KIND, CLAIMANT

Doblie, Bischoff & Murray, 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 claimant's aggravation claim to it for acceptance and payment of compensation.

Claimant, at age 36, suffered a compensable back injury on January 28, 1975 when he slipped and fell from one conveyor to another. Dr. Abel diagnosed acute lumbosacral strain with right L4-5 nerve root irritation and contusion of the right knee. On March 5, 1975 Dr. Abel indicated that claimant was medically stationary and released him for work as of February 12, 1975. On March 19, the doctor stated that claimant would not suffer any permanent impairment as a result of this injury. A Determination Order was entered granting temporary total disability only. Claimant did not appeal this award.

Claimant returned to Dr. Abel in October of 1976 with back and leg complaints. The doctor diagnosed chronic low back pain status post-laminectomy. Claimant told the doctor that he had suffered light injuries to his back since the industrial injury in January of 1975 and that his back was getting worse all the time.

On October 15, 1976, claimant saw Dr. Golden who found extensive osteoarthritic changes in the lumbosacral spine without any significant encroachment on the neural foramina. He noted claimant had chronic back strain, but there was no evidence of nerve root irritation. He felt claimant should be treated conservatively. Claimant told Dr. Golden that he had to quit work on October 4, 1976 due to his symptoms. He also told the doctor of an automobile accident in 1972 which resulted in low back pain for approximately a year afterwards.

On November 9, 1976, Dr. Rockey found claimant was suffering from a chronic degenerative disc disease of the lower two spaces in his lumbar spine. Superimposed on this, he found

a strain of the area caused by the industrial injury and perpetuated by obesity and lordotic posture. He found no evidence of disc protrusion or neuritis.

On December 8, 1976 claimant was hospitalized for physiotherapy and traction. On January 10, 1977 Dr. Rockey found claimant stationary, but noted his back pain was disabling him from regular work. He recommended claimant be retrained for lighter work.

On January 18, 1977 the Fund issued its denial on the basis that claimant's present condition was not related to his industrial injury.

Gary DeYoung, claimant's foreman in 1972, noted that claimant had similar complaints both when he returned to work after the automobile accident and when he returned after the January 1975 industrial injury. He did not feel that claimant's complaints got any greater in late 1976, as claimant alleges. In mid-July 1976, claimant was transferred to the planer mill because he was not fully performing his regular job. His new foreman, James Neveau, did not observe any physical difficulties and claimant did not complain that he was having any trouble. Mr. Neveau saw claimant lifting heavy items frequently, some as heavy as 100 pounds. He admitted that claimant was somewhat slower than his co-workers, but felt that this was due to a lack of motivation.

Some suspicion is raised when claimant's foreman testified that on October 4, 1976, the day claimant left work, he was advised that he was being laid off in a general layoff which would be permanent. Claimant's response was that he was going to discuss this with his union steward and see a doctor.

The Referee found claimant to be fully credible in his testimony. He noted that claimant filed two claims for injuries suffered subsequent to the January 1975 incident, one of them being when he was blown out of a second story window while fighting a fire. If claimant had wanted to "build a claim", the Referee felt this incident would have been much more dramatic and it would have been easier to prove an aggravation after this incident. He concluded that the history given to the doctors was accurate and therefore remanded the claim to the Fund for acceptance and payment of compensation.

The Board, after de novo review, finds that the medical reports do not support claimant's contention that he is suffering from an aggravation. The doctors were unable to find any back problems of significance and ended up treating claimant's subjective complaints. Claimant's lack of motivation was also evident in the record. It is the opinion of the Board, after considering carefully all of the evidence submitted, that claimant has not sustained an aggravation of his January 1975 injury.

ORDER

The order of the Referee, dated May 18, 1977, is reversed.

The denial of the Fund, dated January 18, 1977, for claimant's claim of aggravation, is hereby affirmed.

WCB CASE NO. 76-3316

OCTOBER 28, 1977

LARRY MILLIGAN, 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 claimant's claim to it for payment of compensation of a foot and back injury. The Fund contends that the order of the Referee should be reversed.

Claimant, at the age of 27, alleged an industrial injury in August of 1975 when the cat he was operating became over-balanced while driving over a large hump, the log he was transporting rolled off, and the cat tilted upward and slammed forcefully back downward to the ground. Claimant had suffered a previous injury to his shoulder in July of 1970 for which he was being treated.

In September of 1975, claimant was admitted to the hospital for his shoulder pain. No mention was made by Dr. Woolpert about any back or foot problems. It was not until January 16, 1976 that ankle and back complaints show up in the medical reports. Claimant complained to Dr. Woolpert of weakness in the left ankle which he relates to the August 1975 incident, although the problem did not show up until just prior to the January examination. The doctor also found definite tenderness over the low back area and diagnosed claimant's problem as a probable disc protrusion related to his back trauma with residual nerve involvement.

On April 3, 1976, Dr. Norris-Pearce attributed claimant's weakness in his leg to a case of very mild diabetes. He found claimant's problem was that of a peripheral neuropathy rather than a lumbar radiculopathy. Dr. Campagna, on June 17, 1976, found definite evidence of left pyramidal tract lesion, etiology to be determined and felt claimant should be hospitalized for further examination. In June of 1976, a myelogram performed by Dr. Campagna was within normal limits.

Dr. Woolpert, in his August 16, 1976 report to claimant's attorney, felt that claimant's back problems could very probably have been originated at the time of his August 1975 industrial incident. He explains that claimant could have told him about it earlier than January 1976, but that his primary concern at the time was for claimant's shoulder complaints. He was still investigating the cause of claimant's foot problems, but did not feel that they were related to his back injury while driving the car.

Dr. Campagna, on November 12, 1976, stated that it was his opinion that claimant's low back problems were directly related to the incident in August of 1975.

The Referee found claimant's back and ankle condition to be compensable and based a large part of his decision on the fact that he found claimant and his wife to be extremely credible. He found that the medical evidence in relationship to claimant's back problem left little doubt that the condition was compensable. The leg complaints created a problem, though. Dr. Campagna never really said that the leg problems could be connected to claimant's industrial injury. It is the Referee's contention that, although he never stated that fact, that it was implied in his reports that the leg condition and the back condition were being evaluated together and therefore, that his conclusion concerning the back would hold true for the leg problems also. The Referee gave the greatest weight to the medical opinion of Dr. Campagna and concluded that claimant's back and leg claim was compensable by law. He also concluded that the record did not substantiate any assessment of penalties.

The Board, after de novo review, concurs with the findings of the Referee in connection with claimant's back condition. However, there is no medical evidence to support the causal relationship of claimant's leg or foot problems to the industrial accident in August of 1975. None of the medical evidence relates claimant's leg problems to the accident and, in fact, Drs. Norris-Pearce and Woolpert were quite definite that claimant's leg problems were not related to the incident. The reports of Dr. Campagna, on which the Referee relied so heavily, did not state an opinion as to the causal connection of claimant's leg problems, one way or the other. The Board finds that the Referee's order should be modified to affirm the Fund's denial of claimant's leg condition but remand the claim to the Fund for acceptance of his back condition.

ORDER

The denial of the Fund in connection with claimant's leg problems is approved.

Claimant's claim is remanded to the Fund to be accepted for payment of compensation for claimant's low back condition which resulted from an industrial injury in August of 1975, until claim closure pursuant to ORS 656.268.

In the Matter of the Compensation
of the Beneficiaries of
HAROLD A. STIMSON, CLAIMANT
Dye & 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 seeks Board review of that portion of the Referee's order which found the decedent's death to be materially related to his industrial injury and remanded the claim to it for payment of compensation.

The majority of the Board, after de novo review, concurs with the Referee's finding that claimant has established by a preponderance of the evidence that decedent's death was materially related to the stress occasioned by the industrial injury and its aftermath. The Board affirms and adopts that portion of the Referee's order, a copy of which is attached hereto.

On the issue of whether claimant was permanently and totally disabled at the time of his death, the Referee concluded that although decedent had substantial disability, he was not unable to work. The Board does not so find.

The decedent sustained a severe compensable injury in 1970. He continued to work in construction in 1971 and worked part time in 1972 when he began to have increasing trouble with lower back pain. From 1973 through 1975 he was unable to continue in construction work because of back pain and worked in canneries. He last worked in the cannery from July through September 1975 when he was advised by Dr. Tiley that he could not continue because the nature of the work (standing in water and cleanup work) was bad for his arthritis and back. From March 1975 until the time of his death, decedent was examined by ten doctors and the consensus of most of these consultations was that he had a severe back problem and only a limited chance of improvement with surgery. During this time, he began to experience weakness in his lower extremities described as his legs "giving out" so that he would fall. On April 8, 1975 he fell at his home and broke his right leg at the knee. At this time he was also being considered for vocational rehabilitation training and this program was then canceled. Larry Scott, vocational counselor, testified the prognosis for the decedent returning to any kind of active employment was very bad, based on his limited educational background, long laboring work history and a medical condition which was chronic.

Based on the above, the Board reverses the conclusion of the Referee with respect to permanent disability and finds

that decedent, at the time of his death, was permanently and totally disabled.

ORDER

That portion of the Referee's order which disapproved the Fund's denial of the claim for death benefits and remanded the claim to it for acceptance and payment of compensation is hereby affirmed.

Furthermore, it is hereby found that the decedent was permanently and totally disabled at the time of his death and as a result of his industrial injury and therefore, his beneficiaries are entitled to compensation as provided by law.

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.

Claimant's attorney is granted an additional attorney's fee in the amount of 25% of the award of permanent total disability granted by this order, not to exceed \$2,000.

Board Member Moore respectfully dissents from the majority of the Board for the following reasons:

The opinions of Dr. Kloster, upon whom the Referee's conclusions rely, seem to be speculative. He opines chronic stress and anxiety "can be a significant contributory factor in the development of coronary heart disease". He then equates constant pain and economic uncertainty to the above. The Referee's order (page 4) states "There is evidence in the record indicating decedent felt he was in no financial difficulty just prior to death, when he was receiving Workmen's Compensation benefits."

With respect to risk factors, the record clearly demonstrates in the history given to Dr. Kloster a family history of cardio-vascular problems in both a sister and brother, and an admitted smoking risk factor. No other risk factors are identified but testimony reveals that no tests were conducted such as an EKG, cholesterol counts, blood examinations, or consistent blood pressure recordings. Instead we must depend on Dr. Kloster's "empirical or 'gut-feeling' impressions that life stress and anxiety played a definite role in development of atherosclerosis and precipitation of acute coronary events".

I do not believe that the beneficiaries have carried the burden of proof, and would reverse the Referee on the issue of "Was the industrial injury a material factor in claimant's demise?"

/s/ George A. Moore, Board Member

OCTOBER 28, 1977

CAROL WASHINGTON, CLAIMANT
Duncan & Walter, 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 the relationship of claimant's present back complaints to her industrial injury of November 11, 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 April 19, 1977, is affirmed.

WCB CASE NO. 76-6671

OCTOBER 31, 1977

WCB CASE NO. 76-6672

WCB CASE NO. 76-6917

ALVIN L. BECK, CLAIMANT
Gary K. Jensen, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
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 found the incident of November 8, 1976 to constitute a new injury and remanded the claim to the Fund for acceptance and payment of compensation. The denial of claimant's claim for aggravation issued by Argonaut Insurance Company was affirmed.

Claimant, on July 30, 1973, suffered an industrial injury to his right shoulder while pulling on the green chain. On December 3, 1973, the claim was closed with no award for permanent partial disability. A second injury to the same shoulder occurred on September 4, 1973 while performing the same job. Again, the Determination Order of March 11, 1974 granted no disability award. These two Determination Orders were appealed and settled

by Stipulation with 5% unscheduled disability awarded.

Claimant's claim for an industrial injury of November 8, 1976 was originally accepted by the Fund as a non-disabling injury. After paying some temporary total disability, the claim was denied on March 2, 1977.

All of the medical reports between the time of his first injury in July 1973 and the closure of his second injury in March 1974 indicated that there was nothing seriously wrong with claimant's shoulder and that after a short time of loosening and strengthening it, claimant could return to work. None of the doctors could find any objective symptoms to correlate with claimant's complaints and felt that he had an underlying psychological problem that was causing his problems. The last medical report with regard to the first two industrial injuries affirmed the previous findings. Dr. Carter, in his December 30, 1975 report, stated: ". . . find no objective evidence of disease in this man's shoulder. His behavior with the shoulder, . . . is much more typical of a functional hysterical type problem than it is of any organic problem".

After that report from Dr. Carter, claimant had no further difficulty with his shoulder. He attended school for a period of time and worked at several part time jobs, before going to work for Westbrook Wood Products. He had been there a month when the alleged injury occurred on November 8, 1976. Dr. Taylor's initial diagnosis was tendonitis of the right shoulder and felt that claimant would probably be off work for a week or so. Dr. Robertson, on December 10, 1976 diagnosed a possible rotator cuff tear and scheduled claimant for an arthrogram the following Monday. The findings from this arthrogram were normal with no findings of a rotator cuff tear. Claimant continued to see Dr. Robertson with reports of pain and physical therapy was recommended and carried out. In late January 1977, Dr. Robertson indicated that he felt claimant was stretching his claim and that there was a great deal of functional overlay involved. He could find no anatomic abnormality.

Dr. Rockey, on March 7, 1977, stated that claimant had some obvious hysterical problems superimposed on a right shoulder contracture, but that he needed more information before he could make an intelligent assessment. Claimant was hospitalized by the doctor on March 8 for further evaluation and treatment. The general summary of this evaluation was "to show that the patient has a behavioral disorder with a significant amount of somatization (hysterical physical symptoms)". The doctor was unable to relate claimant's complaints to either the November 8, 1976, injury or the July 2, 1973 industrial accident. It was Dr. Rockey's opinion that ". . . in neither case was there evidence of any significant injury in any objectively measurable way".

A. The Referee found claimant's credibility was suspect in some areas. The deposition of Officer Vaughn and the testimony

of Mr. Akins, the mill supervisor, did not support claimant's contentions as far as the injury itself is concerned. However, there is nothing in the testimony that would dispute the fact of whether or not claimant actually did suffer an industrial injury. The Referee put a significant amount of weight on the statement of Dr. Rockey's which indicated that claimant had "some obvious hysterical problems superimposed on a right shoulder contracture" (emphasis added). Since Dr. Rockey could not relate claimant's complaints with the earlier injury, it seemed only natural to the Referee that the doctor was referring to the industrial injury suffered in November 1976. The Referee could find no evidence to support an aggravation of either of the two earlier injuries and concluded that claimant did suffer a new injury in November of 1976 and Westbrook Wood Products was responsible for his problems.

The Board, after de novo review, agrees with the Referee that there are too many contradictions to find claimant's testimony credible. It is also their contention that the medical reports did not support either an aggravation or a new injury. None of the doctors could find any significant objective findings to indicate claimant had any problems. The consensus of opinion among the doctors was that he was suffering from functional overlay and that there were no physical problems in his right shoulder. The Board, therefore, concludes claimant has not sustained his burden of proving his entitlement to compensation. Therefore, the denials of both Argonaut Insurance Company and the State Accident Insurance Fund should be affirmed.

ORDER

The order of the Referee, dated April 13, 1977, is modified. The denials of both Argonaut Insurance Company and the State Accident Insurance Fund are approved and the entire matter is dismissed.

The State Accident Insurance Fund is not required to pay claimant's attorney any attorney's fee.

WCB CASE NO. 77-852

OCTOBER 31, 1977

DONALD E. BRALLIER, CLAIMANT
Richard O. Nesting, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson,
& Schwabe, Defense Atty.

Reviewed by Board Members Wilson and Moore.

The Board, after reviewing de novo the Opinion and Order of the Referee, affirms and adopts it as its own. A copy of said Opinion and Order is attached hereto and, by this

reference, is made a part hereof. There were no briefs submitted by either side.

ORDER

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

WCB CASE NO. 76-5087 OCTOBER 31, 1977

DONNA (BENNETT) COMPTON, CLAIMANT
Noreen Saltveit, Claimant's Atty.
Delbert J. Brenneman, Defense Atty.
Stipulation and Order of Dismissal

THIS MATTER having come on regularly before the undersigned Referee upon the stipulation of the parties, claimant acting by and through her attorney, Noreen Saltveit (Merten & Saltveit), and employer, acting by and through Delbert J. Brenneman (Souther, Spaulding, Kinsey, Williamson & Schwabe) of its counsel, and it appearing that the matter has been fully compromised between the parties and that this order may be entered, now therefore,

IT IS HEREBY ORDERED that the claimant be and she is hereby awarded compensation for unscheduled low back disability equal to 8 degrees for her injury, said award amounting to \$560 and payment therefore to be made in a lump sum, and

IT IS FURTHER ORDERED that Noreen Saltveit, claimant's attorney, be and she is hereby awarded \$140 of the compensation made payable by this order; and

IT IS FURTHER ORDERED that claimant's request for hearing be and it is hereby dismissed.

IT IS SO ORDERED and the matter is dismissed.

WCB CASE NO. 77-365 OCTOBER 31, 1977

RICHARD E. DAHL, JR., CLAIMANT
Michael D. Henry, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, 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 that the July 28, 1976 injury was a consequential injury resulting from compensable injuries sustained on January 26 and April 27, 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 26, 1977, is affirmed.

WCB CASE NO. 75-4839 OCTOBER 31, 1977

FLOYD T. DICKEY, CLAIMANT
Gary K. Jensen, 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 September 25, 1975 of the compensability of claimant's heart condition.

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 4, 1977, is affirmed.

WCB CASE NO. 76-4790 OCTOBER 31, 1977

CLARENCE C. GILROY, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-appeal by the SAIF

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of the compensability of

his low back condition but awarded temporary total disability benefits up to the date of the denial. Claimant contends that the denial should be disapproved. The Fund, on cross-appeal, contends that the Referee erred in awarding temporary total disability benefits and attorney fees.

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 26, 1977, is affirmed.

WCB CASE NO. 76-5854 OCTOBER 31, 1977

ALBERT L. JIRGES, CLAIMANT
Michael Strooband, 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 claimant's medical bills for February 9, 1976 and March 5, 1976 to the Fund for payment. Penalties and attorney's fees were assessed against the Fund. The Fund contends that this order should be reversed.

Claimant suffered a "non-disabling" injury on June 10, 1974 when he struck his tailbone against the door latch while entering a car. The diagnosis by Dr. Koch, on July 2, 1974 was a bruised coccyx junction.

No medical attention was necessary until February 9, 1976 when claimant went to Dr. Royal with complaints of discomfort in the low back and coccygeal area. The doctor opined claimant's problem was coccydynia and he felt it was a result of claimant's injury of June 10, 1974. Dr. Filarski saw claimant on March 5, 1976 and gave him a donut seat pad for relief of coccygeal irritation. He also saw claimant for lumbosacral problems but indicated that these were not related to the industrial injury.

The Fund denied claimant's claim on September 17, 1976 on the basis that claimant did not require any medical treatment for a period of two years after the injury and they were unable to relate claimant's present problems to the incident in June 1974.

The Referee concluded that claimant's condition has not worsened since the date of the injury and therefore, he does not have a claim for aggravation. He did find, however, that claimant did suffer a compensable injury in June of 1974 and that the medical services required in 1976 were a result of that injury. He concluded that claimant's case falls within ORS 656.245 and that the Fund is responsible for claimant's medical expenses. He found the Fund to be unreasonable in its delay in processing claimant's claim after receiving Dr. Filarski's report of March 5, 1976. It was not until September 17, 1976 that the Fund denied the claim and no compensation was paid prior to that time.

The Board concurs with the findings of the Referee except on one point. It finds the Fund responsible for claimant's medical bills incurred on February 9, 1976 and March 5, 1976 only for the treatment of the coccygeal condition. The Fund is not required to pay for any treatment connected with claimant's low back complaints.

ORDER

The Fund is directed to pay that portion of claimant's medical bills submitted by Dr. Royal on February 9, 1976 and Dr. Filarski on March 5, 1976 which relate to the coccygeal condition. All medical services furnished in connection with claimant's low back condition are not the responsibility of the Fund.

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 Fund.

The remainder of the Referee's order, dated April 21, 1977, as amended on May 6, 1977, is hereby ratified and reaffirmed.

WCB CASE NO. 76-1741

OCTOBER 31, 1977

LEONARD KELLEY, 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 granted claimant an award of 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 March 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 \$250, payable by the Fund.

SAIF CLAIM NO. C 296804 OCTOBER 31, 1977

JAMES LATTIN, CLAIMANT
Small & Winther, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order Referred for Hearing

On September 27, 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 further treatment and possible increased disability for an injury suffered on December 21, 1970. Claimant's aggravation rights have expired. A February 28, 1977 report from Dr. Mayon and a March 2, 1977 report from Dr. Magley were furnished in support of claimant's request.

On October 3, 1977, the Board advised the Fund to respond within 20 days, stating its position with respect to the claimant's request. On October 14, 1977, the Fund informed the Board of the history of claimant's claim and its reason for denying claimant's request for reopening. The records of the Fund indicate that after claimant strained his low back on December 21, 1970, he underwent a laminectomy on February 27, 1971. On October 27, 1971, the claim was closed with an award of 32° for 10% unscheduled low back disability and 20° for partial loss of the right foot. An order dated February 28, 1972 granted claimant an additional 32° unscheduled disability. Nothing further was heard until claimant, in March of 1977, requested a reopening. It was brought to the attention of the Fund that claimant had been hospitalized in Washington with low back pain that came on gradually after chopping wood. Since there was no medical treatment since 1971 and no apparent trauma to the back since that time, the Fund refused to accept responsibility.

The evidence before the Board, at the present time, is not sufficient for it to determine the merits of claimant's request. The matter, therefore, 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 December 21, 1970 and is the responsibility of the Fund. 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 this issue.

WILLIAM H. LYNCH, CLAIMANT
Orlin Anson, 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 Determination Order of January 3, 1977 which granted 13.5° for 10% scheduled disability for injury to the right foot. Claimant contends this award is inadequate.

Claimant sustained a compensable injury on January 29, 1976 when he fell from a broken scaffold and landed on his feet. He was taken to the hospital where he underwent surgery on his right heel. Claimant made gradual progress under the care and treatment of Dr. Burr and returned to work on June 22, 1976. On November 19, 1976 claimant saw Dr. Burr for his closing examination with complaints of tenderness if he is on the foot too long together with some swelling and aching. He was found to be medically stationary at that time. The doctor indicated that claimant would continue to be symptomatic in his heel for some time in the future and that arthritis could possibly develop which would increase his symptoms.

The Determination Order was entered on January 3, 1977 with the award mentioned in the first paragraph of this order.

The Referee found claimant to be credible and she did not feel that he exaggerated his symptoms. Claimant stated that his condition has stayed pretty much the same as it was at the time of Dr. Burr's closing examination in November of 1976. He has been able to return to his former occupation with very little restrictions, except that he is unable to walk on the stilts required in his job activities. The Referee affirmed the Determination Order based on the medical evidence, claimant's testimony, and the fact that Dr. Burr stated in November of 1976 that claimant would be symptomatic for some time.

The Board, after de novo review, concurs with the findings and conclusion of the Referee.

ORDER

The order of the Referee, dated April 22, 1977, is affirmed.

HOMER MUNSON, CLAIMANT

Santos & Schneider, 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 June 9, 1976 Determination Order which did not increase the previous awards totaling 100% loss of the left leg. Claimant contends that his disability is unscheduled and he should be found permanently and totally disabled.

Claimant sustained a compensable injury to the left knee on May 27, 1971 in a pulling incident. The diagnosis was probable internal derangement of the left knee. Dr. Hall, on December 1, 1971, found a definite disability and recommended further treatment.

In January of 1972, the Physical Rehabilitation Center found claimant was not too interested in retraining, although he did want to get a job as soon as possible.

On February 17, 1972, claimant's left knee gave way causing him to fall and fracture his left hip. Dr. Cook felt it was quite probable that his knee condition at the time may have caused the fall and subsequent hip injury. Open reduction and internal fixation of the hip was performed. On November 13, 1972, Dr. Cook found no residual symptoms with relationship to claimant's left hip, but the knee was still giving him trouble. He was advised to pursue whatever activities his knee would tolerate, which precluded him from prolonged standing, frequent knee bending and heavy lifting.

The Determination Order of December 7, 1972 awarded temporary disability and 15% loss of the left leg equal to 22.5%.

In March of 1973, claimant suffered hip discomfort while unloading wood and was unable to bear his full weight after that. The pins in his hip were removed on May 3, 1973.

On June 26, 1973, claimant suffered abrupt pain and x-rays revealed that he had completely disrupted the femoral head from the neck. On September 14, 1973 claimant underwent surgery for removal of the femoral head and a total hip arthroplasty on the left. Several months after the surgery claimant continued to have pain in the hip area. On February 8, 1974 Dr. Cook indicated there were no objective findings yet claimant continued to have legitimate intractable pain. Claimant was found to have a deep wound infection and on March 1, 1974 he underwent removal of his total hip prosthetic components.

On September 5, 1974 Dr. Cook advised the Fund that claimant had slipped and twisted his knee in early August and that the fall occurred either because of his crippled hip or his impaired knee. He did not feel referral to the Disability Prevention Division was indicated as claimant's left lower extremity was gravely impaired and he also had a limited education and a healthy appetite for alcohol.

On January 17, 1975 Dr. Pasquesi opined that claimant's impairment was total. He found that claimant has a hip equivalent to 100% loss of a lower extremity and thought it unlikely that claimant could ever return to work in a laboring capacity.

The Determination Order of March 4, 1975 granted claimant 127.5° for 85% loss of the left leg in addition to the 15% previously awarded for a total of 100%.

On August 26, 1975 claimant was hospitalized for infection of the left hip. The claim was reopened by stipulation of December 15, 1975.

On April 16, 1976 Dr. Hazel found claimant had a girdle-stone resection of the hip which meant virtually no hip joint and his leg had no inherent stability. He needs two crutches to ambulate and will never be able to return to his former occupation in the logging field. He found his condition medically stationary. The June 9, 1976 Determination Order granted no further compensation.

The Referee found that all of claimant's disability is in the left lower extremity only and that he has a scheduled disability. Based on this conclusion, the award of 100% unscheduled disability was proper.

The Board, after de novo review, finds that claimant's disability is in the unscheduled area by virtue of the involvement of the acetabulum and capsule of the hip joint, muscles and cartilage and surrounding tissue. Claimant, in essence, is functioning without the benefit of a hip joint. Regardless of claimant's apparent lack of motivation, mentioned by the Referee, it is the opinion of the Board that he is permanently and totally disabled. He has worked in the logging business for 30 years, has a limited education, and can get around only with the use of crutches. It is evident that claimant is precluded from any gainful and suitable occupation.

ORDER

The order of the Referee, dated March 24, 1977, is reversed.

Claimant shall be considered to have a permanent total disability as of the date of this order.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the compensation granted by this order, not to exceed \$2,300.

WCB CASE NO. 77-898

OCTOBER 31, 1977

MILLMAN NAPIER, 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 granted claimant 32° for 10% unscheduled permanent partial disability for injury to his head. Claimant contends that this award is 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 May 23, 1977, is affirmed.

WCB CASE NO. 75-4225

OCTOBER 31, 1977

MILDRED OTTO, CLAIMANT
Joseph C. Post, Claimant's Atty.
Schouboe & Cavanaugh, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Moore and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of her low back claim.

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 May 13, 1977, is affirmed.

Board Member Moore dissents as follows:

ORS 656.005(8)(a) defines compensable injury as an accidental injury arising out of and in the course of employment . . . an injury is accidental if the result is an accident whether or not due to accidental means.

Claimant's injury in this case did occur in the course of her employment, the question here is whether it arose out of her employment. The term arising out of involves the idea of causal relationship between employment and the injury.

The Referee based his decision of denying compensability in this case on the Board's prior ruling in the Pickett case. In Pickett, which the Board held was not compensable, claimant had a history of back difficulties and was on the toilet seat at his place of employment and was straining when the incident occurred. The Board held that claimant's act of relieving himself was personal and did not arise out of his employment. I do not find the Pickett case applicable here as claimant, in the instant case, was not actually in the act of relieving herself.

Seven factors were delineated in Workmen's Compensation Practice in Oregon 64-65, §7.1 (1968) published by the Oregon State Bar Committee on Continuing Education. This text was cited with approval in Jordan v. Western Electric Co., 1 Or App 441.

The seven factors used in deciding Jordan and applied in the instant case are:

(1) Whether the activity was for the benefit of the employer in determining whether an injury arose out of and in the course of employment. In Jordan the court reasoned the employer benefited from the employee being refreshed, which made him more useful on the job. In the herein case, claimant's relieving her bladder made her refreshed and more useful on the job.

(2) Whether the activity was contemplated by the employer and the employee at the time of hiring or subsequently. Here the employer had to be aware of the biological fact that during the course of an 8-hour day of employment employees develop the need to relieve themselves, and that is why male and female restrooms are provided. It is also the requirement under the Oregon Wage and Hour Commission.

(3) Whether the activity was an ordinary risk, and incidental to, the employment. Going to the restroom is an ordinary incident of working for 8 continuous hours, thus an injury while so doing is compensable.

(4) Whether the employee was paid for the activity. Claimant, in this case, began work at 9 A.M. and her injury occurred fifteen minutes later while being paid by the employer.

(5) Whether the activity was on the employer's premises. The restroom to which claimant went and sustained injury was located on the employer's premises.

(6) Whether the activity was directed by, or acquiesced in, by the employer. In the herein case, the employer not only acquiesced in claimant's going to the women's restroom during the time of her employment but he was required to permit her to do so by the Oregon Wage and Hour Commission rules.

(7) Whether the employee was on a personal mission of his own. Claimant was not performing a purely personal mission, but was engaging in activity which enabled her to be more attentive to her job duties and thus perform better.

A further factor not mentioned in Jordan is whether the activity was a customary one. Going to the restroom to respond to a call of nature is customary where an employee works for 8 continuous hours.

In 1 Larson, Workmen's Compensation Law, §21.50, personal comfort doctrine is explained that "personal comfort activities (seeking warmth, coolness, or toilet facilities) . . . are so obviously in the category of necessities that no question arises about their being basically in the course of employment. The only issue on which compensation is sometimes denied is that of seeking facilities in an unreasonable manner" If the method of obtaining personal comfort is prohibited, unusual or unreasonable, some courts will hold such acts not to be an incident of employment. In this case the need (toilet facilities) was natural and foreseeable by the employer and the means (relieving oneself in the employer's restroom at the employer's place of business) were usual and reasonable and an injury occurring while so doing is properly covered by the Workmen's Compensation Law.

There is no reported Oregon case on point. Therefore, such acts as are reasonably necessary to the health and comfort of the employee, although personal to himself and not strictly acts of service to his employment are nevertheless incident to the employment and an injury sustained in the performance of such an act should be held compensable as arising out of and in the course of employment. 82 Am Jur 2d 64.

The Oregon Supreme Court stated that it has "uniformly held that the provisions of the Workmen's Compensation Law should be interpreted liberally in favor of the workman, and particularly should this be so when we are confronted with a 'borderline case'. In the interests of justice and to carry out the humane purposes of the Compensation Law, all reasonable doubts should be resolved in favor of the workman" and I so find.

/s/ George A. Moore, Board Member

OCTOBER 31, 1977

LINO B. PALANDRI, 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 Moore and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the July 9, 1976 Determination Order which granted claimant an award of 16° for 5% unscheduled neck disability. Claimant contends this award is 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 28, 1977, is affirmed.

OCTOBER 31, 1977

SOPHIA RODABAUGH, CLAIMANT
Bailey, Welch, Bruun & Green, Claimant's
Atty.
Gearin, Cheney, Landis, Aebi & Kelly,
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 her an increase of 10% unscheduled low back disability for a total award of 80° for 25% disability. Claimant contends that the award is inadequate in light of her lack of training, skills and work experience in other than hard physical labor, her lack of education and her present age.

Claimant, age 56, injured her left knee on the job on February 6, 1974. Two days later, Dr. Weare diagnosed her condition as a sprained left knee. She saw Dr. Hebert, on February 15, with complaints of pain in the left leg clear up into the lower back and his diagnosis was acute lumbosacral sprain with extension neuralgia into the left leg. After further conservative treatment, claimant was released for regular work on April 1, 1974.

On August 12, 1974, Dr. Havlina diagnosed a probable lumbar disc herniation syndrome and recommended that she try another job where bending and heavy lifting were not required. On October 14, 1974, the doctor found her condition improving and he again said she could work with restrictions.

Dr. Miller, in November of 1974, found claimant's condition had improved greatly since she had quit work in July because of pain. He felt that if she could have a job with no bending or heavy lifting, she could return to work by December of 1974 and by January 1, 1975 claimant should be able to return to her former occupation.

Claimant underwent a myelogram on January 29, 1975 which found L4-5 degenerative disc disease. A laminectomy was performed the following day.

Claimant was contacted by the Disability Prevention Division, but the file was closed in March, 1975 because claimant had no employment in mind and placement action or referral did not seem feasible for this reason. On June 21, 1975, Dr. Miller found claimant asymptomatic and recommended she return to work on July 7.

In December of 1975, claimant returned to Dr. Miller with complaints of recurring symptoms when she is working. He concluded that she could continue working if she could have a job that did not require heavy lifting (over 25 pounds) or bending or twisting.

The Determination Order was entered on February 6, 1976 granting claimant temporary total disability and 48° for 15% unscheduled low back disability.

On January 21, 1976, Dr. Miller found no objective abnormal findings and felt the claimant was stationary. His report in August of 1976 was basically the same with no neurological findings evident to support her complaints. On September 24, 1976, a Second Determination Order was issued with no additional permanent partial disability.

Claimant has a 10th grade education and has done heavy manual labor all of her life. She is not able to return to any of the jobs she had in the past because of her condition.

The Referee found that she is precluded from any heavy work, although she is perfectly capable of performing lighter work as far as her physical condition is concerned. He felt her award should be increased and granted her a total of 25% unscheduled disability.

The Board, after de novo review, found that the Referee's award is inadequate to fully compensate claimant for her loss of wage earning capacity. Claimant was born and raised in a rural community where heavy manual labor was a way of life to her. For probably 40 years, claimant has performed jobs that required a strong

back, stable legs, and complete mobility. She had no formal education past the 10th grade and she never had the opportunities for jobs that a person has in the larger cities such as Portland or Eugene. The reality of this claimant finding a job at her age and in her community that does not require heavy physical labor is very remote. The Board feels that claimant is entitled to a larger award to compensate her loss of wage earning capacity, based not only on her physical condition, but also on her age, education, and past experience.

ORDER

The order of the Referee, dated February 9, 1977, is modified.

Claimant is hereby granted an increase of 25% unscheduled disability for a total award of 128° for 40% permanent partial disability from injury to her low back.

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 increased compensation granted by this order, not to exceed \$2,300.

WCB CASE NO. 77-1620

OCTOBER 31, 1977

R. L. SCOTT, CLAIMANT
Orlin Anson, 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 referred the matter back to it to pay claimant temporary total disability based on \$160.00 per week until closure and to reimburse claimant for any temporary total disability benefits not paid at this rate prior to the Referee's order. The Fund contends that there is no factual evidence to support the rate being increased to this amount which comes to \$4.00 per hour.

Claimant suffered a compensable injury on February 21, 1977 for which the Fund commenced time loss benefits. The Fund based its payments on the rate of \$20 per day which they based on the statement in the 801 report of injury form that claimant was being paid \$20 a day for piecework. Claimant testified that he started work for the employer on February 8, 1977 performing a job that would last approximately two weeks and at a wage of \$3.00 an hour. It was his understanding that if he liked the job he would then be placed on a gutter truck and install gutters at

a rate of \$4.00 an hour based on a 40-hour work week. Claimant had only worked as a gutter installer for three or four days when the injury occurred.

The Referee found claimant to be completely credible and felt that there was no evidence submitted to disprove claimant's contention that he was to receive \$4.00 an hour at the time of his injury. He felt the Fund should have looked into the matter more thoroughly, but did not assess penalties as the Fund based its rate of payment on the 801 form in their possession.

The Board, after de novo review, does not agree with the conclusion of the Referee in this matter. Exhibits 5 and 6 in the record indicate clearly that claimant was being paid at a rate of \$3.00 an hour. It is the opinion of the Board that the evidence in the record holds more weight than claimant's statements as to what he thought the employer planned to pay him. Therefore, claimant should receive benefits based on \$3.00 an hour for \$120.00 a week.

ORDER

The order of the Referee, dated June 21, 1977, is modified.

The Fund shall pay claimant temporary total disability benefits based on \$120.00 a week from February 21, 1977 until closure is authorized pursuant to ORS 656.268, less time worked, and he is to be reimbursed by the Fund for any temporary total disability not paid at this rate prior to this order.

In all other respects, the Referee's order is affirmed.

WCB CASE NO. 76-6118 OCTOBER 31, 1977

MARY SULLIVAN, CLAIMANT
Keith Skelton, 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 affirmed the carrier's denial which found claimant's alleged condition of depression was not related to her employment.

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 June 2, 1977, is affirmed.

WCB CASE NO. 76-3930

OCTOBER 31, 1977

GEORGE VARISCO, CLAIMANT
Don Swink, 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 an increase of 25% permanent partial disability for a total award of 128° for 40% unscheduled disability for injury to the right shoulder. Claimant contends that this award is inadequate and should be increased or, in the alternative, 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 June 2, 1977, is affirmed.

WCB CASE NO. 76-2676

NOVEMBER 3, 1977

ROSE L. ALBERT, CLAIMANT
Green & Griswold, 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 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 January 31, 1977, is affirmed.

Claimant's attorney is hereby granted a reasonable attorney's fee for her services in connection with this Board review in the amount of \$100, payable by the Fund.

WCB CASE NO. 76-7114

NOVEMBER 3, 1977

GERALD ANDRUS, CLAIMANT
A. C. Roll, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
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 to it for acceptance and payment of compensation. The employer contends that claimant's low back condition is an aggravation of a pre-existing problem and, therefore, they are not responsible.

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, 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. 76-3091

NOVEMBER 3, 1977

EARL BARTRON, CLAIMANT
D. S. Denning, Jr., Claimant's Atty.
Roger R. Warren, 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 July 3, 1975 Determination Order which granted no permanent disability. Claimant contends that he is entitled to an award of 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 March 17, 1977, is affirmed.

WCB CASE NO. 76-5871

NOVEMBER 3, 1977

In the Matter of the Compensation of
GARRISON CANDEE, CLAIMANT
And in the Complying Status of
B & B'S WHITE ELEPHANT, EMPLOYER
Jones, Lang, Klein, Wolf & Smith,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

The State Accident Insurance Fund seeks Board review of the Referee's order which awarded claimant penalties in the amount of 25% of two payments made to claimant on December 8, 1976 and December 17, 1976 as a result of the Fund's unreasonable delay.

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 22, 1977, is affirmed, as is the amended order of April 18, 1977.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of \$50, payable by the Fund.

WCB CASE NO. 77-1484

NOVEMBER 3, 1977

KENNETH FREE, CLAIMANT
Timothy A. Bailey, Claimant's Atty.
Stanley C. Jones, 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 claimant's claim to it for acceptance and payment of compensation of claimant's bronchial asthma condition.

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 June 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.

SAIF CLAIM NO. 69382 NOVEMBER 3, 1977

ROBERT HAINES, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 27, 1977 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an injury suffered on April 20, 1967. Claimant supported his request with a medical report from Dr. Knox.

The Fund was requested by the Board to respond within 20 days. On June 9, 1977 the Fund responded in opposition to the claimant's request, stating that there was an outstanding medical bill from the Corvallis Clinic in the amount of \$445.90 which the Fund would give consideration to paying for if an adequate explanation of the charges was given to it.

The Board, having given full consideration of the evidence presented to it, concluded that it was not sufficient to allow the Board to make a decision on the merits of claimant's request and, therefore, the matter was referred to the Hearings Division with instructions to set the matter for hearing and take evidence on the issue of whether claimant's condition has worsened since the last arrangement of compensation which was January 20, 1976 and, if so, whether that worsening was related to the industrial injury of April 20, 1967.

On August 30, 1977 a hearing was held before Referee William J. Foster who, after hearing evidence presented by claimant's attorney and the attorney representing the Fund and reading the deposition of Dr. Knox, caused a transcript of the testimony to be prepared and submitted to the Board with his recommendation that the Board, under its own motion jurisdiction, remand claimant's claim to the Fund for the payment of compensation commencing on August 9, 1976.

The Board, after giving full consideration to the transcript of testimony and the recommendation made by the Referee, accepts said recommendation.

ORDER

The claim is hereby remanded to the State Accident Insurance Fund for acceptance and for the payment of compensation, as provided by law, commencing on August 9, 1976 and until the claim is closed pursuant to ORS 656.278.

Claimant's attorney is awarded as a reasonable attorney's fee for his services the sum equal to 25% of the compensation which claimant may receive as a result of this order, payable out of said compensation as paid, not to exceed the total sum of \$2,000.

WCB CASE NO. 77-285

NOVEMBER 3, 1977

GAIL E. HEATH, 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 claimant's claim to it for acceptance and payment of compensation in addition to time loss benefits, penalties and attorney's fees.

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 June 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 \$50, payable by the Fund.

NOVEMBER 3, 1977

MINNIE B. JOHNSON, CLAIMANT
William Whitney, Claimant's Atty.
Charles Holloway III, Defense Atty.
Own Motion Order

On January 4, 1977 claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and reopen her claim for an industrial injury of July 30, 1968. Claimant's aggravation rights expired on January 17, 1974. The carrier replied on January 20, 1977, contesting claimant's request and enclosing medical reports to support its position.

By an order of the Board, dated February 3, 1977, claimant's request was referred to the Hearings Division with instructions to hold a hearing and determine whether claimant's present condition is related to her June 30, 1968 industrial injury and, if so, if her present condition has worsened since the last award or arrangement of compensation on November 4, 1971.

A hearing was held on June 20, 1977 by Referee James, who found, based on the medical evidence and the testimony, that there was some question whether a carpal tunnel operation performed in 1976 was a result of the same operation in 1968. It was his final conclusion that the Board should not exercise its own motion authority in this case as the medical records did not support a causal relationship, but that it could possibly award claimant time loss and medical expenses for her 1976 surgery.

The Board, after thorough consideration of the transcript, the medical evidence and the Referee's recommendation, finds that claimant has not established any basis for own motion relief. Claimant can receive relief for her medical expenses under the provisions of ORS 656.245.

ORDER

Claimant's petition for own motion relief, under the provisions of ORS 656.278, is hereby denied.

NOVEMBER 3, 1977

DONALD K. KELLER, CLAIMANT
White, Sutherland, Parks & Allen,
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 aggravation 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 June 15, 1977, is affirmed.

NOVEMBER 3, 1977

JOSEPH E. KOLAR, CLAIMANT
Panner, Johnson, Marceau, Karnopp
& Kennedy, Claimant's Atty.
Breathouwer & Gilman, 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 remanded claimant's claim to it for acceptance and payment of compensation for an injury to his low back suffered on March 2, 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 19, 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.

NOVEMBER 3, 1977

MELVIN H. LINDSEY, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 4, 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 industrial injury suffered on March 18, 1965 while employed by Corvallis Sand & Gravel Company whose Workmen's Compensation insurance was provided by the State Compensation Department, predecessor of the State Accident Insurance Fund. The claim was initially closed with an award for permanent partial disability equal to 70% loss of function of the arm for unscheduled disability. Claimant's aggravation rights have expired.

Claimant's neck, left shoulder and left upper extremity pain, as well as paresthesia involving the left upper arm, neck and shoulder, have become progressively worse according to claimant's petition. Claimant was seen by Dr. Knox in December 1973 whose diagnoses are set forth in claimant's petition. Dr. Knox felt that the claim should be reopened. It was his opinion that there was a definite temporal relationship to the current positive physical radiographic and electrophysiologic findings to claimant's 1965 industrial injury.

On August 11, 1977 Dr. Steele performed (1) left scalene release, (2) excision of traumatic exostosis, left olecranon, and (3) left volar carpal ligament release. Since his discharge from the hospital after surgery, claimant has been, according to his petition, temporarily and totally disabled and in need of further medical care and treatment. In the alternative, claimant states that he is now either permanently and totally disabled from any type of gainful and suitable employment or has sustained greater permanent partial disability than that heretofore awarded to him.

On October 10, 1977 the Fund was furnished a copy of the own motion petition together with the medical attachments and asked to make a response thereto within 20 days. On October 13, 1977 the Board received a letter from the Fund stating that it would accept responsibility for the left anterior scalene release and the left volar carpal ligament release but that it would deny any responsibility for the excision of the traumatic exostosis of the left olecranon because it appeared that the bony changes in the elbow and the surgery therefor pre-existed claimant's 1965 injury and there was no evidence that it had been aggravated by the 1965 injury. The Fund has paid claimant temporary total disability benefits from July 29, 1977 to October 21, 1977.

On October 14, 1977 claimant's attorney was advised of the Fund's position and asked whether or not it was acceptable.

The Board, having received no reply to that letter, concludes, based upon the medical evidence furnished to it, that the Fund is responsible only for the surgery on August 11, 1977 which related to the left anterior scalene release and the left volar carpal ligament release. The Board also concludes that the benefits paid claimant for temporary total disability from July 29, 1977 to October 21, 1977 are all the disability benefits to which claimant is entitled.

IT IS SO ORDERED.

WCB CASE NO. 76-3894

NOVEMBER 3, 1977

FRED E. MITTELSTADT, CLAIMANT
Lachman & Henninger, 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 granted claimant 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 March 30, 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 Fund.

NOVEMBER 3, 1977

BILL C. OGDEN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, 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 aggravation 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 April 6, 1977, is affirmed.

NOVEMBER 3, 1977

CHRIS RARIDEN, CLAIMANT
McClain & Brown, Claimant's Atty.
Merlin Miller, 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 claimant's alleged injury of October 10, 1976.

The Board, after de novo review, concurs with the ultimate conclusion contained in the Referee's Opinion and Order, a copy of which is attached hereto and, by this reference, is made a part hereof. However, the Board does not agree with the Referee's statement on page 3 of his order that claimant aggravated his 1974 non-industrial injury by attempting work activities which were beyond his physical capabilities at that time. The Board finds no medical evidence to support this statement.

ORDER

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

M. KINNE BLEVINS, CLAIMANT
Doblie, Bischoff & Murray, 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 granted claimant 64° for 20% unscheduled permanent partial disability. The Fund contends that claimant does not have any permanent impairment and therefore the Determination Order of September 23, 1976 which awarded claimant compensation for time loss only should be affirmed.

On or about November 20, 1975, claimant received a compensable injury or an occupational disease to his lung area when he was exposed to and inhaled glue fumes in connection with his work. He complained of a general tiredness and shortness of breath. The first medical report in the record indicated that Dr. Quinn found claimant medically stationary in September of 1976. On February 1, 1977, Dr. Quinn found that claimant obviously improved when he changed jobs and was not exposed to fumes to the degree that he was in his former occupation. The doctor found no permanent disability and felt claimant would be restricted only a little, if at all. On February 9, he recommended that claimant not be exposed to large quantities of fumes.

The Referee found that claimant was precluded from a substantial portion of the general industrial labor market when he acted upon the doctor's advice not to re-expose himself to a large quantity of fumes. He also found that by taking the new job to avoid these fumes, claimant sustained a wage loss. For these reasons, the Referee awarded claimant compensation for 20% unscheduled disability.

The Board, after de novo review, finds that claimant has sustained no permanent impairment, based on the medical reports in the record. Admittedly, he is precluded from a portion of the general labor market, but it is only a very small portion. The Board concludes that the award of the Referee was excessive and should be reduced. An award for 10% disability, based on claimant's loss of wage earning capacity as a result of his preclusion from a portion of the labor market, adequately compensates him.

ORDER

The Referee's order, dated April 22, 1977, is modified.

Claimant is awarded 32° of a maximum of 320° unscheduled permanent partial disability. This is in lieu of the award granted by the Referee's order which in all other respects is affirmed.

In the Matter of the Compensation
of the Beneficiaries of
DELLA CRAIG, DECEASED
Clark & MacMurray, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The Beneficiaries of Della Craig (hereafter referred to as claimant) seek Board review of the Referee's order which affirmed the carrier's denial of May 20, 1976.

Mrs. Craig, on February 16, 1976, was killed in an automobile accident at about 6:30 p.m. Claimant contends that the decedent was in the course and scope of her employment at the time of the accident. She was enroute to Prineville, allegedly to assist the new manager of the Prineville theatre in taking inventory. The decedent left her home in Redmond after a serious domestic argument with her husband at about 4:15 p.m. She was extremely upset when she called her employer's office manager and asked her to go to Prineville with her to hear a band at the Empire Room. She drove by the home of some friends, and after a 10-minute chat with them, left for Prineville about 6:00 p.m.

The decedent's husband was unable to state for sure just why his wife was going to Prineville, although he assumed it was to help out the new theatre manager there as she had been planning to do that for some time. The testimony of a friend, Ms. Briley, indicated that decedent told her that she was taking inventory sheets to the manager in Prineville. However, in a signed statement given to the insurance investigator, Ms. Briley indicated the decedent "did not say why" she was going to Prineville. Decedent's supervisor indicated at the hearing that there was no reason for her to go to Prineville when the instructions she had for the new manager were so simple that it could have been taken care of without a personal visit. Other witnesses were called, none of whom could give any evidence to substantiate claimant's story.

The Referee found that at the time of the accident decedent's condition was such that, assuming she was going to Prineville to help out the new manager, she would have been unable to have been of any material benefit to him. Therefore, he found claimant failed to carry the burden of proof and affirmed the denial.

The Board, after de novo review, finds that decedent's condition was not relevant in this case as there was no persuading evidence to indicate that the decedent, regardless of her condition, was engaged in her employment at the time of her

demise. None of the credible testimony at the hearing would support such a contention. The Board concurs with the conclusion of the Referee.

ORDER

The order of the Referee, dated March 31, 1977, is affirmed.

WCB CASE NO. 77-1217

NOVEMBER 4, 1977

JOHN CROSTA, 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 and Moore.

The employer seeks Board review of the Referee's order which granted claimant an award of permanent total disability. The employer contends that claimant is not "motivated" to return to work and therefore, the award is excessive.

Claimant, at the age of 60, sustained a compensable injury on January 14, 1976 when he slipped in some water and fell to the cement floor striking his back and right shoulder. Dr. Smith diagnosed strains of the cervical-thoracic area, the lumbosacral area, the right shoulder and the right elbow. The back strain cleared up fairly rapidly, but claimant continued to see Dr. Hauge for his right shoulder condition. Dr. Hauge, in September of 1976, felt that claimant could return to work if he was not required to perform any duties which necessitated the use of his arms above the shoulder level. A program of physical therapy brought a measure of improvement, but it was discontinued when claimant's progress reached a standstill.

Dr. Pasquesi, in his report of December 13, 1976, found no impairment in claimant's low back. With regard to the shoulder, the doctor found that claimant apparently suffered a rotator cuff or peritendinitis type of injury which he felt was stable. Dr. Pasquesi found that claimant had limited motion and weakness, but he did not have any atrophy. His conclusion was that claimant would not be able to work in any capacity requiring him to use his right shoulder at shoulder level or above.

The claim was closed on January 17, 1977 with an award of 160° for 50% permanent partial disability in addition to temporary total disability benefits.

Claimant attempted to return to his former occupation, but the employer would not allow him to work until he had a full medical release from his treating physician. Claimant made no other attempts to gain employment as he felt no one would hire him if he couldn't even return to his former job. He is precluded from using his right arm over his head and he has no special training or skill other than the work he did for the employer.

The Referee found that claimant's impairment combined with his age, his limited education and his work experience puts him in the odd-lot category. With this fact established, the burden shifted to the employer to show that there were available jobs which claimant could perform, and the employer was unable or unwilling to do so. Therefore, the Referee concluded claimant was entitled to an award of permanent total disability.

The Board, after de novo review, finds that the medical evidence quite clearly establishes that claimant is not permanently and totally disabled as far as his permanent impairment is concerned. Therefore, to come within the odd-lot category, claimant must show motivation, i.e., that he has made a bona fide attempt to return to some type of work but is unable to do so because of his physical condition. Claimant does have marketable skills, even with his impairment. He is a certified, licensed electrician and there is no significant evidence in the record that claimant can't still do this type of work even with his limitations.

Claimant has not shown any motivation to return to light work, although he has indicated an interest. After he was turned down by his former employer, he did nothing to attempt to secure work elsewhere.

The Board concludes that claimant is not odd-lot and he has not borne his burden of proving that he is permanently and totally disabled. The award of 160° for 50% unscheduled disability granted by the Determination Order of January 17, 1977 adequately compensates claimant for his loss of wage earning capacity.

ORDER

The order of the Referee, dated June 10, 1977, is reversed.

The Determination Order, dated January 17, 1977, is affirmed.

VICTORIA DAVID, CLAIMANT
Allan Knappenberger, Claimant's Atty.
Merlin Miller, Defense Atty.
Own Motion Order

On September 17, 1976, claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction and modify the Determination Order of January 6, 1971 in the above entitled matter and extend the time in which claimant may request a hearing on a claim for aggravation. The employer responded to this request, stating that there was no appeal made from the Determination Order within one year of its issuance and that the Board had no basis to change the order. The employer also felt that the evidence did not support reopening on account of aggravation as they construed Dr. Logan's report to indicate that claimant's worsened condition was a result of her present occupation with Woodland Park Hospital.

By an order of the Board, dated November 2, 1976, claimant's request was referred to the Hearings Division with instructions to hold a hearing and take evidence on the merits of claimant's request.

A hearing was held on March 21, 1977 by Referee James, who found that Dr. Logan's report indicated that claimant's complaints were suggestive of a persistence in her symptoms rather than an increase because of her present job. It was the Referee's opinion that, because claimant's aggravation rights had expired, the Board should exercise its own motion jurisdiction and require that the carrier pay claimant's medical bills, including Dr. Logan's bills for a narrative report, and that it award the claimant a modest increase in permanent partial disability.

The Board, after thorough consideration of the transcript of the hearing, the medical evidence and the Referee's recommendation, finds, on the merits, that claimant has not shown an increase in her permanent disability. However, claimant is entitled to the payment of her medical bills under ORS 656.245, including special shoes, if prescribed, and the carrier is required to pay Dr. Logan's bills as recommended by Referee James.

ORDER

The employer and its carrier are directed to pay claimant's medical bills incurred as a result of her November 11, 1970 injury (ORS 656.245).

The employer and its carrier are also required to pay Dr. Logan's bill of \$30 for a narrative report (ORS 656.273(5)).

NOVEMBER 4, 1977

ROBERT G. GRESHAM, CLAIMANT
Walter D. Nunley, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

On September 20, 1977 the Workers' Compensation Board received from the claimant a request for review of the Referee's order entered in the above entitled case on July 19, 1977. On October 6, 1977, the Board advised claimant by letter that his request for Board review was untimely. The order of the Referee had been mailed to claimant's last known address, Crater National Bank of Medford, Oregon, on July 19, 1977. The bank had returned the order to the Hearings Division of the Board, whereupon it was mailed to claimant's attorney on July 28, 1977 with a note requesting that that office see that claimant receive a copy of the order.

By affidavit, dated October 14, 1977, claimant's attorney informed the Board of his failure to comply with the request to forward the copy of the Opinion and Order to the claimant. By letter of the same date, the claimant's attorney requested the Board to exercise its own motion jurisdiction and review the findings and order of the Referee.

The Board concludes that the mailing of a request of Board review within the time provided by ORS 656.289(3) is jurisdictional and that when the appeal is not taken within the time fixed by statute, jurisdiction cannot be conferred upon the Board by consent of the parties or by waiver. Am Jur 2d, Appeal & Error, Section 292.

Because more than 30 days expired between the date the copy of the Opinion and Order was mailed to claimant and claimant's request for review thereof, the Board has no jurisdiction to review the Referee's order. The request for review must be dismissed.

IT IS SO ORDERED.

CLAIM NO. 428-C-01297
(Great American Ins.)
CLAIM NO. 05-X-025591
(Argonaut Ins.)

NOVEMBER 4, 1977

KENNETH LARSON, CLAIMANT
Allan Coons, Claimant's Atty.
R. Kenney Roberts, Defense Atty.
Lawrance L. Paulson, Defense Atty.
Amended Own Motion Order

On October 19, 1977 an Own Motion Order was entered in the above entitled matter which, among other things, granted claimant's attorney as a reasonable attorney's fee 25% of the temporary total disability compensation granted by the order, not to exceed the sum of \$500.

After reviewing attorney's fees awarded by the Board in similar cases, the Board concludes that claimant's attorney is entitled to 25% of all compensation claimant may receive. Therefore, the Own Motion Order is amended by deleting the second paragraph on page 2 of said order and substituting in lieu thereof the following:

"Claimant's attorney is hereby granted as a reasonable attorney's fee for his services a sum equal to 25% of the compensation which claimant may receive as a result of this order, payable out of said compensation as paid, not to exceed \$2,000.

In all other respects, the Own Motion Order dated October 19, 1977, is ratified and reaffirmed.

WCB CASE NO. 72-2343

NOVEMBER 4, 1977

BILL D. NICHOLSON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 24, 1977 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 August 31, 1971. Claimant's aggravation rights have expired and he now is in need of further medical care and surgery, vocational rehabilitation and time loss benefits. Claimant furnished the Board with the July 12, 1977 report of the Orthopaedic Consultants 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 20, 1977 the Fund indicated that it had contacted the Orthopaedic Consultants for additional information regarding claimant's claim. It questioned whether the need for a fusion recommended by the doctors was a result of a congenital abnormality, a non-injury condition, or directly related to the industrial injury.

On October 14, 1977, after receiving the requested report from the Orthopaedic Consultants, the Fund advised the Board that, based on the doctors' opinion that the treatment recommended was a direct result of the 1971 industrial injury, it would reopen claimant's claim for further medical treatment and time loss, if and when indicated.

The Board, after thorough consideration of the medical report furnished by the claimant and the response made by the Fund, concludes that claimant's claim should be reopened for the medical treatment and surgery recommended by the Orthopaedic Consultants and temporary total disability benefits paid for the time claimant is in the hospital.

ORDER

Claimant's claim for his August 31, 1971 industrial injury is remanded to the Fund for the medical treatment and surgery recommended. Temporary total disability benefits shall be paid to claimant by the Fund for the period of time claimant is hospitalized for this surgery.

Claimant's attorney is granted as a reasonable attorney's fee for his services a sum equal to 25% of the increased compensation which may be granted by this order, payable out of such compensation as paid, not to exceed \$2,000.

WCB CASE NO. 76-4514-SI NOVEMBER 4, 1977

In the Matter of the Second Injury
Fund Relief of
NORTHWEST NATURAL GAS CO., EMPLOYER
Dezendorf, Spears, Lubersky & Campbell,
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 August 2, 1976 Determination Order which denied it relief from the Second Injury Fund for the injury of August 13, 1974 suffered by the claimant, Delbert Carter.

The Board, after considering the abstract of record and the recommendations made by Referee Leahy, adopts as its own the recommendation dated June 8, 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 August 2, 1976 is affirmed.

WCB CASE NO. 68-404

NOVEMBER 4, 1977

GLENN STONER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 29, 1977 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 injuries suffered in 1952 and 1958. Claimant contends that his condition has worsened since the last arrangement of compensation granted in October of 1968. Claimant furnished the Board with the report of Dr. Post, dated March 9, 1977, in support of his position.

On October 13, 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 October 21, 1977, the Fund stated that, in its opinion, claimant's claim should not be reopened; claimant has been granted unscheduled disability awards equal to 120% over a period of time during which he had sustained three industrial injuries. It found that Dr. Post indicated a solid fusion and recommended no further treatment.

The Board, after thorough consideration of the medical report furnished by the claimant and the response of the Fund, concludes that there is no justification for reopening claimant's claim. There is no evidence that his condition has worsened.

The doctor felt that claimant could do sedentary work and the Board recommends that claimant attempt to seek assistance from the Vocational Rehabilitation Division through a program of retraining in some lighter field of work that his physical condition would enable him to perform, or contact one of the Department's service coordinators to attempt a suitable job placement.

ORDER

Claimant's petition for own motion relief, under the provisions of ORS 656.278, is hereby denied.

WCB CASE NO. 76-6121-SI NOVEMBER 8, 1977

In the Matter of the Second Injury
Fund Relief of
BINGHAM-WILLAMETTE COMPANY, EMPLOYER
Miller, Anderson, Nash, Yerke & Wiener,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Dept. of Justice, Defense Atty.
Final Order

This is a request for additional second injury relief. The issue is the employer's challenge of the October 7, 1976 Determination Order which denied it any relief with respect to its increased workers' compensation costs and any other costs related to the April 27, 1973 injury of Leonard White. The employer, on September 29, 1977, filed with the Workers' Compensation Board its exception to the Referee's Recommended Order and the Agency responded on October 5, 1977.

The Board, after considering the abstract of record and the recommendations made by Referee Fink, adopts as its own the recommendation dated July 18, 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 October 7, 1976 is affirmed.

SAIF CLAIM NO. C 144684 NOVEMBER 8, 1977

DONALD HUTCHINSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, on August 30, 1968, sustained a fractured pubis, contusions of both elbows, the right thigh and right hip when he fell 20-25 feet off a plank scaffold. Dr. Jones, on November 6, 1968, indicated that the right symphysis pubis was healed but recommended a lumbosacral support for claimant's continuing symptoms. Claimant was declared medically stationary by Dr. Blauer on June 6, 1969 with a modest amount of permanent impairment. The first Determination Order, dated June 18, 1969, granted awards for 5% unscheduled disability and 10% loss of the left leg.

Dr. Jones, on July 21, 1971, found that claimant had low lumbar disc pathology and on September 22, 1971 Dr. Nash performed a myelogram which revealed slight indentations at L4-5 and some narrowing at L5-S1. On October 13, 1971 Dr. Nash performed a laminectomy and removed a ruptured intervertebral disc, L4-5, left.

In May of 1972, claimant's claim was reopened effective July 21, 1971. The Second Determination Order of October 20, 1972 granted an additional award for 15% unscheduled low back disability. A stipulation dated May 9, 1973, awarded claimant an additional award of 12.5% for unscheduled disability.

On February 15, 1977, a Stipulation and Order of Dismissal reopened the claim on an aggravation basis and started temporary total disability benefits from October 10, 1976 until termination. Claimant had been hospitalized with complaints of low back pain and left leg pain on October 10, 1976. A myelogram performed by Dr. Nash on October 13, 1976 revealed a large defect at L4-5, left. On October 20, a laminectomy L5, complete with diskectomy L4-5, left, was performed by Dr. Nash.

The Orthopaedic Consultants found claimant's condition stationary with moderate loss of function of the back due to the industrial injury on March 7, 1977. They felt he could return to his former occupation with restrictions. On June 3, 1977, Dr. Nash indicated that claimant had achieved maximal medical benefit, listing degrees of motion loss primarily due to pain.

On July 28, 1977, the State Accident Insurance Fund requested a determination of this matter from the Workers' Compensation Board. The Evaluation Division of the Board recommended that claimant be granted an award of compensation for 40% unscheduled disability, to be in lieu of and not in addition to the awards previously granted. They also recommend that claimant be granted temporary total disability from October 10, 1976, per the Stipulation of February 15, 1977, until February 6, 1977. The Board concurs with the conclusions of the Evaluation Division.

ORDER

Claimant is hereby granted permanent partial disability compensation for 40% unscheduled disability. This is in lieu of, and not in addition to, the awards of compensation previously granted claimant.

Claimant is also awarded temporary total disability compensation from October 10, 1976 (per the Stipulation of February 15, 1977) until February 6, 1977, less time worked.

GERALD MESSINGER, CLAIMANT
A. C. Roll, Claimant's Atty.
Scott M. Kelley, Defense Atty.
Stipulated Order

Claimant received a compensable injury on September 12, 1972, consisting of an injury to the low back. He received workmen's compensation benefits. By determination order of September 11, 1973, claimant was granted 15 per cent unscheduled permanent partial disability and by a second determination order issued on July 12, 1976, was granted an additional 10 per cent unscheduled, for a total of 25 per cent unscheduled permanent partial disability.

The claimant thereafter filed a request for hearing contending that his disability was greater than that allowed. A hearing was held and the referee thereupon awarded compensation for permanent partial disability equal to 320 degrees for 100 per cent unscheduled disability, and the employer and carrier subsequently made a request for review of such opinion and order by the Worker's Compensation Board.

The parties have agreed to resolve the present claim as follows:

IT IS AGREED by the claimant individually and by A. C. Roll, his attorney, and by the subject employer, Clow Roofing & Siding Company, and Industrial Indemnity Company, its worker's compensation carrier, by and through Scott M. Kelley of its attorneys, that the carrier shall pay to the claimant a sum equivalent to an increase of 40 per cent unscheduled disability, or \$8,960, less \$1,479, which is the amount of compensation already paid to the claimant since the opinion and order of the referee of July 1, 1977, for a net payment to the claimant, in a lump sum, of \$7,481; and

IT IS FURTHER AGREED that of and from said net sum of \$7,481.00, there shall be paid to A. C. Roll the sum of \$1,630.28 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 employer-carrier's request for review.

NOVEMBER 8, 1977

JACK D. SHUMAKER, CLAIMANT
Anderson, Fulton, Lavis & Van Thiel,
Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Order

Claimant, by and through his attorney, requested Board review of the Referee's order on September 26, 1977. By a motion, dated October 8, 1977, claimant petitioned the Board for inclusion in the record of Dr. Cottrell's September 13, 1977 report as it was not available at the time of the hearing before the Referee. The claimant also felt that it would be in the interest of justice to remand the matter back to the Referee for additional information to complete the record.

The Board, after thorough consideration of the motion before it, and the response filed by the respondent in this case, concludes that claimant's motion should be denied, as should his request that the case be remanded. Claimant's attorney could have asked for a continuance or requested that the Referee hold the case in an open status until the additional medical was obtained.

IT IS SO ORDERED.

CLAIM NO. H 104 C 314863 NOVEMBER 9, 1977

LARRY BARKER, CLAIMANT
Coons & Anderson, Claimant's Atty.
D. R. Dimick, Defense Atty.
Long, Neuner, Dole, Caley &
Kilberg, Defense Atty.
Own Motion Order

On November 9, 1976 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an industrial injury suffered on April 8, 1967. Claimant's aggravation rights expired on February 3, 1976. Claimant's attorney requested that this matter be consolidated with the issues involved in the request for hearing of claimant's October 13, 1975 industrial injury. Therefore, the Board referred claimant's request for own motion relief to the Hearings Division with instructions to hold a hearing and take evidence on the issue of whether claimant had aggravated his 1967 injury at the same time as he receives evidence with respect to the 1975 injury.

On August 11, 1977 a hearing was held before Referee

John F. Drake who, after hearing evidence presented by claimant's attorney and the attorney representing the carrier, caused a transcript of the testimony to be prepared and submitted to the Board with his recommendation that the Board, under its own motion jurisdiction, reopen claimant's claim to provide such medical services and time loss benefits as are indicated in the circumstances of claimant's present physical condition, and as are consistent with the Opinion and Order entered in WCB Case No. 76-6092 wherein the Referee disapproved the denial of the carrier dated June 6, 1976 and remanded that claim to the carrier "for payment of compensation pursuant to the provisions of ORS 656.245".

The Board, after giving full consideration to the transcript of testimony and the recommendation made by the Referee, accepts the recommendation of the Referee.

ORDER

The claim for the 1967 injury is remanded to the carrier, Fireman's Fund, for acceptance and payment of compensation, as provided by law, commencing October 17, 1977, the date claimant entered the hospital for the surgery recommended by Dr. Young, and until the claim is closed pursuant to ORS 656.278.

Claimant's attorney is allowed as a reasonable attorney's fee a sum equal to 25% of the compensation which claimant may receive as a result of the reopening of this 1967 claim, payable out of such compensation as paid, not to exceed \$2,300.

WCB CASE NO. 76-6421

NOVEMBER 9, 1977

MARY LOU CLAYPOOL, CLAIMANT
Richard O. Nesting, 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 her request for an increased permanent partial disability award and dismissed the matter.

The Board, after de novo review, agrees with the Referee's conclusion contained in his Opinion and Order, a copy of which is attached hereto and, by this reference, is made a part hereof. However, the Board does not agree with the Referee's statement that claimant's coaching opportunity was in the nature of overtime and therefore was not a proper criterion to consider.

ORDER

The order of the Referee, dated May 11, 1977, is affirmed.

CLAIM NO. N05 EC 709996 NOVEMBER 9, 1977

TED O. DICKERSON, CLAIMANT
Merten & Saltveit, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on July 3, 1966 for which he was granted an award for 20% unscheduled low back disability and 5% for left leg disability by a Determination Order dated June 26, 1970. After a hearing, a Referee, on July 6, 1973, increased this award for unscheduled disability to 40%. This award was affirmed by the Board and by the Circuit Court.

Claimant's request for the Board to exercise its own motion jurisdiction and reopen his claim was granted by an order of February 4, 1977. The order provided for enrollment in the Pain Clinic for treatment and for the payment of compensation commencing on the date claimant was enrolled. This treatment began on July 21, 1977 and continued through September 16, 1977.

The Pain Clinic indicated that claimant has hypertension which was diagnosed in 1970 and diabetes which was found and treated in 1977. As a result, claimant now has a diabetic neuropathy involving his legs for which he uses a drop-foot brace on the right leg. He has gained 24 pounds since April, 1977, he does the prescribed exercises on occasion and he continues to use Emperin #3 at the rate of four a day. Claimant's motivation to improve his condition is questionable.

On October 20, 1977, the carrier requested a determination of claimant's disability because claimant was uninterested in the program at the Pain Clinic. It is the recommendation of the Evaluation Division of the Board that claimant be granted compensation for temporary total disability from July 21, 1977 through September 16, 1977. The permanent disability compensation which claimant has already received adequately compensates him.

The Board concurs with the recommendation of the Evaluation Division.

ORDER

Claimant is hereby granted compensation for temporary total disability commencing July 21, 1977 and through September 16, 1977, less time worked.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the additional compensation for temporary total disability granted by this order, payable from said compensation as paid, not to exceed \$500.

WCB CASE NO. 76-4923

NOVEMBER 9, 1977

TERRY L. MYERS, CLAIMANT
Newhouse, Foss, Whitty & Roess,
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.

ORDER

The order of the Referee, dated February 16, 1977, is affirmed.

WCB CASE NO. 76-3124

NOVEMBER 9, 1977

VERNETTA NEAL, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
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 granted claimant an award of permanent total disability for an injury suffered on May 7, 1969 to her low back.

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 29, 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.

SAIF CLAIM NO. YC 132542 NOVEMBER 9, 1977

BRUCE L. RIDINGER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his low back on May 25, 1968. He had suffered prior injuries to the back and had undergone two earlier surgical procedures, including a two-level fusion. The Determination Order of May 7, 1969 granted claimant an award for 20% unscheduled disability of the low back. A Second Determination Order of May 11, 1970 granted an award for 10% additional low back disability. Claimant's aggravation rights expired on May 7, 1974.

Claimant was admitted to the hospital for conservative treatment after his condition became aggravated on November 8, 1976. He returned to work on December 20, 1976. His treating physician stated that there has been no change in his disability since the last closure.

On July 22, 1977, the Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted time loss benefits from November 8, 1976 through December 19, 1976 but no additional award for permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability commencing on November 8, 1976 through December 19, 1976, less time worked.

NOVEMBER 9, 1977

RICHARD UHING, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, a warehouseman, suffered a compensable back injury on September 13, 1968 while lifting a bale of burlap. The initial diagnosis by Dr. Herron was spasm of the lumbar muscles. Dr. Anderson, on October 1, 1968, indicated a possible disc L4-5, left. A myelogram, performed by Dr. White on October 8, 1968, was negative. Dr. Anderson, on January 20, 1969, suggested claim closure and a change of occupation. The Determination Order of February 19, 1969 granted an award for 5% unscheduled low back disability.

Claimant's claim has been opened and closed several times since the initial closure. A Second Determination Order, dated April 30, 1970, granted no additional permanent partial disability. A subsequent stipulation, dated July 2, 1970, awarded claimant an additional award for 10% unscheduled disability.

After a laminectomy was performed, claimant was found stationary on March 18, 1971 and a Third Determination Order, on March 29, 1971, granted claimant no further compensation for permanent partial disability. On November 5, 1971, a Fourth Determination Order again awarded time loss only. A Stipulation dated April 4, 1972 granted claimant an additional 24% for 7-1/2% unscheduled disability. A Fifth Determination Order was entered on May 16, 1973 with no further compensation awarded.

On January 19, 1977 an Own Motion Order denied a request to reopen the claim after a December 2, 1976 myelogram was essentially negative. On March 29, 1977 the Fund advised that the claim was reopened for further time loss from November 26, 1976. In Dr. Grewe's discharge summary for hospitalization from December 1, 1976 to December 8, 1976 he indicated a need for further treatment with left lumbar sympathectomy. In his May 31, 1977 closing examination, he indicated that the sympathectomy gave "good result from causal-gic pain".

On July 22, 1977 the Fund requested that the Board issue a determination of this claim. The Evaluation Division recommends that claimant's claim be closed with no further permanent partial disability but with an award of temporary total disability from November 26, 1976 through May 31, 1977. The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability commencing November 26, 1976 and continuing through May 31, 1977. Claimant is granted no award for his permanent partial disability in addition to that heretofore granted to him.

NOVEMBER 9, 1977

JOHN M. WHEELER, CLAIMANT
A. C. Roll, 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 claimant's hernia condition.

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 June 9, 1977, is affirmed.

NOVEMBER 10, 1977

In the Matter of the Compensation
of the Beneficiaries of
LESTER CONOVER, DECEASED
Duncan, Duncan & Tiger, Claimant's Atty.
Ronald Podnar, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The Beneficiaries of Lester Conover (hereafter referred to as claimant) seek Board review of the Referee's order which affirmed the carrier's denial of claimant's claim for benefits. Claimant contends that Glenn Conover, son of the deceased, is entitled to benefits after his 18th birthday as he is an invalid child.

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 June 10, 1977, is affirmed.

NOVEMBER 10, 1977

KENNETH M. DOGGETT, CLAIMANT
Bryant & Guyett, 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 Determination Order which granted claimant 25% for loss of the left leg and 10% unscheduled disability for injury to the low back. Claimant feels that more appropriate awards would be 60% scheduled disability for loss of the leg and 50% unscheduled low 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 April 12, 1977, is affirmed.

NOVEMBER 10, 1977

TERRY L. KNAUS, CLAIMANT
Milo Pope, 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 carrier's denial of claimant's low back 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. However, a change should be made on page 3 of the order in the quote from Dr. Ruggeri's October 18, 1976 report. The words "would change" should be corrected to read "could change". Also the Board is not in complete agreement with the second paragraph on page 4 of the Referee's order in which he states that claimant's problems are "not causally related to the industrial injury". The Board feels that it would be more accurate to say that claimant "failed to prove" causal connection between his condition and the injury of January 15, 1976.

ORDER

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

WCB CASE NO. 76-4352

NOVEMBER 10, 1977

In the Matter of the Compensation
Of the Beneficiaries of
JAY DEE LACEY, DECEASED
Luvaas, Cobb, Richards & Fraser,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The Beneficiaries of the decedent seek Board review of the Referee's order which affirmed the carrier's denial of 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 June 28, 1977, is affirmed.

WCB CASE NO. 76-4514-SI

NOVEMBER 10, 1977

In the Matter of the Second Injury
Fund Relief of
NORTHWEST NATURAL GAS CO., EMPLOYER
Dezendorf, Spears, Lubersky & Campbell,
Claimant's Atty.
Dept. of Justice, Defense Atty.
SAIF, Legal Services, Defense Atty.
Amended Final Order

A Final Order was entered in the above entitled matter on November 4, 1977, which adopted the recommendation made by the Referee and attached said recommendation to said order and made it a part thereof.

The Board's final order erroneously stated that the Determination Order of August 2, 1976 was affirmed. It should be corrected to state that the Determination Order of August 2, 1976

is reversed. In all other respects the Final Order is ratified and reaffirmed.

IT IS SO ORDERED.

WCB CASE NO. 76-6254

NOVEMBER 10, 1977

WILLIAM RENZ, CLAIMANT
Jerry Gastineau, 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 November 12, 1976 Determination Order which did not increase the previous awards of 38% for loss of the legs and approximately 75% for 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 March 2, 1977, is affirmed.

WCB CASE NO. 76-4753-B

NOVEMBER 10, 1977

JERRY R. ROYLANCE, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Souther, Spaulding, Kinsey, Williamson &
Schwabe, Defense Atty.
Request for Review by Northern Ins. Co.

Reviewed by Board Members Moore and Phillips.

Northern Insurance Company seeks Board review of the Referee's order which remanded claimant's knee claim to it for acceptance and payment of compensation. This carrier contends that Fireman's Fund Insurance is responsible for claimant's present condition.

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 10, 1977, is affirmed.

WCB CASE NO. 76-3776

NOVEMBER 10, 1977

BILL F. SEIBERT, CLAIMANT
Edward L. Daniels, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On October 28, 1977 the State Accident Insurance Fund moved that the above entitled matter be remanded to the Hearings Division of the Workers' Compensation Board for the taking of further testimony and their presentation of additional evidence. Offered in support of, and attached to, the motion was an affidavit of Quintin B. Estell, the attorney representing the Fund.

The affidavit of Mr. Estell states that he had neither heard nor observed a claimant make such sounds nor act in such a way as claimant did at the hearing of the above entitled matter and, therefore, he thought that claimant was magnifying his problems, probably intentionally. Because of this, after the hearing Mr. Estell requested an investigation be conducted and movies taken of claimant's activities. This is the evidence which Mr. Estell now wishes to offer if the matter is remanded and upon which he bases his claim that the matter was incompletely tried originally because the evidence he wishes to present was not then available.

Obviously, this evidence was not available because it was not until after the hearing that the investigation was conducted and the movies taken. It is Mr. Estell's contention that he had had no way of knowing the condition of claimant prior to the hearing because claimant apparently engaged in no, or extremely limited, physical activities which made it impossible to determine whether or not claimant was capable of engaging in substantial physical activities.

The Board concludes that the reasons set forth in Mr. Estell's affidavit are not sufficient to remand the matter to the Hearings Division of the Workers' Compensation Board.

ORDER

The State Accident Insurance Fund's motion to remand the above entitled matter to the Hearings Division for the taking of further testimony and the presentation of additional evidence is hereby denied.

NOVEMBER 10, 1977

HELENE TEEL, CLAIMANT
Carey & Joseph, 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 her an additional 10% unscheduled low back disability for a total award of 192° for 60% permanent partial disability. Claimant contends that she 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 June 29, 1977, is affirmed.

NOVEMBER 15, 1977

JOAN C. ANNETT, CLAIMANT
Emmons, Kyle, Kropp & Kryger, 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 claimant's claim regarding her low back, right hip and right leg condition 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 May 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 \$400, payable by the Fund.

HENRY A. BERGERON, CLAIMANT
Henigson, Stunz & Fonda, 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 found that claimant was not entitled to aggravation benefits from his May 7, 1974 industrial injury.

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.

EARL HOOK, CLAIMANT
Lindsay, Nahstoll, Hart & Krause,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Order on Review

On November 2, 1977, the Board received from claimant's attorney a motion for reconsideration of the award for attorney's fees granted claimant for his services on Board review of the above entitled matter.

Attached to the motion was the affidavit of Robert E. Babcock and the entire time records relating to the above compensation claim indicating that Mr. Babcock and Richard M. Davis, both members of the law firm of Lindsay, Nahstoll, Hart & Krause, spent 30.1 hours on the issue before the Board and that they should be compensated at an hourly rate of \$85; therefore, a reasonable attorney's fee for their services at Board review would be \$2558.50 to be paid by the State Accident Insurance Fund.

The Referee's order had found claimant had failed to prove entitlement to either temporary total disability benefits or to an aggravation and dismissed his request. The Board reversed, therefore, claimant's attorney is entitled to a reasonable attorney's fee to be paid by the Fund for his services at the hearing before the Referee and also for his services before the Board on review.

After due consideration, the Board concludes that claimant's attorney should have been granted as a reasonable attorney's fee at the hearing level the sum of \$1,000, payable by the Fund and an attorney's fee of \$400 for his services at Board level also payable by the Fund.

The Board does not believe that an hourly rate of \$85 is reasonable.

ORDER

The Order on Review dated October 28, 1977 is amended by adding after the second paragraph on page 3 thereof, the following paragraph:

"Claimant's attorney is also granted a reasonable attorney's fee for his services before the Referee, whose Opinion and Order was reversed by the Board, in the amount of \$1,000, payable by the Fund."

The figure "\$750" in the third line of the third paragraph is hereby deleted and the figure "\$400" is substituted therefor.

WCB CASE NO. 77-167

NOVEMBER 15, 1977

BOBBY D. MITCHELL, CLAIMANT
Malagon, Starr & Vinson, 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 assessed penalties against it in the amount of 25% of the temporary total disability benefits due to claimant from November 15, 1976 through January 9, 1977.

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 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 \$150, payable by the Fund.

JOE L. MOTT, CLAIMANT

Doblie, Bischoff & Murray, Claimant's Atty.

Jones, Lang, Klein, Wolf & Smith,

Defense Atty.

Request for Review by Claimant

Cross-appeal by Employer

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which granted him an award of 12° for 8% loss of function of the left knee. Claimant contends that he is entitled to further temporary total disability benefits from October 19, 1976 through February 1, 1977. The employer, on cross-appeal, contends that claimant's award of permanent disability should be reversed and the Determination Order restored.

Claimant, age 19, suffered a compensable injury on July 29, 1976 when a power saw he was using kicked back, cutting the left knee. The wound was cleaned and repaired in the emergency room of Polk Community Hospital. Claimant saw Dr. Hoda on August 11, 1976 with complaints of pain in the knee and was told that he would probably have to use his leg brace for another two weeks and bending should be avoided. On November 8, 1976, the doctor could find nothing seriously wrong with claimant's knee joint, except that the muscle was still weak as claimant had not done enough exercise to build it back up.

On December 28, 1976, Dr. Daack indicated that claimant saw him with a request for some type of padding to protect his knee, but that he did not request any type of physical therapy. Dr. Spady, on January 14, 1977, found no substantial impairment of function and suggested that claimant's claim be closed.

Dr. Hoda indicated in his February 1, 1977 report that claimant had been released for modified work on October 11, 1976. In his report of March 28, 1977, Dr. Hoda indicated his complete agreement with Dr. Spady's finding of no permanent impairment and found his injury completely healed.

Dr. Daack, who had recommended a thorough physical therapy program, saw claimant on only four occasions, the last time being February 1, 1977 at which time he was showing good recovery.

Dr. Shlim, on April 27, 1977, indicated that claimant had been fired from his job; therefore, when he was released for work in October of 1976, he had no job to which he could return. Claimant indicated that the knee is no problem in his work. Dr. Shlim did not feel that claimant required any further treatment and that he definitely had no impairment.

Claimant, when making application for unemployment benefits in late October or early November, 1976, indicated that he was able physically to go to work.

The Referee found that claimant was not entitled to further temporary total disability benefits, based not only on the medical reports, but also on claimant's very candid testimony. Claimant was apparently advised by Dr. Hoda that he could return to work in October of 1976 and claimant admits to this. However, the Referee did find that claimant was suffering from minimal permanent impairment and granted claimant an award for 8% loss of function of the left knee.

The Board, after de novo review, concurs with the finding of the Referee that claimant is not entitled to any further compensation for time loss. The record is clear that claimant was released for work in October of 1976, both in the doctor's reports and by claimant's testimony at the hearing.

The Board does not agree that claimant has sustained 8% loss of function of the knee. There is no medical evidence in the record to support claimant's contentions of any permanent physical impairment. Claimant has had no apparent trouble with his new job which requires standing eight hours a day and lifting of heavy objects in addition to stepping up and down from a platform. The Board concludes that claimant has not sustained any permanent disability to the left knee and that the award of 12% for 8% loss of function of the left knee should be reversed.

ORDER

The order of the Referee, dated June 10, 1977, is modified.

The Determination Order of April 18, 1977, which awarded claimant time loss benefits from July 28, 1976 through October 19, 1976 only, is hereby ratified and reaffirmed.

WCB CASE NO. 76-6019

NOVEMBER 15, 1977

ROSIE L. PETERS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
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 permanent total disability for her back injury of June 4, 1974. The employer contends the award for 50% unscheduled disability by the June 23, 1976 Determination Order is adequate.

Claimant, at the time age 50, suffered a compensable injury to her back when she suffered an onset of pain when she straightened up from emptying a wastebasket. She had suffered previous back injuries in 1960 and 1966. In February, 1975 claimant underwent a laminectomy and disc removal at L3-4, L4-5, and L5-S1 together with nerve root decompression.

On January 5, 1976 the Orthopaedic Consultants found residuals of two laminectomies and one rhizotomy and two myelogram studies. They noted evidence, by history, of a chronic low back strain but found no radiculopathy. They considered claimant's condition to be stationary and that no further active treatment was necessary. It was their opinion that she could not return to her former occupation of janitor work, but she was able to do other work. Her total loss of function at that time was in the range of moderate, while the loss of function due to her industrial injury was mildly moderate.

On March 30, 1976, Dr. Grewe felt that claimant needed periodic medical attention, but that it would be beneficial if a service coordinator could help her return to gainful employment. He found her to be medically stationary on February 3, 1976. The claim was closed by Determination Order of June 23, 1976.

On August 10, 1976, Dr. Grewe noted that claimant was going to have difficulty returning to work as long as her husband remained an invalid; that taking care of him was perpetuating her distress.

The Referee found that claimant's physical condition precludes her from returning to work and that, although she had suffered previous back injuries, she was able to return to work after each of those episodes. He felt that she lacked motivation to return to work, but that she also had a lot of physical discomfort; that she was not well educated and obtaining employment would be extremely difficult for her.

The Board, after de novo review, finds no medical evidence in the record to support claimant's contention that she is permanently and totally disabled. All examining and treating doctors seem to agree that her disability falls in the mildly moderate category indicated by the Orthopaedic Consultants. Claimant has testified her willingness to work, but she has made no effort to secure employment. Her former employer has offered to let her work any hours that she could whether it be 3/4 of an hour or a full shift. She has not attempted to try this. At the present time, claimant is apparently receiving around \$1,000 in

free income per month and this may be a possible partial explanation of her lack of motivation to return to work.

The Board finds, based on the medical reports alone, that claimant has been adequately compensated by the award of 50% disability compensation granted by the Determination Order.

ORDER

The order of the Referee, dated March 30, 1977, is reversed.

The Determination Order of June 23, 1976, which granted claimant 160° for 50% unscheduled back disability is affirmed.

WCB CASE NO. 76-6619

NOVEMBER 15, 1977

LINDA L. REINWALD, CLAIMANT
Dye & Olson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appeal by Claimant

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which granted claimant 80° for 25% unscheduled low back disability. Claimant cross-appealed solely on the issue of the Referee's failure to place claimant under vocational rehabilitation. No briefs were filed.

Claimant sustained a compensable injury on August 12, 1975, at the age of 22, when she slipped and fell, hurting her lower back as she attempted to avert the fall. Dr. Atkinson diagnosed spondylolysis and spondylolisthesis of L5-S1 on October 15, 1975. Dr. Burr, upon referral from Dr. Atkinson, made the same diagnosis and recommended a conservative regime at that time. He continued to follow-up on claimant and indicated that she was stable on August 24, 1976, recommending that she return to work.

On December 10, 1975, Dr. Buza indicated that her examination was within normal limits and that conservative treatment was recommended at that time. On January 22, 1976, Dr. Burr noted that claimant was still suffering quite a bit of pain and that he had discussed possible surgical intervention with her, although he did not recommend it unless claimant felt she was so disabled that it was necessary.

The Orthopaedic Consultants examined claimant on April 14, 1976, finding spondylolisthesis, Grade I and an emotional disturbance. They felt she was not stationary and recommended a

psychological evaluation and counselling. After the completion of such a program, they felt she could return to her former occupation. Referral to vocational rehabilitation was unnecessary; they found her loss of function due to the injury to be minimal.

Dr. Maltby, in his report of June 17, 1976, felt that claimant was using her injury as a justification to solve some emotional problem and that once her claim was settled her symptoms would clear up. Dr. Burr, on September 24, 1976, indicated that claimant was still having low back discomfort, but she was much improved and her condition was stationary at that time.

She received a notice of non-referral to vocational rehabilitation in January of 1977.

The Referee found that there was no question that claimant had sustained a measure of permanent disability. He found that she was restricted in what she could do, based upon the medical reports of her treating physicians, Drs. Burr and Atkinson. He also found her to be entitled to vocational rehabilitation and, by sending a copy of his order to the Disability Prevention Division, indicated his recommendation that she be placed in an authorized program.

The Board, after de novo review, finds that the medical reports do not support the Referee's conclusion that claimant is either vocationally handicapped or entitled to a 25% permanent disability award. Dr. Burr, her major treating physician, found claimant's condition was much improved and did not place any restrictions on her activities. The Orthopaedic Consultants found her loss of function due to the injury to be minimal. Dr. Atkinson, who initially diagnosed her condition but did not follow up on her, was unable to state whether her condition was stable, but he thought she probably would not be able to return to any work which requires lifting, stooping, bending and straining. This did not seem to be the opinion of Dr. Burr or the Orthopaedic Consultants.

There is no evidence to indicate that claimant is vocationally handicapped and the Board does not recommend that she be placed in an authorized program. Based upon the medical evidence in the record, the Board concludes that claimant is entitled to an award of 48° for 15% unscheduled low back disability.

ORDER

The order of the Referee, dated June 8, 1977, is modified.

Claimant is hereby granted an award of 48° of a maximum of 320° for 15% unscheduled low back disability. This is in lieu of the Referee's order, which is affirmed with respect to the award of a 25% attorney's fee to claimant's attorney, payable out of the compensation claimant shall receive as paid, to a maximum of \$2,000.

WCB CASE NO. 77-221

NOVEMBER 15, 1977

JOHN SLOWICK, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
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 total disability for his right shoulder problems.

Claimant had worked for the employer since September, 1951; he gradually developed right shoulder problems for which he filed a claim on September 10, 1975. The initial diagnosis, by Dr. Goodwin, was bursitis of the right shoulder. Claimant had suffered a previous industrial accident on August 9, 1971 at which time he lost four fingers of his left hand. Because of this, his job was changed and he was given one of the lightest jobs at the company. Claimant did not immediately relate his shoulder condition to his work activities until Dr. Goodwin indicated that it was caused by his regular hammering duties on the job.

Claimant was offered a job by his employer which involved driving a pickup and delivering parts to various plant locations. He refused to attempt this work because he was suffering extreme pain and he was afraid the job would cause his shoulder pain to worsen if he wasn't careful.

On January 12, 1976 Dr. Pasquesi diagnosed claimant's condition as subacute supraspinatus tendinitis of the right shoulder. He felt claimant's condition was not yet stationary, but that possibly he could do the work the employer offered him while undergoing treatment.

On February 9, 1976 Dr. Courogen performed an arthrography on claimant's shoulder and diagnosed tear of the rotator cuff. In August 1976 the doctor indicated that claimant would probably have rather severe restrictions if he were to return to work and that he might even require vocational rehabilitation. The Disability Prevention Division denied claimant assistance as it did not feel that claimant would benefit from such services as it could offer claimant.

On November 16, 1976, Dr. Courogen indicated that claimant had moderate discomfort of the shoulder while trying to sleep and with moderate activity. He had restricted rotation of the shoulder and he was in a program of gentle active exercise on his own. Dr. Courogen found claimant's condition to be medically stationary at that time.

A Determination Order dated January 5, 1977 granted claimant 160° for 50% unscheduled right shoulder disability.

Claimant is now 60 years old with a high school education. He has no specialized training for any white collar work. He was offered an alternative job by the employer, but since his surgery the owner of the plant sold the company and the Portland plant was shut down.

The Referee concluded, without actually saying so, that claimant's condition was in an odd-lot status and several things needed to be considered. The fact that the employer's mill shut down is of concern in this case because had it not been it would have afforded claimant a chance to work in a "sheltered" situation. The Referee was uncertain why claimant was denied vocational rehabilitation services, although his age could have been a consideration. He concluded that claimant's age, experience and training, when combined with his physical disabilities in his shoulder and left hand, would preclude him from obtaining any gainful or suitable employment and, therefore, claimant is permanently and totally disabled.

The Board, after de novo review, does not find claimant to be permanently and totally disabled. Even though claimant's former place of employment is no longer in operation, that does not necessarily preclude him from working somewhere else. Claimant has a substantial background in the lumber business and the Board is confident that there are some jobs he could perform.

Claimant has shown little motivation in seeking employment. It is apparent that he is enjoying his retirement and has very little desire to try to obtain a job he can handle. None of the medical reports indicate that claimant is permanently and totally disabled although it is evident that he has restrictions and has suffered a severe disability.

The Board concludes that an award for 80% would adequately compensate claimant for his loss of wage earning capacity. He is not permanently and totally disabled.

ORDER

The order of the Referee, dated May 20, 1977, is modified.

Claimant is hereby granted 256° of a maximum of 320° for 80% unscheduled permanent partial disability for injury to the right shoulder. This is in lieu of the award granted by the Referee.

KERRY SMITH, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on November 18, 1967 diagnosed as a comminuted fracture of the right radius. The claim was initially closed by a Determination Order, dated October 8, 1968 which awarded claimant compensation for 15% right forearm. Claimant's aggravation rights have expired. A Board's Own Motion Determination issued February 18, 1976 awarded claimant 30% of the right arm in lieu of all awards previously granted.

Claimant subsequently developed a measure of traumatic arthritis at the distal radioulnar joint. The Fund voluntarily commenced time loss compensation on June 29, 1976. On June 30, 1976 claimant underwent a Darrach resection which consisted of removal of the distal 3/4 inch of the right ulna. He was released for regular work as a truck driver on November 29, 1976 and the Fund terminated payment of time loss at that time.

On July 26, 1977 the Fund requested a determination of claimant's claim based on Dr. Holbert's closing examination of July 11, 1977 which indicated that claimant's right arm function was improved as a result of the ulnar resection. It was noted that claimant's range of motion in the right elbow and wrist and his right forearm rotation were improved when compared with his pre-ulnar resection performance.

The Evaluation Division of the Board finds that claimant should be compensated for time loss from June 29, 1976 through November 28, 1976, but that he has been awarded an adequate amount of permanent disability.

ORDER

Claimant is hereby awarded temporary total disability benefits from June 29, 1976 through November 28, 1976, less time worked. Said benefits have been paid to claimant by the Fund.

WCB CASE NO. 76-7112 NOVEMBER 15, 1977

GERALD C. WILLS, CLAIMANT
Ryan Lawrence, 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 claimant's claim for aggravation.

Claimant sustained a compensable injury to his low back on June 22, 1971. After a series of operations, claimant was awarded 80° for 25% unscheduled low back disability by a Determination Order. Claimant appealed contending he was permanently totally disabled. The Referee affirmed the Determination Order. By an Order on Review issued by the Workmen's Compensation Board in July 1975, claimant received an increase in compensation for a total award of 160° for 50%. This was upheld by the circuit court and the Court of Appeals.

In May of 1976 claimant saw Dr. Thompson with complaints of significant pain in his back and a transcutaneous stimulator was recommended. By letter of October 4, 1976 Dr. Thompson stated that it was difficult to pinpoint whether claimant had actually sustained an aggravation of his 1971 injury, but it was his feeling that claimant's condition had worsened.

The November 29, 1976 report of the Orthopaedic Consultants indicated that they found residuals of spinal fusions, but no neuropathy and evidence of functional overlay. They found his condition to be stationary and indicated that he could not return to his former occupation, although he could perform lighter work. It was their conclusion that claimant had been adequately compensated by the previous award for 80° for 50% back disability. By a memo to the Fund, Dr. Thompson indicated his agreement with the opinion of the Orthopaedic Consultants. Based on these reports, the Fund issued its denial of claimant's aggravation claim on December 21, 1976.

The Referee found that a comparison of the testimony of claimant and his wife given at the hearing with their testimony given at the 1975 hearing revealed that claimant's limitations seem to be the same now as they were then. He detailed the Court of Appeals skepticism concerning Dr. Thompson's reports, which skepticism he seemed to share.

The Referee's conclusion, based on the similarity in the testimony offered at the two hearings, the apparent question as to the accuracy of Dr. Thompson's opinion and the report of the Orthopaedic Consultants, was that claimant has received adequate compensation for his present disability.

The Board, after de novo review, concurs with the findings of the Referee. The medical reports in the record do not show that claimant has sustained an aggravation of his 1971 industrial injury.

ORDER

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

NOVEMBER 16, 1977

JOSEPH J. BERNASKY, CLAIMANT
Souther, Spaulding, Kinsey, Williamson
& Schwabe, 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 claimant's claim for his emphysema condition, finding also that his condition as a result of congestive heart failure 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 June 2, 1977, is affirmed.

NOVEMBER 16, 1977

DONNA COLIRON, CLAIMANT
Tooze, Kerr, Peterson, Marshall
& Shenker, 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 an increase of 32° for a total award of 128° for 40% unscheduled low 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 May 13, 1977, is affirmed.

JOHN H. COOMBES, CLAIMANT
Frank J. Mowry, Claimant's Atty.
Gerald C. Knapp, 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 him 320° for 100% unscheduled disability. Claimant contends that he is permanently and totally disabled.

Claimant, at the age of 34, sustained a compensable injury to his back on August 19, 1968. Following a fusion and a long period of recuperation under the care of Dr. Cherry, claimant was granted 112° for 35% unscheduled disability. His claim was reopened by a Referee's Opinion and Order in December of 1975 after his condition was diagnosed as pseudoarthrosis and surgery was performed. A Second Determination Order of June 26, 1976 granted claimant 128° for 40% low back disability for a total award of 240° for 75% permanent disability.

Claimant attempted to retrain under an authorized program of vocational rehabilitation in 1970 and 1971 but surgery for unrelated problems interfered. He was able to find jobs without this aid until March, 1974 when he moved to California. Between July, 1975, the date of claimant's second fusion, and July, 1976, the date of the Second Determination Order, claimant made a very commendable attempt to secure employment, but was unsuccessful. After July, 1976, he did not try to get work.

Claimant saw Dr. Cherry in January of 1976 with complaints of worsened low back and left leg pain since his February, 1975 fusion. Upon examination, the doctor found claimant to be severely disabled at that time.

Dr. Touton examined claimant in March of 1976 and felt that claimant's condition was stationary at that time. He indicated that claimant would be unable to participate in any work involving heavy lifting, but he felt that the workman could be retrained for a more sedentary type job.

Dr. Cherry indicated on October 12, 1976 that claimant has pseudarthrosis of the fusion at L3-4, severe low back strain and sciatic nerve involvement, left leg. He doubted if claimant could be retrained for an occupation which he could perform and found him to be totally and permanently disabled.

Apparently claimant then went to California to try to obtain work, but the rehabilitation services there refused to attempt to rehabilitate him as they felt there was little

chance of success. After an extensive examination in February of 1977, Dr. Cherry again reiterated that claimant was totally and permanently disabled as far as work is concerned.

The Referee found that claimant's disabilities were severe but felt that he could perform light work. She relied on the medical opinion of Dr. Touton who indicated that claimant could be retrained for light work. She also felt that claimant did not show sufficient motivation to entitle him to permanent total disability compensation in an odd lot status. The Referee did find, however, that, based on claimant's substantial physical impairment, age, education, skills and training, he was entitled to a maximum award of permanent partial disability.

The Board, after de novo review, finds that claimant's entitlement to an award for permanent total disability is not because he comes within the odd lot category. The medical evidence, especially the very persuasive opinion of Dr. Cherry, indicates that claimant's physical impairment is such by itself as to justify an award for permanent total disability for his August 1968 industrial injury.

ORDER

The order of the Referee, dated February 25, 1977, is modified.

Claimant is found to be permanently totally disabled from the date of this order.

Claimant's attorney is granted as a reasonable attorney's fee for his services in connection with this Board review a sum equal to 25% of the compensation granted claimant by this order, payable from said compensation as paid, not to exceed \$2,300 in the aggregate, i.e., including the attorney's fee granted by the Referee in her order.

WCB CASE NO. 76-6149

NOVEMBER 16, 1977

MARY EVANS, CLAIMANT

Pozzi, Wilson, Atchison, Kahn &

O'Leary, 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 her a total award of 48° for 15% unscheduled low back disability. Claimant contends that she is entitled to temporary total disability benefits retroactive to July 8, 1976

in addition 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 February 28, 1977, is affirmed.

WCB CASE NO. 76-1239

NOVEMBER 16, 1977

SHIRLEY A. GARLAND, CLAIMANT
Robert Gardner, Claimant's Atty.
William Replogle, 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 claimant's claim to it for her cervical condition for acceptance and payment of compensation to which she is entitled. The employer was also ordered to reimburse claimant for costs incurred for the taking of the deposition of Dr. Tsai.

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 June 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. 76-5683

NOVEMBER 16, 1977

ROBERT J. JONES, CLAIMANT
Dye & Olson, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the Referee's Interim Order which found it responsible for payment of a reason-

able attorney's fee to claimant's counsel for his services in connection with this claim. By order of the Referee entered shortly thereafter, claimant's counsel was granted \$850 as a reasonable fee.

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

ORDER

The Interim Order of the Referee, dated February 14, 1977, and his final Order, dated February 24, 1977, are 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. 76-5389

NOVEMBER 16, 1977

PATRICK KLEIN, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
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 48° for 15% unscheduled low 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 March 23, 1977, is affirmed.

WCB CASE NO. 76-2322

NOVEMBER 16, 1977

JULIE LaSENE, CLAIMANT
Charles Paulson, Claimant's Atty.
Elden Rosenthal, Claimant's Atty.
G. Howard Cliff, 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 February 9, 1977 Determination Order which awarded an additional 5% unscheduled disability for a total award of 32% for 10% low back disability. Claimant contends that this award is 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. This conclusion is based primarily on the similarity of awards for the same type of injury when comparing other cases.

ORDER

The order of the Referee, dated April 8, 1977, is affirmed.

WCB CASE NO. 77-73

NOVEMBER 16, 1977

EDITH L. MOORE, 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 carrier's denial of claimant's aggravation 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 May 19, 1977, is affirmed.

WCB CASE NO. 76-6817

NOVEMBER 16, 1977

LARRY D. WRIGHT, CLAIMANT
Allen G. Owen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Stipulation and Order

IT IS HEREBY STIPULATED AND AGREED by and between the above-named claimant, acting through his attorney Allen G. Owen, and the State Accident Insurance Fund, acting through Lawrence J. Hall of its attorneys, that all issues raised in claimant's request for hearing herein including his request for reopening

under own motion jurisdiction be settled, subject to the approval of the Worker's Compensation Board, as follows:

That based upon the reports procured and submitted by claimant's counsel indicating that claimant's industrial conditions were no longer stationary but in need of further treatment as of January 9, 1977, the claim shall be reopened for medical care and temporary total disability payments pursuant to claimant's own motion petition under the provisions of ORS 656.278 as of January 9, 1977; SAIF's responsibility specifically includes all problems concerning both the low back and the dorsal column stimulator surgically implanted previously in the course of this claim, and the recent removal of same; but specifically excludes responsibility for treatment or disability attributable exclusively to thoracic outlet syndrome, carpal tunnel syndrome, or other physical problem or symptoms of either arm.

It is further agreed that claimant shall not be prejudiced from presenting additional medical explanation or evidence concerning relationship of a thoracic outlet syndrome, carpal tunnel syndrome or other physical problem or symptoms of the arms and making a formal claim to SAIF for acceptance of responsibility of same, in which event SAIF will then consider all of the evidence and either accept or reject (by letter of partial denial) responsibility for thoracic outlet syndrome, carpal tunnel syndrome or other physical problem or symptoms of the arms.

IT IS FURTHER STIPULATED AND AGREED that claimant's request for hearing shall be dismissed, and any balance of claimant's permanent partial disability award payments which have not been paid as of the execution hereof shall be suspended while the claim is open as herein provided, and reinstated when claimant is again medically stationary and the claim closed, and

FURTHER, that claimant's counsel, Allen G. Owen, shall be paid 25 percent of the temporary total disability compensation payable hereunder but not to exceed the sum of \$2,000 as a reasonable attorney fee for his services herein, the same to be a lien upon and payable out of such additional compensation.

IT IS SO ORDERED and further ORDERED that claimant's request for hearing is hereby dismissed.

MYRTLE BRISCOE, CLAIMANT
Cottle and Howser, 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 Determination Order dated June 21, 1976 which had granted claimant an award of compensation for 60% unscheduled low back disability. Claimant contends that she is permanently and totally disabled.

Claimant, on June 23, 1972, while employed as a receptionist and veterinarian's assistant, sustained a compensable injury as a result of a dog bite. The initial diagnosis made on the same day was of laceration of anterior and post left leg. The lacerations became infected and caused claimant considerable pain; also, during the healing process, claimant walked with a limp which ultimately caused claimant to have low back problems as well as pain in her left hip and left leg.

Drs. Campagna and Hagens performed a decompressive laminotomy, L4-5 left, with removal of extruded L4 disc left, on June 21, 1974. Almost one year later Drs. Hagens and Dunn performed another laminotomy and a foraminotomy and also a posterior two level lumbar fusion between the L4 and S1 and S2 segments.

When claimant was examined by the Orthopaedic Consultants on January 29, 1976, her chief complaints were constant pain and discomfort in both legs and in the lumbosacral region and pain in both hips, especially the left hip. At that time she walked without a limp. The diagnosis at that time was chronic lumbar sprain, superimposed upon degenerative disc disease at L4 and L5, residual pain at L4 level, slight residual bilateral leg pain and bilateral leg pain, lateral thighs and calfs. It was their opinion that claimant was medically stationary; her total loss of function in the unscheduled area was moderate and her loss of function of the leg was minimal. Claimant had little chronic fibrous capsulitis of the left hip due to arthritis; it was their opinion that claimant could carry on some other occupation if she avoided any heavy lifting. On November 15, 1976, Dr. Hagens advised that he did not think claimant would ever be a candidate for continued work, even sedentary.

Claimant is 61 years old and has a work background which consists of a variety of different types of work. After claimant had submitted to a Minnesota Multiphasic Personality Inventory and had been evaluated by the Eugene Psychological Services, the consensus of opinion was that claimant could perform such jobs as desk clerk, bench assembly operator and telephone

central office operator and other similar types of work. However, Mr. Robert Adolph, a vocational consultant, concluded, after evaluating claimant, that because she had not worked for three years and because of her advanced age and her various disabilities that it was problematical whether claimant could, in fact, sustain an eight hour a day, 40 hour a week regimen.

The Referee correctly stated that the evaluation of a workperson's unscheduled disability is determined by measuring the workperson's loss of earning capacity and in making such measurement factors such as age, education, intelligence, training, trainability, and ability to obtain and hold employment in the broad labor market must be considered. He gave great weight to the opinion expressed by the Orthopaedic Consultants and concluded that the opinion expressed by Dr. Hagens, claimant's treating physician, was not supported by the medical evidence.

He concluded that although claimant could not return to her former occupation and retrainability was contraindicated, there were several other occupations which claimant can do in spite of her present condition. He therefore affirmed the Determination Order.

The Board, on de novo review, finds that claimant is permanently and totally disabled. Claimant cannot return to her old job as a receptionist and veterinarian's assistant and this is the job which would afford her the best chance to continue in the labor market. The Board finds it very doubtful that claimant could go back to any type of suitable and gainful employment, taking into consideration claimant's age and the severity of her unscheduled disability, her work background and education. It is not realistic to find claimant a good candidate for retraining.

ORDER

The order of the Referee, dated June 24, 1977, is reversed and claimant is to be considered permanently and totally disabled as of the date of this order.

Claimant's counsel is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the compensation granted claimant by this order, payable out of said compensation as paid, not to exceed \$2,300.

NOVEMBER 18, 1977

EARLINE E. CAMPBELL, CLAIMANT
Russell Bevans, 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 claimant's low back claim to it for acceptance and payment of medical services necessary in the treatment of her condition. Temporary total disability benefits were also ordered commencing January 15, 1974. Claimant's claim for payment of compensation in connection with her right ankle injury of July 1973 or her consequential thrombophlebitis condition was denied by the order of the Referee.

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 8, 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 \$250, payable by the Fund.

NOVEMBER 18, 1977

JIMMY FAULK, CLAIMANT
Donald Miller, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Employer's Atty.
SAIF, Legal Services, Defense Atty.
Order

On April 25, 1977 the Workers' Compensation Board received a Stipulation signed by the parties involved in the above entitled matter which requested a determination of whether or not the Workers' Compensation Board has jurisdiction to conduct a hearing to determine the responsible carrier in the above entitled matter and, if so, to direct that such a hearing be convened.

The Board, having determined that it does have jurisdiction, hereby remands the above entitled matter to the Hearings Division to conduct a hearing on the issue of which carrier is responsible for claimant's condition on account of aggravation.

This issue shall be heard at the same time the issues presented in WCB Case No. 77-3712 are heard.

ORDER

The above entitled matter (WCB Case No. 74-4505) is hereby remanded to the Hearings Division for a determination, after a hearing, of which carrier is responsible for claimant's condition, on account of aggravation. This order is entered nunc pro tunc April 27, 1977.

WCB CASE NO. 76-3761

NOVEMBER 18, 1977

PEGGY FORD, 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 seeks Board review of the Referee's order which approved the July 19, 1976 denial by the State Accident Insurance Fund of claimant's request to reopen her claim.

Claimant contends that the injury suffered by her on April 30, 1975 was a material contributing cause to the resulting disability and, therefore, was compensable; furthermore, that she was entitled to compensation for the surgery to her shoulder and for payment of temporary total disability benefits from April 12 through July 7, 1976 and an award for permanent partial disability. She seeks penalties and attorney's fees.

The Fund does not question the fact that claimant suffered an injury on April 30, 1975 which was compensable; its denial was based on its contention that her condition on June 18, 1976 when she requested that her claim be reopened was not related to that injury.

Claimant's injury was first treated by Dr. Gail, an osteopathic physician, on May 1, 1975. She continued to treat claimant until May 15 when she was reported to be medically stationary. Claimant was released for work on May 19, 1975 and Dr. Gail again reported claimant medically stationary during June 1975 and again released her for work on June 9, 1975. In July 1975, Dr. Gail reported, "No residuals resulting from this injury". Claimant's claim was closed by Determination Order, dated August 27, 1975, which granted claimant compensation for temporary total disability only and from April 30, 1975 through June 1, 1975, less time worked.

Claimant worked steadily until March 25, 1976 when she saw Dr. MacKay who reported on March 26, 1976 that claimant would

be disabled for the next two weeks for shoulder, neck and arm physical therapy. Claimant's shoulder condition continued to worsen and Dr. MacKay recommended that she see Dr. Bachhuber. Dr. Bachhuber, after examining claimant, felt her symptoms arose from an old marginal articular fracture and that her work as an aluminum window sash glazer, her occupation at that time of the injury, did not produce her symptoms. He released her for work on April 12 but apparently claimant was able to work only one day because of the pain. On May 8, 1976 Dr. Bachhuber performed surgery, excising the lateral clavicle. In his report of June 14, 1976, Dr. Bachhuber stated that at the time of surgery he had discovered that claimant had an ununited fragment of the lateral clavicle comprised of approximately 40% of the AC joint surface and there were also associated degenerative changes. It was his opinion that her condition could not have been caused by the injury at work (Defendant's Exhibit 17).

On June 28, 1976, the Second Determination Order awarded claimant compensation for temporary total disability from March 25, 1976 through April 11, 1976. On June 18, 1976 claimant's counsel requested the Fund to reopen claimant's claim. He enclosed Dr. Bachhuber's report of June 14, 1976 and Dr. MacKay's report of March 26, 1976. On July 19, 1976 the Fund denied any work relationship to claimant's present condition.

The Referee found that claimant's testimony was contrary to the undisputed medical finding of pre-existing shoulder injury and that she admitted to a fall from a horse and a subsequent knee injury in 1972, although she denied the pre-existing shoulder symptoms.

The Referee, relying on Dr. Bachhuber's report and testimony on deposition, found claimant's testimony to be questionable. The Fund had already accepted two alleged episodes of symptoms from the pre-existing injury arising during work and had compensated claimant therefor. He concluded that claimant was not entitled to any further temporary total disability compensation nor was the Fund responsible for the operation that corrected the underlying pre-existing non-industrial injury.

The Referee further concluded that claimant had no disability attributable to the April 30, 1975 incident and that the carrier had not failed to accept or deny or to pay compensation. He therefore approved the denial of July 19, 1976.

The Board, on de novo review, agrees with the majority of the Referee's findings and conclusions, however, the Board feels that the Fund should be responsible for payment of temporary total disability benefits to claimant from April 13, 1976, the date claimant ceased to work, to July 19, 1976, the date the Fund denied claimant's request to reopen her claim.

The Board finds no medical evidence to support a conclusion that claimant has received permanent partial disability

as a result of the April 30, 1975 incident and, as did the Referee, gives great weight to Dr. Bachhuber's opinion that the surgery performed by him was to correct a pre-existing shoulder condition and, therefore, the Fund should not be responsible for any costs or time loss resulting from such surgery.

The Board finds that the denial was timely made and no penalties or attorney's fees should be assessed against the Fund.

ORDER

The order of the Referee, dated November 1, 1976, is modified by granting claimant compensation, as provided by law, from April 13, 1976 to July 19, 1976; in all other respects the Referee's order is affirmed.

Claimant's counsel is awarded as a reasonable attorney's fee for his services in connection with this Board review a sum equal to 25% of the compensation for temporary total disability granted to claimant by this order, payable out of said compensation as paid, not to exceed the sum of \$300.

WCB CASE NO. 74-1475

NOVEMBER 18, 1977

WALTON A. GARDNER, CLAIMANT
Bedingfield, Joelson, Gould & Barron,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Remand

Claimant seeks Board review of the Referee's Opinion and Order which dismissed his request for hearing on a denied claim for aggravation.

The Referee found that claimant had sustained an industrial injury on January 23, 1969. The claim was closed with an award which claimant felt was inadequate. He requested a hearing. After said hearing, it was the opinion of the Referee that claimant's condition of rheumatoid arthritis was not a causal result of his industrial accident; however, he increased the award for permanent disability for the low back condition arising from the industrial accident to 128°.

On January 18, 1974, claimant requested that his claim be reopened for aggravation. The request was denied on the grounds that the condition of rheumatoid arthritis had been fully adjudicated, notwithstanding the fact that claimant's claim was for the aggravation of claimant's spondylolisthesis back disorder which was the basis of the initial award of compensation to claimant as a result of the 1969 injury.

The Referee states only that the medical reports relied upon by claimant in an effort to prove an aggravation indicate that his present disability is a direct result of the rheumatoid arthritic condition. The Referee finds that claimant relied upon the findings of Dr. Hauschildt to support his contention that the rheumatoid arthritis stemmed from the industrial injury and has become aggravated.

The Referee then completes his order by stating that the question of the causal relationship of the rheumatoid arthritis has been fully adjudicated, therefore, it is immaterial whether or not that condition has, in fact, become worse. Based upon that, the motion to dismiss made by the Fund was granted.

The Board, on de novo review, finds that the medical reports submitted by claimant referred both to his rheumatoid arthritic condition and his spondylolisthesis and, in fact, Dr. Hauschildt's report, dated November 14, 1975, which was submitted to the Referee as Exhibit 33, stated that the spondylolisthesis had graduated from a Grade II in 1973 to a Grade III in October, 1975.

A reading of the brief indicates that at one time claimant's counsel considered withdrawing his request for this hearing before the Referee and filing a new claim for aggravation, specifically referring to the low back condition of claimant, however, after discussion "off the record", claimant's counsel changed his mind and the Referee indicated that he would continue the hearing for the purpose of receiving further medical evidence, not stating that such medical evidence was limited to any particular condition.

On March 19, 1976 a report from the Orthopaedic Consultants was received (Defendant's Exhibit 1) but a promised report from Dr. Hauschildt was never received and on February 24, 1977 the Referee closed the hearing and wrote the Order of Dismissal.

The Board concludes that this matter has not been fully and completely heard; the issue of compensability of claimant's claim for aggravation which was filed on January 18, 1974 and denied by the Fund on February 20, 1974 was not based solely on aggravation of the rheumatoid arthritic condition and, therefore, the claimant has never been given the opportunity to present evidence on the issue of the aggravation of the back injury (spondylolisthesis).

The Board concludes that pursuant to ORS 656.298(5) the above entitled matter should be remanded to Referee Raymond S. Danner to take evidence on the issue of whether or not claimant has aggravated the back injury (spondylolisthesis) for which he was originally compensated.

ORDER

The order of the Referee, dated March 18, 1977, is hereby

set aside and the case is remanded to the Hearings Division with instructions to set the matter for hearing before Referee Raymond S. Danner for the taking of evidence on the issue of whether claimant's present condition insofar as it relates to his low back represents a worsening since the last award or arrangement of compensation for such disability.

WCB CASE NO. 76-1286

NOVEMBER 18, 1977

BRUCE LATTIN, 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 dismissed his request for hearing.

The Board, on de novo review, finds no inaccuracies in the recital of facts contained in the first four paragraphs of the Referee's order.

It agrees with the conclusion reached by the Referee that claimant's request for hearing should be dismissed inasmuch as the sole issue presented by the claimant for the Board's consideration was whether or not claimant was entitled to payment of benefits for permanent and total disability between the time of his industrial injury on January 17, 1974 and the date of the judgment order entered over the signature of Judge Sulmonetti on February 6, 1976.

However, the Board feels it is necessary to clarify the Referee's Opinion and Order, a copy of which is attached hereto, by stating that claimant is entitled to receive benefits for permanent and total disability from February 6, 1976, the date of the judgment order to June 14, 1976, the date the Oregon Court of Appeals reversed that judgment order by finding that claimant had failed to prove that his myocardial infarction constituted a compensable injury. The evidence indicates that the Fund commenced payment on the date of Judge Sulmonetti's order and, presumably, ceased paying such benefits soon after the entry of the Court of Appeals decision on June 14, 1976.

ORDER

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

NOVEMBER 18, 1977

EUGENE MILLER, CLAIMANT
Bailey, Welch, Bruun & Green,
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 both of claimant's aggravation claims to it for acceptance and payment of compensation until closure 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 March 31, 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 Fund.

NOVEMBER 18, 1977

RALPH C. MINOR, CLAIMANT
Larry Dawson, Claimant's Atty.
G. Howard Cliff, Defense Atty.
Order

On November 8, 1977, the Board received a request from claimant to present new evidence in the above entitled matter for the reason that such evidence was not available at the time of the hearing before the Referee.

The Board, after due consideration, finds there is nothing contained in the request to justify remanding the matter to the Referee. Claimant has failed to provide the Board with any material evidence which was not considered by the Referee at the time of the hearing.

ORDER

The request made by claimant to present new evidence is hereby denied.

LUCINE T. SCHAFFER, CLAIMANT
Brian L. Welch, Claimant's Atty.
Gearin, Cheney, Landis, Aebi &
Kelley, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks Board review of the Referee's order affirming the Determination Order dated September 23, 1976. Claimant contends that her claim was prematurely closed.

Claimant suffered an injury to her right knee on June 21, 1972 and was seen, initially, by Dr. Weare who diagnosed a sprained right knee with tear of the lateral collateral ligament and laxity of the patellar ligament. On November 28, 1972 claimant underwent an arthrotomy and right patellectomy. She returned to work on a trial basis on May 1, 1973 but had difficulty working. She was then seen by Dr. Tregoning, an orthopedic surgeon, on September 25, 1973. Claimant had improved insofar as the quadriceps function was concerned but still continued to have minimal swelling about the knee. He advised her to continue exercise activity, but he felt no further treatment was necessary. However, she did have some permanent disability as a result of a loss of her patella. The claim was closed by the Determination Order dated October 9, 1973 with an award for 25% loss of the right leg.

Claimant was subsequently seen by Drs. Coughlin, Garver, and Carroll, all orthopedic surgeons. Claimant had been working since May 1, 1973, although she was required to take pain pills on a daily basis. On November 15, 1974, Dr. Carroll, after an arthrogram of the knee joint, found no significant retention of cartilage on the medial side of the joint. He thought claimant's overall results from the surgery were good, that she had typical lingering complaints associated with weakness in the quadriceps soon after the patellectomy. He recommended continued work and activity with the quadriceps muscle building exercise and concluded claimant had a residual disability to her knee which had to be accepted along with the benefits gained from the patellectomy.

On February 21, 1975 claimant was examined by Dr. James. At that time claimant was still working in the mill at the job which required extensive use of her right lower leg and she continued to have persistent pain in her right knee and recurrent swelling and instability. On June 6, 1975 an exploratory arthrotomy was done and on June 12 a patella ligament transfer was done. During the operation her knee was explored and a patella mechanism realigned.

On January 13, 1976 Dr. Carroll, after examining claimant, found she still had complaints of increasing pain in her

knee with marked atrophy of the right thigh muscle and considerable weakness in these muscles which resisted extension. Claimant was still taking physical therapy and had not returned to work since the surgery. No further surgery was recommended although physical therapy and use of a knee brace was indicated. Dr. Carroll recommended claimant attempt to obtain light work for approximately a month and then that her claim be closed with a finding of moderate residual disability at the knee joint. He allowed claimant to return to her regular job on a trial basis as of May 14, 1976 and recommended that she be retrained for a lighter, more sedentary type of employment. He again saw claimant on July 6, 1976. At that time he felt her condition was stable with considerable disability in the knee joint and recommended claim closure; he again recommended retraining for lighter work. Claimant worked between May 17 and July 9, 1976 but then quit because of continued pain in the right leg, hip and back.

On July 21, 1976, Dr. Weare found claimant was unable to work but, inasmuch as Dr. Carroll was claimant's primary physician, he felt Dr. Carroll should be the one to state whether or not the present employment should be injurious to her. On September 23, 1976 the Second Determination Order awarded compensation for temporary total disability from May 5 to May 16, 1976 and from July 9 to August 19, 1976.

On October 14, 1976, Dr. Weare indicated that claimant was unable to work and had been unable to work since May 5, 1975 to date, with the exception of the period between May 17 and July 9, 1976.

Claimant was then referred to the Disability Prevention Center for treatment and consultation. After examining claimant, Dr. Halferty, at the Center, recommended further therapy. The physical therapy that claimant was receiving at the time of the hearing was helpful to her and at the time of the hearing she also was on a Disability Prevention Division program. She had not seen Dr. Carroll or Dr. James since July although Dr. Weare saw her regularly each week. While in the program at the Center, claimant's meals and lodging were provided on weekdays under a special maintenance and on weekends she was entitled to return to her home on a mileage reimbursable basis of 14¢ a mile.

The Referee, relying upon Jackson v. SAIF, 7 Or App 109, found that claimant had been released by her doctor to return to regular work which is sufficient basis for termination by the carrier of payment of temporary total disability compensation. The present claim arose prior to the amendment of ORS 656.268 which requires that the workman must complete any authorized program of vocational rehabilitation prior to claim closure. At the time claimant's claim was presented the statute provided only that claimant should not have her claim closed nor any permanent awards, if any, made until her condition became medically stationary. In the opinion of the Referee, Dr. Carroll's statement that claimant's condition was stationary, when taken to-

gether with the statement made by Dr. Weare that Dr. Carroll, as claimant's primary physician, was the one who should determine her condition, was sufficient basis for the issuance of the Determination Order of September 23, 1976 and he affirmed the same.

The Referee found that claimant's entry into the Disability Prevention Center was for physical therapy and evaluation under the old law and therefore, her claim would not be submitted for further action pursuant to ORS 656.268. Once payment of temporary total disability benefits has been stopped, pursuant to the law, the employer is not required to reopen a case unless there is proper medical opinion to indicate a worsening of the worker's condition to the extent that it would require an award of compensation and that the worker's medical condition was not stationary and the worker would benefit from further treatment.

The Referee finds that Dr. Weare's statement does not indicate that claimant's claim should be reopened because of a worsening condition after she had become medically stationary, but merely attempts to refute the Determination Order on the question of disability. He found no obligation on the part of the carrier to reopen the claim for temporary total disability benefits based on Dr. Weare's statement; he further found that the claim was properly closed.

On de novo review, the majority of the Board disagrees with the conclusion reached by the Referee. The majority of the Board finds that the medical evidence indicates claimant's claim was prematurely closed by the Determination Order of September 23, 1976. Dr. Weare's opinion expressed in his October 14, 1976 letter and also the evident results from the treatment claimant received from Dr. Halferty at the Disability Prevention Center and still was receiving at the time of the hearing indicate that the physical therapy was improving claimant's condition and is certainly strong evidence that claimant's condition was not medically stationary at the time of the closure.

The majority of the Board concludes that the claim should be reopened as of August 20, 1976 and that payment of compensation for temporary total disability, as provided by law, plus payment for medical treatment should be made from that date until, based upon competent medical opinion that claimant's condition is medically stationary, closed pursuant to ORS 656.268. The majority of the Board finds that the events which transpired subsequent to Dr. Carroll's report indicate that he was in error when he found claimant's condition to be stable after examining her on July 6, 1976.

ORDER

The order of the Referee, dated February 10, 1977, is reversed.

Claimant's claim is remanded to the employer for pay-

ment of compensation, as provided by law, commencing August 20, 1976 and until closed pursuant to ORS 656.268.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in connection with this Board review a sum equal to 25% of the compensation which claimant may receive as a result of this order; provided, that should claimant receive only additional compensation for temporary total disability, the sum, which shall be payable out of said compensation as paid, shall not exceed the sum of \$500.

Chairman M. Keith Wilson dissents:

I would respectfully dissent from the majority opinion and would affirm the Referee's Opinion and Order in its entirety based upon the reasons set forth in said Opinion and Order.

/s/ M. Keith Wilson, Chairman

WCB CASE NO. 75-4382

NOVEMBER 18, 1977

WCB CASE NO. 75-5087

WCB CASE NO. 75-5088

In the Matter of the Compensation of
TERRY & THOMAS WOLFF, CLAIMANTS
and In the Complying Status of
WILLIAM & DONNA SMITH, EMPLOYERS
Terry Haenny, Claimant's Atty.
George Layman, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimants

Reviewed by Board Members Wilson and Moore.

The claimants seek Board review of the Referee's order which affirmed the carrier's denials of their claims for compensability.

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 22, 1977, is affirmed.

CARL BLAIR, CLAIMANT

Malagon, 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 dismissed his claim and ordered that all further compensation be suspended until claimant consents to further psychiatric examination. Claimant has contended that the Fund unreasonably resisted the payment of compensation (ORS 656.262(8)) and also that there was a de facto denial in the payment of compensation. The Referee found that the medical evidence, which was equivocal and conflicting would not support a finding that requiring a further psychiatric examination would be unreasonable nor was there any medical evidence that further psychiatric examination would be harmful to claimant, therefore, claimant's refusal to submit to a psychiatric examination required that compensation be suspended pursuant to ORS 656.325 until claimant consents to such examination.

The Board, after de novo review, affirms and adopts the conclusion reached by the Referee in his Opinion and Order, a copy of which is attached hereto and, by this reference, is made a part of the Board's order.

The Fund, under the provisions of ORS 656.325, has the right to require examination of the worker as long as such is not unreasonable and refusal by the worker to recognize that right and cooperate in submitting to such examinations by the worker is sufficient grounds to terminate his Workers' Compensation benefits, nevertheless, this claim was handled very poorly by the Fund and in the future such handling of claims of this nature will not be countenanced. It appears from the record that the treatment of claimant was ignored. Payment of compensation and strategy became the criteria for judgment rather than the treatment of the claimant. However, aside from this, the main issue remains that of whether or not the Fund's requirement for another psychiatric examination of claimant was totally unreasonable and the Board must agree with the Referee's conclusion that it was not.

ORDER

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

GEORGE E. FINNEY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on July 29, 1969 when he fell from a walkway while working in a sawmill. The diagnosis was fractures of the right tibia and fibula at the ankle. An open reduction and pin fixation were performed. The Determination Order of April 2, 1970 granted claimant an award of "20° for partial loss of the right foot".

Claimant's condition worsened and a subsequent fusion and re-fusion were performed in 1972 and 1973. Claimant was found to be stationary on April 16, 1975 with a severe disability. On May 30, 1975 a Determination Order granted him additional temporary total disability and 90° for 60% for loss of the right leg.

After an August 1975 hearing, the Referee awarded claimant an additional 30° for a total award of 120° for 80% loss of function of the right leg. Also, on the basis of Dr. Cohen's findings that claimant's hip and low back problems were related to his limp which was a direct result of the accident, claimant was awarded 64° for 20% unscheduled low back disability. The Board, in its Order on Review in March of 1976, affirmed the Referee's order.

After a further worsening, Dr. Cohen, on February 13, 1976, performed a triple arthrodesis to correct a varus deformity in the right foot. Dr. Cohen's final letter to the Fund on August 3, 1977, stated that claimant was still wearing an ankle brace and that he could not do work that required standing, bending, climbing or lifting. He found claimant's condition to be stationary but felt that claimant's working situation was very uncertain.

On August 9, 1977, the Fund requested a determination of claimant's claim from the Workers' Compensation Board. The Evaluation Division of the Board recommends that claimant be granted an award for temporary total disability from February 12, 1976 through August 3, 1977. They also felt that claimant was entitled to an additional 15° for loss of the right leg (a total award of 135°) and an additional 32° for unscheduled low back disability (a total award of 96°).

The Board concurs with the findings of the Evaluation Division.

ORDER

Claimant is hereby granted temporary total disability benefits from February 12, 1976 through August 3, 1977, less time worked.

Claimant is also granted 15° for loss of function of the right leg and 32° for unscheduled low back disability. These are in addition to, and not in lieu of, the previous awards granted claimant.

SAIF CLAIM NO. ZC 51193 NOVEMBER 22, 1977

GLENN FISHER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a left knee injury on December 8, 1966 when an iron bar fell across it fracturing the lateral tibial plateau. An open reduction was performed and further surgery in 1967 and 1969. He was granted compensation for 30% loss of function of the left leg by Determination Order of July 7, 1970. The second closure, after further surgery in 1974, granted him an additional award for 10%.

On November 13, 1975, Dr. Slocum, after seeing claimant, indicated that he felt a removal of the osteophytes over the lateral and medial facets of the patella would give claimant the most symptomatic relief. This surgery was performed on October 5, 1976 and the Fund reopened claimant's claim. Dr. Stanford's August 1, 1977 report indicated that claimant had returned to work, but he was uncertain of the exact date. He found that claimant's condition was much improved after the surgery.

On October 10, 1977, the Fund requested a determination of claimant's claim from the Worker's Compensation Board. The Evaluation Division of the Board felt that claimant had been adequately compensated by the award for 40% disability previously granted. They did find, however, that claimant was entitled to an award of temporary total disability from October 4, 1976 through August 1, 1977, less time worked.

The Board concurs with the recommendation of the Evaluation Division.

ORDER

Claimant is hereby granted an award of temporary total disability compensation from October 4, 1976 through August 1, 1977, less time worked.

BURTON L. KNUTSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered an injury to his right foot on August 9, 1967 when log tongs were dropped on it. As a result his right great toe was amputated at the proximal portion of the first metatarsal and fractures were reduced of the 2nd and 3rd metatarsals. In June 1968 claimant was awarded 81° for 60% loss of the right foot. Later, on November 9, 1970, Dr. Fry prescribed a metatarsal pad.

Dr. Fry requested that the claim be reopened in October of 1974 as claimant had varus drift, 2nd toe, and a possible condylectomy of the 4th metatarsal was necessary. Time loss was commenced by the Fund on February 14, 1975. Surgery was performed by Dr. Fry on August 12, 1975.

On April 22, 1976 Dr. Fry reported that a trial of transcutaneous nerve stimulator seemed to help. Further surgery was performed on May 10, 1977 and on July 28, 1977 Dr. Fry stated that claimant continues to use a cane and walks flat footed on the right side. Claimant also continues using the TNS with flexible electrodes. Dr. Fry did not think further medical treatment was indicated.

On August 9, 1977 the Fund requested a determination of this claim by the Workers' Compensation Board. The Evaluation Division of the Board recommends that claimant be awarded additional compensation for temporary total disability from February 14, 1975 through July 28, 1977 and an additional award of compensation for 15% loss of function of the right foot. The Board concurs with this conclusion.

ORDER

Claimant is hereby granted compensation for temporary total disability from February 14, 1975 through July 28, 1977, less time worked. This compensation, which is in addition to any compensation for temporary total disability previously paid to claimant, has apparently been paid by the Fund.

Claimant is granted 20.25° for 15% loss of function of the right foot. This award is in addition to, and not in lieu of, all previous awards granted claimant.

MARJORIE L. PETERSEN, CLAIMANT
Susan Elizabeth Reese, Claimant's Atty.
Merlin L. Miller, Defense Atty.
Bonafide Dispute Stipulation and Settlement

COME NOW the parties, Marjorie L. Peterson, Claimant, in person and through her attorney, Susan Elizabeth Reese, and the employer Tektronix Inc., and its insurance carrier, Travelers Insurance Co., acting by and through their attorney, Merlin L. Miller, and recite, stipulate and petition as follows:

On or about October 4, 1968, the claimant was standing on a step stool, checking water in a cocoa machine in the course and scope of her employment. She lost her balance and started to fall, but kept from falling by grabbing something, possibly the top step of the stool. In the process she injured the middle and little fingers of her left hand and also injured the upper part of her back in the cervical area. A claim was presented and benefits were paid. The claim was closed on August 13, 1960 and June 15, 1971, following which there was a protracted period of litigation involving the extent of the claimant's permanent disability. She has received unscheduled disability awards totaling 148 degrees.

During 1977, the claimant, through her attorney, requested that the Worker's Compensation Board, upon its own motion, "modify the former findings made with respect to claimant WCB Case No: 71-1513(In the Matter of the Compensation of Marjorie Petersen, No. 33-845) as a result of her injury suffered on October 4, 1968." The claimant sought a determination that she was permanently and totally disabled. It is the claimants contention that she sustained a compensable injury on January 19, 1976 while in the employ of J.C. Penney Company, whose Worker's Compensation coverage was provided by Liberty Mutual Insurance Company. She alleges, in the alternative, that she sustained either a new injury at J.C. Penney Company, or an aggravation of her 1968 Tektronix injury. Her current condition involved pain in her right hand, which has resulted in several different diagnoses, to wit: synovitis and rheumatoid arthritis, diffuse hand pain referred or radiating from the cervical area into the hand, possible tenosynovitis or mono-articular rheumatoid arthritis, palmar fasciitis with possible early Dupuytren's disease and a surgically proved right carpal tunnel syndrome.

It is the position of Tektronix and Travelers Insurance Company that the claimant has not had a compensable aggravation of her 1968 injury. They contend that the early diagnosis of diffuse hand pain radiating from the cervical area has been ruled out by more recent diagnoses confirming rheumatoid arthritis in some of the finger joints along with the carpal tunnel syndrome, which was confirmed during surgery on the right hand-wrist.

The parties recognize and represent there is a bona fide dispute as to the compensability of claimant's aggravation claim and because there is such a dispute, they have agreed to compromise and settle said claim pursuant to ORS 656.289(4) for the sum of \$3450.00, said sum to include claimant's attorneys fee in the amount of \$250.00.

All parties understand and agree that if these payments are approved by the Board and payments made thereunder, said payments are in full, final and complete settlement of claimant's aggravation claim. It is expressly agreed and understood by all parties that this is a settlement of a doubtful and disputed aggravation claim and is not an admission of liability on the part of the employer and carrier by whom liability is expressly denied, and that the aggravation claim is denied and remains denied in each and every respect.

WHEREFORE, the parties hereby stipulate to and join in this petition for approval of the foregoing settlement and for authority to pay the sum set forth above pursuant to ORS 656.289 (4) in full and final settlement between the parties, and for an order approving this compromise and dismissing this aggravation claim with prejudice.

It is so stipulated.

IT IS APPROVED, and it is so ordered, and the aggravation claim is dismissed with prejudice.

WCB CASE NO. 75-4326

NOVEMBER 22, 1977

MARCIA STONE, CLAIMANT
David Vandenberg, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, 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.

NOVEMBER 25, 1977

WALKER S. ANDERSON, 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 affirmed the Determination Order of October 25, 1976 which did not increase the award previously granted in the amount of 54° for 40% loss of the left 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 June 15, 1977, is affirmed.

WCB CASE NO. 76-622
 WCB CASE NO. 76-5818

NOVEMBER 25, 1977

DAVID COOK, CLAIMANT
 Emmons, Kyle, Kropp & Kryger,
 Claimant's Atty.
 Merlin Miller, Employer's Atty.
 SAIF, Legal Services, Defense Atty.
 Request for Review by Employer
 Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which increased claimant's awards to 40% unscheduled (low back) disability (WCB Case No. 76-5818) and 30% unscheduled (right shoulder) disability (WCB Case No. 76-622). The employer, Hi-Lo Construction Company, contends that the awards are excessive, that the awards which combine for 25% unscheduled disability compensation, and were granted by the two Determination Orders dated January 26, 1976 and July 26, 1976 were adequate. The Fund also appealed the order of the Referee, but did not submit a brief.

Claimant sustained a compensable injury to his low back on March 14, 1972 while placing a concrete pipe in a ditch. The original diagnosis by Dr. Stanley was acute lumbar strain. Claimant was able to return to work after a short time and after receiving conservative treatment in June of 1972, his condition stabil-

ized and the claim was closed with no award of permanent disability. A Second Determination Order, dated July 26, 1976 awarded claimant 48° for this injury.

On November 15, 1973, claimant, while working for a different employer, suffered a compensable injury to his right shoulder when, as he was tightening the binders on his loaded lumber truck, the bar slipped and severely wrenched his shoulder. A rotator cuff tear was found by Dr. Poulson on February 20, 1974. Surgery was performed on March 19, 1974. On May 15, 1974 Dr. Poulson indicated that claimant's shoulder was improving and that he should be able to return to his regular work in approximately two months. Claimant returned to work on June 4, 1974 but continued to have problems and an arthrogram revealed a small defect in the prior surgical repair and additional surgery was performed on October 16, 1974.

Claimant began suffering from low back pain and saw Dr. Poulson who performed a myelogram on July 8, 1975. He continued to treat claimant for this problem, but found that his shoulder condition was stationary on October 8, 1975 and that, as far as his shoulder was concerned, claimant could return to medium work and possibly heavy work. His claim for the November 15, 1973 shoulder injury was closed by a Determination Order dated January 26, 1976 which awarded claimant 32° for 10% unscheduled disability.

Claimant received intermittent conservative treatment from several doctors for his back condition between 1972 and 1974. He then began seeing Dr. Poulson regularly for his back complaints. Dr. Poulson felt that claimant became totally disabled from his back problems on July 18, 1975.

After surgery on August 8, 1975 consisting of a laminectomy and fusion, claimant seemed to be improving nicely and Dr. Poulson recommended that he get into an authorized program of vocational rehabilitation. Claimant entered the Disability Prevention Division's program in the spring of 1976. He enrolled in various courses at Chemeketa Community College in both 1975 and 1976, but dropped out for several reasons.

Claimant has a 10th grade education and a GED which he recently obtained. His major area of vocational training is as a truck driver.

Claimant complains that he is unable to use his right arm in an extended position and that discomfort in the shoulder comes and goes. His back condition restricts his ability to lift over 40 pounds, and he is unable to bend, stoop or twist repetitively.

The Referee found that although claimant has potential for training and employment in a non-strenuous occupation, his injuries restrict him from returning to work at his former job or any job for which he is educated and trained. He concluded that claimant had suffered a substantial loss of wage earning

capacity and increased the award for the back to 128° and the award for the shoulder to 96° to adequately compensate claimant for such loss.

The Board, after de novo review, finds that the awards of the Referee were not justified. Claimant has the potential to be retrained, but has not taken advantage of the opportunities offered to him. The Vocational Rehabilitation Division reports, which the Referee failed to admit into the record, gave substantial evidence of claimant's lack of motivation to return to work. He was given the chance to go to college but, by his own admission, college wasn't for him. He was given a job interview, but he showed no interest in pursuing the matter. The Board finds that claimant's actual loss of wage earning capacity is adequately compensated by an award of 48° payable by the Fund for 15% right shoulder disability and 80° for 25% low back disability, payable by the employer, Hi-Lo Construction Co., and its carrier, The Travelers Insurance Co.

ORDER

The order of the Referee, dated March 21, 1977, is modified.

Claimant is hereby granted 128° of a maximum of 320° for 15% unscheduled (right shoulder) disability and 25% unscheduled (low back) disability. This is in lieu of the Referee's awards. The award for the right shoulder is the responsibility of the Fund; the responsibility for the low back award is The Travelers Insurance Company.

The attorney's fees granted by the Referee for both WCB Case No. 76-622 and WCB Case No. 76-5818 are approved.

WCB CASE NO. 77-519

NOVEMBER 25, 1977

DERWOOD W. DAVIS, CLAIMANT
Galton, Popick & Scott, 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 awarded claimant an additional 22.5° for a total award of 45° for 30% loss of the left leg.

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, 1977, is affirmed.

SAIF CLAIM NO. B 66126 NOVEMBER 25, 1977

BARBARA J. FOSS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 6, 1977 the Board acknowledged the receipt of a request from claimant for additional compensation, stating that her present condition was related to an industrial injury she suffered on June 22, 1964 for which she filed a claim which was closed with an award of 16% of an arm for unscheduled disability. This award was increased in 1967 to 35% of an arm. Claimant's aggravation rights have expired.

The Board's letter of acknowledgment requested claimant to provide a current medical report supporting her contentions.

Upon receipt of this letter claimant was again seen by Dr. Cherry, who had been claimant's only treating physician in the past. Under date of September 22, 1977, Dr. Cherry advised the Fund that it was his impression that claimant was worse now than she was when her claim was initially closed and it was possible that she had a new disc problem. He therefore requested that her claim be reopened for treatment and investigation of a possible herniated disc.

On October 5, 1977 the Fund advised Dr. Cherry that because of the considerable time which had transpired since the original injury in 1964 that it would be important to obtain information relating to the claimant's current complaints before it would consider reopening her claim and reinstating payment of compensation. On October 17, 1977 Dr. Cherry replied to this request stating he did not understand what more information could be supplied to the Fund with regard to claimant's current condition than what was contained in his report of September 22, 1977. On October 20, 1977 the Fund advised Dr. Cherry that it would investigate claimant's case and on November 10, 1977 Dr. Cherry was advised by the Fund that its investigation had been completed and it was the Fund's opinion, after considering all the evidence, that claimant's present problem was not its responsibility.

Copies of all of the above correspondence were furnished to the Board and, after giving full consideration to the contents of Dr. Cherry's report of September 22, 1977 and in the absence of any contrary reports furnished the Board by the Fund, it concludes that claimant's request that the Board, exercising its own jurisdiction powers pursuant to the provisions of ORS 656.278, should be granted.

ORDER

Claimant's claim for an industrial injury suffered on June 22, 1964 is remanded to the State Accident Insurance Fund for the payment of compensation, as provided by law, commencing July 1, 1976 and until the claim is closed pursuant to ORS 656.278, less any time worked after July 1, 1976.

WCB CASE NO. 76-3316

NOVEMBER 25, 1977

LARRY MILLIGAN, CLAIMANT

Malagon, Starr & Vinson, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Supplemental Order Awarding Attorney Fee

The Board's Order on Review issued October 28, 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 \$300, payable by the State Accident Insurance Fund, for services in connection with Board review.

SAIF CLAIM NO. YC 190039

NOVEMBER 30, 1977

MARVIN EMMERT, CLAIMANT

SAIF, Legal Services, Defense Atty.

Own Motion Determination

Claimant suffered a compensable injury on June 19, 1969. His left leg was severely crushed and fractured when logs rolled against him. He was hospitalized immediately and underwent vascular and sciatic nerve repair and internal fixation of the distal tibia together with reduction of the fibular fracture. The claim was initially closed by a Determination Order of June 21, 1971 which awarded claimant 113° for 75.3% loss of function of the left leg.

On March 31, 1976 the Fund voluntarily reopened claimant's claim for additional time loss and medical care. Just previous to that date, claimant had undergone a repair of the left great toe extensor tendon and proximal phalangectomies of the left lesser four toes.

Dr. Van Olst's closing examination revealed similar findings as those noted just prior to the issuance of the first

Determination Order, with the additional observation of left ankle degenerative traumatic arthritic changes. On September 7, 1976 a Second Determination Order granted further temporary total disability benefits but no additional compensation for permanent partial disability.

On March 1, 1977 the Fund again indicated that it was paying claimant additional time loss compensation. One month prior to that date, claimant had undergone further surgery related to his industrial injury. By March 28, 1977, he had returned to his regular work duties. On July 29, 1977 Dr. Fleshman noted that claimant was still suffering from traumatic changes.

On October 3, 1977 the Fund requested a determination of claimant's claim from the Workers' Compensation Board. The Evaluation Division of the Board recommended that claimant be granted temporary total disability benefits from February 1, 1977 through March 22, 1977 and temporary partial disability from March 23, 1977 through March 27, 1977. The previous award of 113% for 75.3% loss of function of the left leg was adequate.

The Board concurs with the recommendation of the Evaluation Division.

ORDER

Claimant is hereby granted temporary total disability benefits from February 1, 1977 through March 22, 1977, less time worked, and temporary partial disability benefits from March 23, 1977 through March 27, 1977, less time worked.

SAIF CLAIM NO. FG 139143 NOVEMBER 30, 1977

PETER V. GATTO, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his low back on July 23, 1968. A complete history of claimant's claim has been recited in the Board's Own Motion Determination of May 24, 1977 and will not be repeated herein.

Claimant suffered an exacerbation of his back condition and additional care, including hospitalization, was provided from September 6, 1977 through September 14, 1977. When he was discharged on that date his pain had been alleviated. Temporary total disability benefits were paid by the carrier during this period of hospitalization.

On October 10, 1977 the Fund requested a determination from the Workers' Compensation Board regarding this claim. The Evaluation Division is of the opinion that claimant has been ade-

quately compensated for his permanent disability but is entitled to temporary total disability compensation for the period of time during which he was hospitalized.

The Board concurs.

ORDER

Claimant is hereby granted temporary total disability benefits from September 6, 1977 through September 14, 1977, less time worked. The record indicates that this compensation has already been paid by the Fund.

SAIF CLAIM NO. GC 149735 NOVEMBER 30, 1977

FREDERICK GRANT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury on October 9, 1968 which resulted in lacerations of the index, middle, and little fingers and amputation of the ring finger, all of which were on the left hand. The Determination Order of February 4, 1969 granted compensation for 35% loss of the left middle finger and 75% loss by separation of the left ring finger. After an appeal of this order, the Hearings Officer, by order of May 27, 1969, granted claimant 20% loss of the left first finger, 40% loss of the left second finger, 90% loss of the left third finger, 10% loss of the left fourth finger and 15% loss of the left thumb by opposition.

In September, 1971 claimant's left index finger was partially amputated, but this was unrelated to the industrial injury of 1968.

On November 19, 1976, Dr. Sirounian noted that a mass had formed on the middle finger and recommended surgery. Claimant had been off work since November 16, 1976 because of the mass. Dr. Gill performed the recommended surgery on January 14, 1977, removing the mass and an exostosis of the middle phalanx.

Claimant was released for work on April 9, 1977. Dr. Gill indicated, by his report of August 1, 1977, that claimant's condition was stationary and his claim could be closed with no additional award.

On August 11, 1977 the Fund requested that the Board make a determination on this claim. The Evaluation Division of the Board recommended that claimant be granted no additional compensation for permanent partial disability but be granted compensation for temporary total disability from November 16, 1976 through April 8, 1977, less time worked.

The Board concurs with the recommendation of the Evaluation Division.

ORDER

Claimant is hereby granted compensation for temporary total disability from November 16, 1976 through April 8, 1977, less time worked.

SAIF CLAIM NO. A 872730 NOVEMBER 30, 1977

JOHN D. MIZAR, CLAIMANT
Galton, Popick & Scott, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Referred for Hearing

On October 10, 1977 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered on July 25, 1961. The claim was accepted by the State Industrial Accident Commission, predecessor of the State Accident Insurance Fund, with an award for permanent partial disability equal to 21.75% on or about January 8, 1963. Claimant's aggravation rights have expired.

On August 15, 1977, claimant suffered an industrial injury while in the employ of Portland Distributing Company, whose Workers' Compensation coverage was furnished by EBI Companies. Claimant filed a claim that was denied by the carrier on the basis that claimant had a pre-existing condition prior to that incident which his doctor stated was an aggravation of his 1961 injury. Claimant requested a hearing on the denial by EBI (WCB Case No. 77-5980).

At the present time the Board does not have sufficient evidence before it to enable it to make a determination of whether claimant's present condition is related to his July 25, 1961 injury and that his condition has worsened since the last award or arrangement of compensation therefor or is the result of an injury suffered on August 15, 1977. Therefore, claimant's motion to reopen his 1961 claim is referred to the Hearings Division with instructions to set it for hearing on a consolidated basis with claimant's request for hearing on the propriety of the denial by EBI of his 1977 injury to determine whether claimant's present condition is the result of an aggravation of his 1961 injury or a new compensable injury.

Upon conclusion of the hearing, if the Referee finds claimant's condition is related to the 1961 injury, he shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendation; however, if the Ref-

eree finds that claimant has suffered a new compensable industrial injury as a result of the incident occurring on August 15, 1977 while in the employ of Portland Distributing Company, he shall enter a final and appealable order thereon.

WCB CASE NO. 76-3432 & 76-4045 NOVEMBER 30, 1977

MIKE MORROW, CLAIMANT
C. Rodney Kirkpatrick, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Bona Fide Dispute Settlement and Order

THIS MATTER coming on before the Worker's Compensation Board upon the Stipulation of the parties, Mike Morrow acting for himself and by and through one of his attorneys, C. Rodney Kirkpatrick of Kirkpatrick & Howe, and the Employer ACME Trading and Supply Co., and its compensation carrier, Employer's Insurance of Wausau acting by and through their attorney, Philip A. Mongrain, it appearing that the insurance carrier having issued a letter of partial denial of June 28, 1976, and a hearing having been held on November 22, 1976, and by Opinion and Order of April 1, 1977, the partial denial having been upheld by the Referee and the matter having been appealed to the Workers' Compensation Board and by Order on Review of October 7, 1977, the Workers' Compensation Board having affirmed the Referee's Order, and

IT FURTHER APPEARING that there is a bona fide dispute existing between the parties as to the responsibility for treatment subsequent to April 26, 1976, as well as for temporary disability benefits thereafter, and

IT APPEARING that the parties have resolved these issues by stipulation as evidenced by their signatures hereinafter set forth, now, therefore,

IT IS HEREBY ORDERED that the Employer shall pay the sum of \$3,000.00 in settlement of the bona fide dispute out of which \$750.00 shall be paid to Kirkpatrick & Howe as and for a reasonable attorney's fee.

IT IS FURTHER ORDERED that the partial denial of April 26, 1976, is hereby affirmed and all of the issues and Claimant's case is dismissed with prejudice as to all claims and issues raised in the above-entitled matter.

IT IS SO STIPULATED.

NOVEMBER 30, 1977

BILL D. NICHOLSON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

On November 4, 1977 an Own Motion Order was entered in the above entitled matter. The third sentence in the first paragraph on page 2 of said order should be amended by substituting therefor the following:

"Temporary total disability benefits shall be paid to claimant by the Fund from the time claimant is hospitalized and until his claim is again closed pursuant to the provisions of ORS 656.278."

In all other respects the Own Motion Order is ratified and reaffirmed.

SAIF CLAIM NO. FC 321906 NOVEMBER 30, 1977

ROGER OLSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant injured his right shoulder on August 16, 1971 while unloading a case of liquor. His condition was diagnosed as bursitis by Dr. Flanery and he was released for work on August 31, 1971. His claim was closed on September 21, 1971 with an award for temporary total disability only.

On June 2, 1975, claimant suffered a recurrence of pain, aching and soreness in his right shoulder and Dr. Smith diagnosed his condition as cervical disc defect on the right side. It was also noted in the doctor's report that claimant was mentally retarded and that he resides with his mother who is an invalid.

On July 10, 1975 a cervical myelogram, a laminectomy and a foramenotomy were performed. Claimant was referred to the Vocational Rehabilitation Division in December of 1975. On January 28, 1976 he was admitted to the hospital because of episodes of "blacking out" and neck pain. All tests were negative with the exception of a neurological deficit. He was terminated from Vocational Rehabilitation on March 1, 1976 because he chose to stay home and care for his mother.

On November 23, 1976 claimant was examined by the Orthopaedic Consultants who recommended a psychological evaluation to determine the degree of his mental retardation and motivation. Dr. Perkins, on February 28, 1977, concluded that claimant was severely handicapped as far as ever returning to work because he lacked

academic skills, was a non-reader, ungroomed, and exhibited poor mechanics.

The Orthopaedic Consultants again examined claimant on June 7, 1977. They felt that claimant could return to his same occupation with no limitations or he could be placed in a sheltered workshop such as Goodwill Industries to try to return to gainful employment. On June 8, 1977 Dr. Smith noted that claimant had continuing complaints of "blackout" spells and prescribed medication for that problem. Another examination on July 11, 1977 indicated that claimant's spells had ceased and the doctor concluded that they were functional.

On August 5, 1977 the Fund requested a determination of claimant's claim. The Evaluation Division of the Board recommended that claimant be granted compensation for temporary total disability from July 10, 1975 through August 7, 1977 in addition to an award of 32° for 10% unscheduled low back and right shoulder disability and 9.6° for 5% of the right arm.

The Board concurs with this recommendation of the Evaluation Division.

ORDER

Claimant is hereby granted compensation for temporary total disability from July 10, 1975 through August 7, 1977, less time worked, and also is granted 32° for 10% unscheduled disability to the back and right shoulder and 9.6° for 5% loss function of the right arm.

WCB CASE NO. 77-15

DECEMBER 1, 1977

THOMAS DARBY, CLAIMANT
Joseph Hershberger, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which dismissed his request for hearing for lack of jurisdiction.

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, 1977, is affirmed.

DECEMBER 1, 1977

LOUIS M. GIOVANINI, CLAIMANT
Merten & Saltviet, 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 claimant's heart claim.

Claimant, at age 52, suffered a myocardial infarction at his home on June 10, 1976. He contends that his work as an attorney and part time municipal judge placed him under sufficient stress to cause the heart attack. There is a substantial amount of testimony in the record to indicate that claimant was under a significant amount of stress on his job. He generally worked from about 8:30 a.m. to 6:00 p.m. five days a week in addition to spending approximately 2 hours reading legal material in the evening. In September 1975 claimant, who had been the sole attorney in his firm, hired a young attorney to work with him. This man was directly out of law school and claimant had to spend a great amount of time training him which contributed to the stress he was already under.

On the day in question, claimant stopped for a couple of drinks at the golf club on his way home. As his family was not home when he got there, he prepared a spaghetti dinner for himself which he had with a bottle of wine. Claimant was quite upset with his wife for going to Reno without him the previous three days and after her return home that evening, they became involved in a rather severe argument, to the point where Mrs. Giovanini had her daughter call the police. Within a few minutes after the termination of the argument, claimant developed the symptomatology which resulted in the myocardial infarction.

Dr. Gibson, on August 4, 1976, gave his opinion that stress and tension on the job can be aggravating factors in the development of coronary artery disease, although he did not consider these to be the primary causes. He did not know, at that time, to what extent claimant's work contributed to his disease. In October, 1976, Dr. Gibson stated his opinion that the job stresses could have contributed to the myocardial infarction which resulted in complete disability. In a later report, he indicated that it was more likely than not that claimant's job was a material contributing factor.

Dr. Stack, on November 24, 1976, found that the stress of working two jobs could have been a material contributing factor leading to claimant's hospitalization, but that the "violent domestic argument" at home was the immediate precipitating factor. He concluded his report by agreeing with Dr. Gibson that it was

more likely than not claimant's job stress was a material contributing factor to the infarction.

At the hearing, Dr. Rogers, cardiologist, testified that, in his opinion, claimant's pre-existing coronary artery disease was not increased by his work. It was his conclusion that the domestic argument precipitated the myocardial infarction.

The Referee found the opinions of both Dr. Gibson and Dr. Stack to be somewhat contradictory, therefore, he gave their conclusions very little weight. He found Dr. Rogers to be completely unequivocal in his testimony at the hearing and, relying upon this, the Referee found that the domestic argument at home was the "straw that broke the camel's back" and was the immediate precipitating factor of claimant's myocardial infarction. He also agreed with Dr. Rogers' opinion that claimant's underlying coronary artery disease was not caused or increased by his work activities. Based upon Dr. Rogers' opinions and testimony, the Referee affirmed the carrier's denial of claimant's claim and dismissed the matter.

The Board, after de novo review, concurs with the conclusion of the Referee. It agrees that, based on all the evidence in the record, claimant's myocardial infarction was a direct result of the domestic argument in which he was involved on the day in question, and that this infarct caused his complete disability. However, the Board does not agree with Dr. Rogers' opinion, concurred in by the Referee, that claimant's pre-existing underlying coronary artery disease was not caused or increased by his work activities.

ORDER

The order of the Referee, dated March 9, 1977, is affirmed.

WCB CASE NO. 76-5151

DECEMBER 1, 1977

PATRICIA JOHNSON, 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 Moore and Phillips.

Claimant seeks Board review of the Referee's order which granted her 7.5° for 5% loss of the right hand and 7.5° for 5% loss of the left hand. Claimant contends that the awards are inadequate, that she is entitled to awards of 15° each for the right hand and the left hand.

Claimant sustained shrimp poisoning of both hands on May 15, 1974 which resulted in contact dermatitis. Her claim was originally denied by the carrier until December 1975 when Dr. Morgan connected her condition unequivocally to her allergy to shrimp.

Dr. Maeyens, on March 25, 1976, felt that claimant's only problems would occur when she came in contact with seafood products or other potentially allergenic or irritating substances. He indicated that she could do any work that did not involve working with these products.

On May 24, 1976, claimant went to work as a telephone operator. She had no apparent problems and the Disability Prevention Division did not refer her for vocational rehabilitation. The Determination Order of September 14, 1976 granted temporary total disability benefits only.

On October 8, 1976, Dr. Maeyens reported that claimant had seen him in June and, at that time, her hands were clear. He felt she would always have problems when she was exposed directly to fish and therefore, she would be prone to dermatitis from contact.

Claimant's testimony at the hearing indicated that about once a month for a period of about three or four days her right hand would swell and become stiff because of the writing and number keying required on her job. She can no longer wear rings on her hands and her hands periodically itch. She can no longer use any soaps in the course of performing household duties except Ivory.

The Referee found, based on the doctor's reports, that claimant's condition is permanent and he noted her testimony at the hearing concerning the varied problems she has with her hands at the present. He concluded that her loss of function was quite minimal but was permanent. He awarded claimant 7.5° for 5% loss of the right hand and the same amount for the left hand.

The Board, after de novo review, finds that claimant will always have a problem with her dermatitis condition when she comes in contact with seafood, but as long as she avoids such products her problems are basically minimal. However, the Board does feel that these problems are significant enough to justify a finding of a greater loss of function in both hands and increases claimant's awards to 15° for 10% loss of the right hand and 15° for 10% loss of the left hand.

ORDER

The order of the Referee, dated February 22, 1977, is modified.

Claimant is granted an increase in compensation equal to 7.5° for 5% scheduled disability of both the right and left hands

for a total award of 15° for 10% loss of the right hand and 15° for 10% loss of the left hand.

Claimant's attorney is granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation, payable out of said compensation, not to exceed \$2,300.

WCB CASE NO. 76-5921

DECEMBER 1, 1977

ROBERT KEMPFER, CLAIMANT
Patrick Ford, 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 granted claimant 32° for 10% unscheduled neck disability. The Fund contends that claimant is entitled to no permanent disability and that the Determination Order of October 28, 1976 should be reinstated.

Claimant, at age 21, sustained a compensable injury to his neck on or about September 16, 1975, while lifting paper into a cutter. Dr. Eggers' initial diagnosis was cervical strain; he recommended that claimant not try to work for 2 or 3 weeks. Claimant was referred to Dr. Campagna, who treated him conservatively over a period of time, during which time claimant was allowed to work. On September 21, 1976, the doctor found claimant's condition medically stationary and indicated that the disability of the neck due to the industrial injury was mild. Subsequently, the Determination Order of October 28, 1976 granted claimant compensation for temporary total disability only.

Dr. Luce, on December 15, 1976, found cervical cephalgia and chronic cervical tension and also felt that claimant's disability was mild.

Dr. Campagna, in his deposition, testified that claimant has no objective findings and no limited range of motion. Although he stated that claimant's condition was mild, in his opinion that term was actually "normal". He felt that the automobile accident in which claimant was involved in March of 1976 could have contributed to his condition, but he could not state unequivocally that this was so. Dr. Campagna felt that claimant had suffered no loss of earning capacity.

The record indicates that claimant has an obvious emotional problem. Prior to his injury, he was considered an excellent worker but he had a high rate of absenteeism and his supervisor had to talk to him concerning this. For some unknown reason,

claimant set fire to his place of employment and as a result was terminated.

The Referee found that claimant has a small amount of impairment as the term "mild" used by Drs. Campagna and Luce would seem to indicate. Based on this evidence, the Referee considered claimant was entitled to 32° for 10% unscheduled disability for injury to the neck.

The Board, after de novo review, does not concur with the Referee's conclusion. The deposition testimony and medical reports of Dr. Campagna were very persuasive that claimant's disability was very minute and there is no evidence that claimant has lost any earning capacity.

The Board concludes that claimant is not entitled to any award for permanent disability, therefore, the Determination Order of October 28, 1976 should be reinstated.

ORDER

The Referee's order of June 2, 1977 is reversed. The Determination Order of October 28, 1976, granting claimant temporary total disability only, is affirmed.

WCB CASE NO. 77-334

DECEMBER 1, 1977

JAMES E. PALMATEER, CLAIMANT
Hugh K. Cole, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Phillips and Moore.

Claimant seeks Board review of the Referee's order which affirmed the Determination Order of January 12, 1977 which awarded him temporary total disability and 32° for 10% unscheduled right shoulder 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 April 20, 1977, is affirmed.

DECEMBER 1, 1977

RONALD SALTMARSH, CLAIMANT
Richardson & Murphy, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-appeal by Argonaut Ins.

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of that portion of the Referee's order which approved the letter of denial by the State Accident Insurance Fund dated November 28, 1973 and dismissed claimant's appeal from the Determination Order of April 16, 1975 whereby claimant was awarded 48° for 15% unscheduled low back disability resulting from his November 25, 1970 injury.

The A.T. Industries, Inc., and its carrier, Argonaut Insurance Company, cross-request Board review of that portion of the Referee's order which stated that the claim of Argonaut Insurance Company against the State Accident Insurance Fund for restitution be dismissed for want of jurisdiction.

On November 25, 1970, while employed at A.T. Industries, claimant suffered a back injury and subsequently, because of complications associated with operative procedures also involved urinary problems which were compensable. Claimant's claim was accepted and benefits have been paid by Argonaut from the date of the injury.

In January, 1973 claimant went to work for Familian Northwest, whose coverage was furnished by the Fund, and while employed by them claimant alleged he suffered a second low back injury. On November 28, 1973 the Fund denied responsibility for this injury and on December 29, 1975 claimant requested a hearing on the propriety of this denial.

On April 16, 1975 a Second Determination Order had awarded claimant 48° for his November 25, 1970 unscheduled low back disability. This was in addition to an award of disability previously made by a Determination Order dated June 21, 1972.

Argonaut contends that by mistake it continued to pay benefits beyond the date of the second injury, January 2, 1973 and that it should be entitled to be reimbursed for the payment of such benefits by the Fund inasmuch as the evidence clearly demonstrated that a new accident had occurred on January 2, 1973 and was the responsibility of the Fund.

Claimant testified at the hearing that he was contemplating an additional operation because of his urinary difficulties.

The Referee ruled that because claimant had failed to appeal the Fund's letter of denial within one year from the date thereof, the denial became final by operation of the law, therefore, he approved it.

The Referee further ruled that claimant's condition was not presently medically stationary and claimant would be entitled to benefits for temporary total disability from the time he entered the hospital for the correction of his urinary problem and until he is found again to be medically stationary pursuant to ORS 656.268. Therefore, he felt that any finding at the time of the hearing on the extent of claimant's permanent disability was precluded.

With respect to Argonaut's right of reimbursement from the Fund, the Referee found, preliminarily, that Argonaut would be barred from seeking recovery against the Fund on a theory of subrogation because the subrogee (claimant) is barred from asserting any claim for failure to make a timely appeal. He stated that the difficulty with Argonaut's position of proceeding against the Fund in its "independent right" is that Argonaut then falls squarely within the prohibition of ORS 656.307(2) which states:

"No employer or its insurer shall be joined in any proceeding under this section regarding its responsibility for any claim subject to ORS 656.271 unless the issue is entitled to hearing on application of the workman."

The Referee concluded that the Board did not have jurisdiction over the Argonaut's claim for restitution. Therefore, it was not necessary for him to decide whether the payments made by Argonaut subsequent to January 2, 1973 were made under circumstances which would entitle it to restitution from the Fund.

The Board, on de novo review, disagrees with the Referee's conclusion that claimant's failure to appeal the Fund's letter of denial within one year from the date thereof precludes him now from appealing that denial. Claimant had suffered an injury in 1970 which had been accepted and for which he was receiving benefits and continued to receive benefits beyond the date of the second injury, January 2, 1973. The evidence clearly indicates that the 1973 injury was a new industrial injury and was the responsibility of the Fund. The Fund denied responsibility therefor, however, the wording of the denial leaves much to be desired. Additionally, it is logical and easily understandable that claimant would not pay much attention, if any, to the denial letter from the Fund based on a claim that was already being covered and for which he was receiving benefits, albeit from a carrier not responsible for the 1973 injury.

The Fund says that it denied the claim because they felt it was due to degenerative back problems. The Board finds this is merely a part of the denial which was vague and ambiguous and

notes that said letter did say that the claim was denied because it did not result from the injury of July 2, 1973.

ORS 656.307 is intended to cover situations which otherwise would result if an injured workman who is entitled to benefits would let the appeal time run out against one of two denials, lose on the appeal from the other, and then be left with nothing. The conclusion reached by the Referee that claimant's failure to appeal within one year left him without a right of appeal is exactly what the court's ruling in Calder v. Hughes & Ladd, et. al., 75 OAS 3495, was attempting to prevent.

The Board, having found that claimant suffered a new, independent industrial injury on January 2, 1973 and that the responsibility therefor was that of the Fund, concludes that, in the absence of any time limitations provided in ORS 656.307, reimbursement as provided under that section can be made after the fact as well as before the fact. Therefore, the Fund, being responsible for the January 2, 1973 injury, should reimburse Argonaut Insurance Company for all monies which it has paid to claimant for and after that injury.

The Board finds that claimant is medically stationary and that the Determination Order of April 16, 1975 should be affirmed. If claimant does have surgery for his urinary problems at a later date, his claim can and should be reopened for that purpose.

ORDER

The order of the Referee, dated September 1, 1976, is reversed.

Claimant's claim for an injury occurring on November 28, 1973 is hereby remanded to the State Accident Insurance Fund for the payment of compensation, as provided by law, commencing from the date of said injury and until the claim is closed pursuant to ORS 656.268.

The Determination Order of April 16, 1975 relating to the November 25, 1970 injury is affirmed.

The State Accident Insurance Fund shall reimburse Argonaut Insurance Company for all monies which it has paid to claimant after January 2, 1973 and which relate to the January 2, 1973 industrial injury.

Claimant's attorney is awarded as a reasonable attorney's fee for his services before the Referee at hearing on the issue of the propriety of the denial by the Fund of the January 2, 1973 industrial injury the sum of \$750, payable by the State Accident Insurance Fund.

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

WCB CASE NO. 76-6701

DECEMBER 1, 1977

LUCILLE THOMPSON, CLAIMANT
A. C. Roll, Claimant's Atty.
Rankin, McCurry, Osburn & Gallagher,
Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of that portion of the Referee's order which granted claimant 15% scheduled disability for an occupational disease of the right knee. The employer contends that claimant has not suffered any permanent disability as a result of her employment.

On November 9, 1976 claimant began suffering severe pain in her right knee and went home about half way through the shift. She had noticed some pain during the previous week, but had not lost any time from work because of it. She returned to work the following Monday with no further complaints, although she did tell her foreman that her knee was a little sore.

Dr. Shawler, on November 16, 1976, diagnosed bursitis, medial knee. The carrier denied claimant's claim on November 23, 1976.

Claimant saw Dr. Specht on April 12, 1977 with complaints of right knee pain. She told the doctor that she had noticed a feeling of instability during the first week after the onset of symptoms, but not since that time. She denies that either walking or her work situation aggravate her symptoms. The only diagnosis Dr. Specht could even suggest was chondromalacia patellae, right knee. He found no significant impairment and recommended no further treatment.

Claimant complained at the hearing that, since the onset of symptoms in November of 1976, she has had to change her movement pattern. She has to move her feet as she moves her body to protect her knee. Bending causes soreness, her knee is tender all the time, and she takes pain pills on occasion.

The Referee found that claimant had suffered a compensable occupational disease to her right knee. Because Dr. Specht indicated that claimant would need to "protect" her knee and claimant testified to the various limitations and problems created by her condition, the Referee concluded that she had sustained 15% loss function of the right knee.

The Board, after de novo review, finds that there is no medical basis for granting claimant permanent disability. Dr. Specht found no significant impairment and Dr. Shawler indicated when he first examined claimant that her condition would result in no permanent impairment. Claimant had told Dr. Specht that she was having very few problems. Her condition has not interfered with her work performance even a little according to both her own testimony and that of her foreman. Therefore, the Board concludes that claimant has sustained no permanent impairment as a result of her condition.

ORDER

The order of the Referee, dated June 3, 1977, is reversed insofar as the award of 22.5° for 15% loss of function of the right knee is concerned, but in all other respects is affirmed.

WCB CASE NO. 76-6452

DECEMBER 5, 1977

FLOYD E. AYER, 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 granted him an increased award of 80° for a total award of 160° for 50% unscheduled back disability. Claimant contends that he is permanently and totally disabled.

Claimant, at age 53, suffered a compensable injury to his low back on January 17, 1975. He was lifting a sack of brake cores while working as a clerk in a hardware and auto parts store. The diagnosis was "low back pain and muscle spasm secondary to acute lumbo-sacral strain with lumbo-sacral degenerative arthritis changes". Claimant attempted to return to modified employment but his duties caused his back pain to increase and he had to quit. Claimant underwent a hernia operation in June of 1975 which was found to be connected with his industrial injury and a stipulated order awarded claimant compensation. In November 1975, Dr. German indicated that claimant would have to be restricted from any heavy lifting.

The Disability Prevention Division had discussed possible retraining with the claimant in late 1975, but claimant did not feel he could sit long enough to attend school.

Dr. German found claimant medically stationary in December 1975. On May 3, 1976, Dr. German indicated that claimant was totally disabled from any type of gainful employment as a result

of his back condition, especially when considered with claimant's education and experience.

Claimant had spent a period of time working with a vocational counsellor in the early months of 1976 with no success in finding an occupation which both he and the counsellor felt he could handle. He received a notice of non-referral for vocational rehabilitation in October of 1976. On November 8, 1976 a Determination Order granted claimant compensation for temporary total disability and 80° for 25% unscheduled back disability.

The Referee found that claimant's disability was quite severe, but it was his conclusion that claimant was motivated only to retire. He noted claimant's lack of financial pressure and the fact that he enjoys travelling in his Winnebago trailer and going hunting and fishing. Although claimant had spent some time with a vocational counsellor, he always came up with some excuse for not pursuing the particular job opportunity suggested. It was the Referee's final conclusion that claimant's award was too low based on his overall loss of wage earning capacity and he increased the award to 160° for 50% unscheduled back disability.

The Board, after de novo review, finds that claimant's physical impairment is much greater than that for which he was compensated by the Referee's order. They found Dr. German's May 1976 report which stated his opinion that claimant was totally disabled from any type of gainful employment, especially when considering claimant's education and past job experience, to be very persuasive.

The Board does note, however, claimant's apparent lack of motivation and believes that there are some jobs which claimant could do even with his present amount of physical disability. The Board concludes that an award of 240° for 75% unscheduled permanent partial disability would more adequately compensate claimant for his loss of wage earning capacity.

ORDER

Claimant is hereby granted 240° of a maximum of 320° for 75% unscheduled disability for injury to his back. This is in lieu of the award made by the Referee's order of June 29, 1977 which in all other respects is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the additional compensation granted claimant by this order, payable out of said compensation as paid, not to exceed \$2,300. This attorney's fee includes that awarded claimant's attorney by the Referee's order.

WCB CASE NO. 77-2253

DECEMBER 5, 1977

ROBERT L. FOWLER, 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 Moore.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's aggravation claim to it for acceptance and payment of benefits 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 July 15, 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 \$450, payable by the carrier.

WCB CASE NO. 75-4834

DECEMBER 5, 1977

LELA HULL, CLAIMANT
Harold Adams, Claimant's 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 claimant's 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.

ORDER

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

WCB CASE NO. 77-511
WCB CASE NO. 77-486

DECEMBER 5, 1977

PATRICIA ANN JOHNSON, CLAIMANT
Fulop & Gross, 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 denials of claimant's claim for occupational diseases.

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 18, 1977, is affirmed.

WCB CASE NO. 77-2216

DECEMBER 5, 1977

LOUISE HOPKINS KININNOOK, CLAIMANT
Bloom, Ruben, Marandas, Berg, Sly
& Barnett, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

On August 9, 1977 the Referee entered an Opinion and Order in the above entitled matter. On October 14, 1977 the Board received a request for review from the claimant; attached thereto was a certificate of mailing service showing the parties involved had been mailed a true and correct copy of the request on October 13, 1977.

ORS 656.289(3) provides that a Referee's order is final unless, within 30 days after the date on which a copy of the order is mailed to the parties, one of the parties requests a review by the Board under the provisions of ORS 656.295. ORS 656.295(2) provides that the request for review shall be mailed to the Board and copies of the request shall be mailed to all other parties to the proceeding before the Referee.

In the above entitled matter the request for review was mailed after the expiration of 30 days from the date which the Referee's Opinion and Order was entered and copies thereof mailed

to the parties to the proceeding; therefore, the Referee's Opinion and Order in the above entitled matter entered on August 9, 1977 has become final by operation of law and the claimant's request for review shall be dismissed with prejudice.

IT IS SO ORDERED.

WCB CASE NO. 76-3865

DECEMBER 5, 1977

ELMER KNIGHT, CLAIMANT
Allen G. Owen, 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 Determination Order issued on July 12, 1976 and revised on July 15, 1976 which granted him 128° for 40% unscheduled disability. Claimant contends 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 May 24, 1977, is affirmed.

WCB CASE NO. 77-2122

DECEMBER 5, 1977

RAY NERO, CLAIMANT
Bernard K. Smith, Claimant's Atty.
Jarvis B. Black, 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 July 13, 1976 Determination Order which awarded him temporary total disability benefits only.

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 June 23, 1977, is affirmed.

DECEMBER 5, 1977

GEORGE NURMI, CLAIMANT
 Bloom, Chaivoe, Ruben, Marandas &
 Berg, 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 granted claimant an award of permanent total disability together with ordering the Fund to pay a bill from the Medical Laboratory in the sum of \$38.50.

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 9, 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 Fund.

DECEMBER 5, 1977

In the Matter of the Compensation
 of the Beneficiaries of
 JOHN PHILLIPS, DECEASED
 MARY JANE PHILLIPS, CLAIMANT
 David C. Glenn, Claimant's Atty.
 Merlin L. Miller, Defense Atty.
 Bonafide Dispute Stipulation and Settlement

COME NOW the parties, Claimant-Beneficiary, in person and through her attorney, David C. Glenn, and the employer, Dessert Seed Company, Inc., and its insurance carrier, Travelers Insurance Company, acting by and through their attorney, Merlin L. Miller, and recite, stipulate, and petition as follows:

On or about October 20, 1975, John A. Phillips was in the course and scope of his employment when he suffered fatal injuries as a result of a tractor mishap. The employer and carrier did not and do not contest that the injuries were incurred in the course and scope of his employment and, in fact, the burial expenses have been paid.

Following the accident, Mary Jane Phillips presented a claim for widow's benefits, contending that she was the widow of

John A. Phillips was, therefore, entitled to such benefits.

The employer and carrier denied her claim for benefits, contending that she was not a "beneficiary" as that term is defined in ORS 656.005(3). The employer and carrier contend that at the time of Mr. Phillip's death, Mary Jane Phillips was living in a state of abandonment. Also, the employer and carrier denied claimant is entitled to any benefits under the provisions of ORS 656.204 or any other provisions of the Oregon Worker's Compensation Law.

A Hearing has been held with respect to the compensability of claimant's claim, with the result being an affirmance of the employer-carrier's denial. The matter is currently on review before the full Worker's Compensation Board.

The parties recognize and represent there is a bona fide dispute as to the compensability of claimant's claim and because there is such a dispute, they have agreed to compromise and settle said claim pursuant to ORS 656.289(4) for the sum of \$3500.00, out of which sum shall be paid claimant's attorney's fee in an amount not to exceed 25% (\$875.00) of the amount payable herein.

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 all claims which claimant has or may have against respondents for injuries claimed or their results, and all benefit under the Worker's Compensation Law and that claimant will consider such payment as being final. It is expressly understood and agreed by all parties that this is a settlement of a doubtful and disputed claim and is not an admission of liability on the part of the respondents, by whom liability is expressly denied; that it is a settlement of any and all claims, whether specifically mentioned or not under the Worker's Compensation Law, and that the claim is denied and remains denied in each and every respect.

WHEREFORE, the parties hereby stipulate to and join in this Petition for approval of the foregoing settlement and for authority to pay the sum set forth pursuant to ORS 656.289 (4) in full and final settlement between the parties, and for an Order approving this compromise and dismissing this claim and Request for Review with prejudice.

IT IS SO STIPULATED.

IT IS APPROVED AND IT IS SO ORDERED and the claim and Request for Review are hereby dismissed with prejudice.

WCB CASE NO. 76-1847

DECEMBER 5, 1977

JAMES PING, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Paul Roess, 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 March 9, 1976 Determination Order which granted claimant 16° for 5% unscheduled neck 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. 76-2423

DECEMBER 7, 1977

THOMAS R. BAGGETT, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
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 Determination Order of April 29, 1976 which granted him 16° for 5% unscheduled disability resulting from a work related skin condition.

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 June 27, 1977, is affirmed.

LINDA BATS, 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, Moore and Phillips.

The employer seeks Board review of the Referee's order which awarded claimant 48% for 15% unscheduled disability. Claimant had requested a hearing after a Determination Order dated April 5, 1976 had granted her only compensation for temporary total disability from December 17, 1975 to February 13, 1976.

Claimant, at the time of her injury, was 25 years old and was working as a clean up laborer when she received a compensable injury to her low back on December 16, 1975. The initial diagnosis was low back strain and her course of treatment was conservative. On February 10, 1976 claimant was found to be medically stationary and she returned to work as a dryer feeder operator but worked for only two days because of her back condition.

Claimant has made numerous attempts to seek employment but has had no success. She has not worked since February 1976 but has been on unemployment compensation benefits.

On February 10, 1976 Dr. Ellison had reported that he felt claimant would be incapable of returning to her former employment or any work involving heavy lifting, twisting, repetitive bending or repetitive stooping. However, on July 12, 1976, he reported that claimant had returned to her pre-injury state and on September 7, 1976 he reported that claimant had "no physical limitations at this point". Dr. Ellison continued to feel, however, that claimant should avoid employment which involved heavy lifting, etc.

The Referee found that claimant had been recommended for vocational rehabilitation training and had made several contacts with the appropriate vocational rehabilitation division representatives which consisted primarily of efforts to locate a job for claimant inasmuch as she was disqualified from participation in a formal training program.

The Referee found that claimant has only a formal high school education. Her work background consists of employment as a dryer feeder, a veneer grader, a Raimann machine operator and edge gluer, all with Boise Cascade. She has also had some experience as a cook and restaurant waitress as well as line production work. All of these jobs involved lifting, repetitive bending and stooping and/or prolonged standing.

Claimant complained primarily of limitation of motion in her back and back pain and discomfort which was increased by activity, particularly heavy lifting, prolonged driving or prolonged standing. She did not know if she could return to her former employment at Boise Cascade or to her work as a cocktail or restaurant waitress because of the physical activities such jobs involved. She did feel that she could perform secretarial tasks such as a receptionist or work as a retail grocery clerk or checker.

Based upon the evidence presented at the hearing, the Referee concluded that claimant did experience some limitation of motion of her back as well as chronic pain and discomfort which affected her ability to perform tasks which required heavy lifting, etc. He felt that claimant was competent to testify as to the residual effects of the industrial injury and he felt further that the claimant's physical condition and resulting limitations would have some effect on her ability to obtain or perform work in the general labor market which required the activities which claimant no longer could engage in.

Taking into consideration claimant's testimony as well as Dr. Ellison's precautionary comments about prospective limitations, the Referee concluded that claimant was entitled to an award of 48° for 15% of the maximum allowable for unscheduled disability to adequately compensate claimant for her loss of wage earning capacity in the general labor market.

After de novo review, the majority of the Board finds that Dr. Ellison, in his report of September 7, 1976, stated that claimant had "no physical limitations at this point". He had previously stated in July that claimant had returned to her pre-injury state. It is the opinion of the majority of the Board that Dr. Ellison's prescribed limitations relating to certain work activities are based primarily upon the fact that claimant is small and of slight build rather than because of any residuals of her injury.

For the above reasons, the majority of the Board concludes that claimant was adequately compensated by the Determination Order dated April 5, 1976 and would reverse the Referee's award and affirm the Determination Order.

ORDER

The order of the Referee, dated March 2, 1977, is reversed.

The Determination Order dated April 5, 1976, which granted claimant compensation for temporary total disability from December 17, 1975 to February 13, 1976, is affirmed.

Board Member Phillips dissents as follows:

I respectfully dissent from the majority of the Board and would affirm the order of the Referee. Claimant's injury was originally diagnosed as a low back sprain. Claimant did return to her regular occupation but only worked two days and quit because she couldn't handle feeding the dryer.

Dr. Ellison found muscle spasm and opined that claimant was unable to return to her regular occupation and must now avoid heavy lifting, twisting and repetitive bending and stooping, and did recommend vocational rehabilitation.

In July and September, 1976, however, Dr. Ellison found claimant asymptomatic and had returned to her pre-injury state but reiterated claimant could not return to her regular occupation.

Claimant's past working experience has been, aside from mill work, a cocktail and restaurant waitress. Dr. Ellison was unequivocal in stating claimant could not return to her regular occupation and because of this preclusion claimant has lost some wage earning capacity. Therefore, I would affirm the award of 48° for 15% unscheduled disability that was granted by the Referee.

/s/ Kenneth V. Phillips, Board Member

WCB CASE NO. 76-5766

DECEMBER 7, 1977

VELMA R. BENTLEY, CLAIMANT
Bernard K. Smith, 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 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.

Before any determination order is issued it is exceedingly important that not only all of the medical evidence but also all of the evidence relating to claimant's vocational status must be considered. The Referee's comments on this, which are contained in his order on page 2, are very well taken.

ORDER

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

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

NO NUMBER

DECEMBER 7, 1977

GLENN R. DAVENPORT, CLAIMANT
Own Motion Determination

Claimant sustained a compensable injury on June 28, 1966 while lifting a heavy case. The initial diagnosis was lumbosacral strain. After several years of treating claimant, Dr. Logan indicated on March 3, 1969 that he felt claimant's permanent disability was 15% loss of function of an arm for unscheduled disability (back). The Determination Order of March 25, 1969 awarded 15% loss of an arm for unscheduled disability.

The carrier denied claimant's request to reopen his claim on January 24, 1977 as the five-year aggravation period had expired and the carrier did not feel that the laminectomy which claimant had had on October 22, 1976 was related to claimant's back injury of 1966.

An Own Motion Order of May 13, 1977 reopened the claim for medical care and treatment, including surgery, together with payment of compensation commencing October 22, 1976. Claimant returned to work on December 20, 1976. Dr. Grewe's closing examination of August 1, 1977 revealed lumbar nerve root compression residuals L4-5, right, secondary to herniated nucleus pulposus. The doctor noted that claimant's low back was not particularly painful at that time. He recommended that claimant continue with his exercises and increased activity program, weight reduction. Claimant, at the present time, is working as a district manager for Bell Telephone and doing very little lifting.

The Evaluation Division of the Board recommends that claimant's claim be closed with an award of temporary total disability benefits from October 22, 1976 through December 19, 1976 but no additional award for permanent disability. The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability benefits from October 22, 1976 through December 19, 1976, less time worked.

DECEMBER 7, 1977

JOSEPH EMLER, CLAIMANT
John D. Ryan, 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 claimant's claim to it for acceptance and 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.

The Board finds briefs of the parties very helpful in the review process. In this case, the Fund is the appellant and has not given the Board the advantage of its theory as to why or upon what grounds it contends the Referee was in error.

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 \$100, payable by the Fund.

DECEMBER 7, 1977

DONALD L. FRY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Atty.
Jaqua & Wheatley, Defense Atty.
Own Motion Referred for Hearing

On June 6, 1977 the Board received a request from claimant, by and through his attorney, Garry L. Kahn, to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for compensation benefits as a result of the deterioration of claimant's physical condition resulting from his 1971 injury. Claimant's aggravation rights have expired. In support of the request a report was submitted from Dr. Bert, an orthopedic surgeon, dated April 28, 1977 and based upon an examination by him of claimant on that date.

Claimant's counsel was advised that Dr. Bert's report was not sufficient; thereafter reports dated August 9, 1977 and

October 20, 1977 were then submitted by Dr. Bert. On October 21, 1977 the Board submitted the medical reports to the employer, Georgia-Pacific Corporation, and asked that it advise the Board promptly of its position with respect to the own motion request. On November 14, 1977 Georgia-Pacific responded, stating that the medical expenses of claimant's recent surgery were being paid for pursuant to ORS 656.245 and they would oppose the Board exercising its own motion jurisdiction and reopening claimant's claim.

The Board concludes that at the present time it does not have sufficient evidence before it upon which to base a determination of whether or not claimant's present condition is a result of his 1971 injury and represents a worsening since the last award or arrangement of compensation which claimant received for that injury. Therefore, the matter is referred to the Hearings Division to set for hearing on this issue. Upon completion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendation.

SAIF CLAIM NO. B 114296 DECEMBER 7, 1977

MELVIN H. LINDSEY, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

On November 3, 1977 an Own Motion Order was entered in the above entitled matter. Based upon the evidence before it at that time the Board directed the State Accident Insurance Fund to be responsible only for the surgery on August 11, 1977 which related to the left anterior scalene release and the left volar carpal ligament release and further stated that the benefits paid claimant for temporary total disability from July 29 to October 21, 1977 were all the disability benefits to which claimant was entitled.

Subsequent to the entry of this order, the Board was furnished by claimant's attorney a stipulation which was signed by all the parties concerned on October 27, 1977 and approved on November 21, 1977 by Referee William J. Foster. This stipulation granted claimant basically the same benefits as set forth in the Board's own motion order except that it was stipulated and agreed that the claim should remain open until closed pursuant to the Oregon Workers' Compensation law and the administrative rules of the Workers' Compensation Board and further stipulated and agreed that claimant's attorneys should be paid an attorney's fee of \$250 in addition to and not out of the compensation payable to claimant.

The Board was not furnished a copy of this stipulation

and order until November 22, 1977. However, inasmuch as all parties concerned have signed the stipulation and it was approved by a Referee representing the Board, the Board concludes that its Own Motion Order dated November 3, 1977 should be amended by deleting the last sentence in the second complete paragraph on page 2 and inserting in lieu thereof the following:

"The Board also concludes that claimant is entitled to temporary total disability benefits from July 29, 1977 and until this claim is closed pursuant to the provisions of ORS 656.278."

In all other respects the Own Motion Order entered on November 3, 1977 is ratified and reaffirmed.

WCB CASE NO. 77-35

DECEMBER 7, 1977

DONALD A. RICTOR, CLAIMANT
Ralf H. Erlandson, Claimant's Atty.
Gearin, Cheney, Landis, Aebi & Kelley
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 denied claimant benefits for temporary total disability from January 31, 1976 through May 4, 1976 and affirmed the Determination Order of December 20, 1976 which provided temporary total disability for November 18, 1975 through November 30, 1975 and from May 4, 1976 through October 19, 1976 and awarded 32° for 10% unscheduled low back disability.

Claimant sustained a compensable injury to his low back while lifting a package on November 14, 1975. He was released, after conservative treatment, to his prior job on December 1, 1975. On December 25, 1975 claimant was involved in a car accident which aggravated his back condition. On May 4, 1976 Dr. Misko, a neurologist, stated unequivocally that claimant was not able to work at that time and temporary total disability payments were commenced.

The Referee found based on the medical record and in light of the testimony, that the Determination Order should not be set aside.

The Referee also found that at the time of the hearing the claimant was in an authorized vocational program. Claimant had been turned down earlier for vocational assistance. A notice of non-referral was mailed to claimant on November 22, 1976, therefore, at the time of the issuance of the Determination Order the physical

condition of claimant had been found to be medically stationary and no vocational rehabilitation program had been authorized for claimant so he also was vocationally stationary.

On January 14, 1977 the Disability Prevention Division, acting on new information, made a referral for vocational rehabilitation which claimant accepted. He entered a vocational program, and at that time was entitled to temporary total disability payments.

The Referee found no evidence in the record that there was any curative treatment available to claimant for his present condition arising out of his compensable injury. He concluded that claimant had not proven by a preponderance of the evidence that he is not at this time medically stationary.

The Board, after de novo review, finds that the claimant, after his November 14, 1975 industrial injury, was released to work and actually did return to work until he was terminated on January 30, 1976. Claimant was not terminated because of any physical disability. There is no medical evidence to support claimant's claim for benefits for temporary total disability for January 31, 1976 through May 4, 1976. Dr. Misko's letter of May 4, 1976 confirmed claimant's inability to work and on that date temporary total disability payments were commenced. There was no medical evidence to justify the entitlement by claimant to temporary total disability benefits prior to this report.

The Board concludes that to decide that the extent of claimant's disability was greater than that granted by the Determination Order would be premature. Although the claimant is now medically stationary he is currently enrolled in an approved vocational program and until he becomes vocationally stationary his claim cannot be closed pursuant to ORS 656.268.

ORDER

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

WCB CASE NO. 76-6988

DECEMBER 7, 1977

BILL STIFEL, CLAIMANT
Dye & Olson, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
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 upheld its denial of claimant's heart condition but reversed

the denial of claimant's back condition and ordered it to pay claimant compensation, as provided by law, of temporary total disability from November 19, 1976 until the claim is closed pursuant to ORS 656.268.

Claimant, a garbage collector, claims to have suffered a compensable injury on November 18, 1976 while lifting a garbage can weighing approximately 100 pounds. He felt a severe burning pain in his back which went up into his neck and into his left shoulder. Claimant continued to work but testified the pain in his back continued all day, although it did lessen towards the end of the day. That evening claimant and his son had a serious argument. Claimant's back condition worsened and he was taken to the hospital at approximately 7:00 p.m. He was released on November 28, 1976.

Claimant, on admission to the hospital, spoke to Dr. Craig, who had treated claimant for a heart attack in April of 1976. During this conversation the claimant, in giving a history of his problem, did not mention any on-the-job injury. He said that after he had argued with his son and chased after him, he developed severe jaw pain, left arm pain and chest pain as well as more back pain. At that time the pain was mostly in the substernal region and in the mid-back region. Dr. Craig diagnosed cystic medial necrosis; also, dissecting thoracic aortic aneurysm secondary thereto. The claimant, at the hearing, claimed the aneurysm as well as the back condition was compensable. The employer denied the claim and the Referee affirmed the denial as it related to the heart condition and that portion of the Referee's order was not appealed; only the part relating to the compensability of the back condition and the award of temporary total disability benefits are at issue before the Board.

The Referee found that the stress of lifting the heavy garbage can caused the back injury and ordered temporary total disability from November 19, 1976 until closure. He awarded attorney's fees because of improper denial.

The Board, after de novo review, finds that the evidence establishes the claimant did suffer a compensable injury to his back on November 18, 1976. Dr. Gallagher, an orthopedic surgeon, expressed his opinion that the claimant's pain was related to low back strain and directly related to the industrial injury of November 18, 1976.

The Board, however, finds no evidence to support the award of temporary total disability benefits for the back condition. Claimant's temporary total disability was the result of his aneurysm, not his back condition.

ORDER

The order of the Referee, dated May 16, 1977, is modified by deleting from said order the directive to the carrier to pay temporary total disability benefits from November 19, 1976 un-

til the claim is closed. In all other respects the order is affirmed.

WCB CASE NO. 76-6269

DECEMBER 7, 1977

CLARENCE ZELLNER, CLAIMANT
Jerold L. Billings, 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 found he was not entitled to temporary total disability benefits for the period September 9, 1976 through October 11, 1976.

Claimant suffered a compensable back injury on February 5, 1975. Dr. Courogen felt that claimant's condition was medically stationary in July of 1975 although he did not think that claimant would be able to return to his former job.

The Evaluation Division of the Board considered claimant to be medically stationary on September 27, 1975, the date Dr. Courogen discharged claimant from his care. The doctor, at that time, recommended that claimant consider pursuing a program of retraining. Claimant then began a series of counselling and testing with the Vocational Rehabilitation Division. The Disability Prevention Division withdrew their referral on March 19, 1976 because claimant was moving to San Diego, California in July and it would not be feasible for him to enter into a program at that time.

Claimant received a letter from the Fund dated July 27, 1976 which stated that it was requesting a determination from the Board as Dr. Pasquesi had found claimant medically stationary after he examined him on April 9, 1976. On September 17, 1976 a Determination Order granted claimant benefits for temporary total disability from February 6, 1975 through March 18, 1976 and also for April 9, 1976. Claimant was also granted 16° for 5% unscheduled low back disability.

Temporary total disability benefits, however, continued to be paid until September 17, 1976, the date of the Determination Order. There was some question as to whether this would constitute an overpayment. The Referee ruled that this overpayment could be used by the Fund as an offset against any future award granted claimant for disability.

Claimant contends that his time loss benefits should not have been terminated on March 18, 1976 just because he had been withdrawn from a vocational rehabilitation program; he thought that

he was not medically stationary and, therefore, was not ready to take advantage of the program. He advised the Fund on October 11, 1976 that he was now stationary and would like to be enrolled in a program and also receive temporary total disability benefits as of September 9, 1976. The basis for the termination of claimant's vocational rehabilitation program because of claimant's move to San Diego a short time after the earlier referral was explained to him and he was told he could reapply for such services. A referral was again made by the Disability Prevention Division on November 8, 1976 and temporary total disability was reinstated.

The Referee found that claimant was not entitled to time loss benefits between September 9, 1976 and October 11, 1976, the date of his letter to the Fund. He felt it was doubtful that claimant was even entitled to benefits between March 18, 1976 and early September. Based on OAR 436-61-052 the Referee concluded that since claimant was not in an authorized program of vocational rehabilitation during September and October 1976, he was not entitled to time loss benefits during that time.

The Board, after de novo review, concurs with the conclusion of the Referee. They note that, although claimant was found medically stationary in September 1975, he was not considered vocationally stationary until the non-referral letter from the Disability Prevention Division of March 18, 1976.

The Evaluation Division of the Board had to wait until September 17, 1976 to issue its Determination Order because requested information from the Fund was not received until that date, therefore, claimant probably was entitled to time loss benefits during the intervening time period, but on the date of the issuance of the Determination Order claimant was both medically and vocationally stationary. Claimant had shown no interest in pursuing a program of vocational training. At the time of the Disability Prevention Division's letter of withdrawal in March of 1976, they informed claimant that he could reapply for their services at any time. Claimant chose not to do this until his benefits were stopped.

The Board concludes that the Referee was correct in not awarding temporary total disability benefits for the period September 9, 1976 to October 11, 1976.

ORDER

The order of the Referee, dated April 15, 1977, is affirmed.

DECEMBER 8, 1977

HAROLD W. BREWER, CLAIMANT
 Brown, Burt & Swanson, 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 December 17, 1976 Determination Order which failed to increase a previous award of 320° for 100% unscheduled disability. Claimant contends 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 July 13, 1977, is affirmed.

DECEMBER 8, 1977

GENE FRANSDEN, CLAIMANT
 William Beers, Claimant's Atty.
 SAIF, Legal Services, Defense Atty.
 Order on Remand

On April 13, 1977 the Board affirmed the order of the Referee, dated November 4, 1976, which had affirmed the Determination Order of December 26, 1975 awarding claimant compensation for temporary total disability but no award of compensation for permanent partial disability. The claimant appealed the Board's Order on Review to the Multnomah County Circuit Court.

Under date of September 15, 1977, the Honorable Charles S. Crookham, Circuit Court Judge, entered his letter opinion stating: "Both logic and significant testimony leads the court to believe claimant has suffered from abdominal and groin pain. Likewise the evidence establishes that the pain is causally related to the injury of December 9, 1974, and the resulting operations."

On December 9, 1974, claimant, a welder, fell from a 10-foot welding platform. Initially, he had a repair of an early direct inguinal hernia but continued to complain of great pain and was again hospitalized for exploration of the inguinal region.

A granulomatous reaction to suture material was found but nothing more. Claimant seemed to be making progress for a period of time and then he developed an acute epididymal orchitis which, following as closely as it did to the previous surgery, was considered a complication of it. After an exploratory operation on July 29, 1975 an orchiectomy was performed; it was thought that there might be an underlying malignant lesion present, however, it turned out to be purely an inflammatory hydrocele and again the same granulomatous change present along the cord.

The Referee found that the repeated surgeries were justified and were compensable consequences of the original industrial injury which caused the hernia, but he found no medical evidence to support claimant's contention that he had disabling pain in the surrounding areas. The Board affirmed this order and on remand from the circuit court the Board again finds that there is absolutely no medical evidence to show the pain of which claimant complains has disabled claimant permanently. Pain and suffering, as such, will not support an award for permanent partial disability.

The Board concludes that, although in this case the workman does have continuous pain, this pain is not disabling and does not in any way affect the workman's potential wage earning capacity which is the sole criterion for evaluating unscheduled disability.

The Board concludes that claimant is not entitled to any award of compensation for permanent partial disability as a result of his December 9, 1974 injury or the surgeries which were performed thereafter to alleviate claimant's pain.

ORDER

The order of the Referee, dated November 4, 1976, which was affirmed by the Board's Order on Review entered on April 13, 1977, is hereby reaffirmed.

WCB CASE NO. 76-6541

DECEMBER 8, 1977

ANDY HUIZENGA, CLAIMANT
Carey & Joseph, Claimant's Atty.
SAIF, Legal Services, 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 granted him an additional 64° for 20% unscheduled back disability and an additional 13.5° for 10% loss of the right foot.

The first Determination Order, dated September 22, 1975, had awarded claimant 64° for his unscheduled low back disability and 20.25° for each foot, and the Second Determination Order had, on November 5, 1976, awarded an additional 20.25° for the right foot and 6.75° for a 5% loss of the left foot. The claimant contends he is permanently and totally disabled.

Claimant is 30 years old and is an achondroplastic dwarf. He sustained a compensable injury on March 8, 1971, when he strained his back lifting a wheel while working as an auto mechanic. The injury produced a completely herniated disc at L2, resulting in paraplegia. The disc at L2 was excised and a laminectomy was performed. During the recovery, claimant had various difficulties and required numerous hospitalizations.

At the time of the hearing, claimant had the following restrictions: unable to lift over thirty pounds, limited in standing and walking on cement because of residual weakness and neurological loss in his feet and ankles, which then primarily affected his right foot, which repeatedly produced blisters on the bottom of his foot.

Claimant worked for several months in 1973 as a welder, until a blister forced him off his feet. This job was obtained through the efforts of the Division of Vocational Rehabilitation. Claimant has not worked since 1973. He resides with his mother in a trailer house.

In 1976, claimant did not accept an invitation to go to the Disability Prevention Division in Wilsonville. He felt that these services would merely duplicate those he obtained at the Rehabilitation Institute of Oregon and would not provide him with any additional knowledge.

During his recovery, the claimant has had various ideas about what kind of employment he wants to do. He first thought he could go back to his old job, and later he wanted to buy his own gas station. At various times he has also expressed a desire to build and race cars.

The claimant is 4'9". He has graduated from high school and completed one year of college. Claimant found school difficult. The claimant has less than average intelligence. He apparently has an interest in and the aptitude, knowledge, and experience to work with mechanical things.

The Referee found claimant was not permanently and totally disabled, odd-lot or otherwise. He concluded the claimant was entitled to an increase for his unscheduled back disability and for his scheduled disability of the right foot. Therefore, the Referee awarded the increases set forth in the first paragraph of this order.

The Board, after de novo review, finds the claimant is

not permanently and totally disabled, but is entitled to a greater award for his unscheduled back disability. The Board finds that claimant undoubtedly has sustained a substantial loss of earning capacity. After considering claimant's congenital physical disability, the restrictions which the doctors have placed on him as a result of his injury, his mental abilities, and his geographical location, all of which limit his earning capacity, the Board concludes that an award of 256° for 80% unscheduled disability would more adequately compensate claimant for his loss of wage earning capacity.

ORDER

The Referee's order, dated June 28, 1977, is modified.

Claimant is granted 256° of a maximum of 320° for 80% unscheduled low back disability. This is in lieu of the Referee's order which is affirmed in all other respects.

Claimant's attorney is granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increase granted by this order, payable out of said increase, as paid, and the total attorney's fee granted by the Referee's order and this order shall not exceed \$2,300.

WCB CASE NO. 77-1198

DECEMBER 8, 1977

LESTER R. LEE, CLAIMANT
Frank W. Mowry, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, 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 March 22, 1976 Determination Order which awarded him no permanent disability. The request for review presented only one issue, i.e., should the Board remand the case to the Referee with instructions to obtain an appropriate psychiatric evaluation of claimant as a basis for determining his 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.

The Board firmly believes that it is the responsibility of a claimant to prepare his own case. The request that the Board should, through one of its Referees, refer claimant to a

psychiatrist to develop supplemental evidence for the record is entirely untenable. Additionally, in this case, claimant, at the hearing, waived all rights to any further evaluations.

ORDER

The order of the Referee, dated June 9, 1977, is affirmed.

WCB CASE NO. 76-3219

DECEMBER 8, 1977

WILBURN MILLER, CLAIMANT
Brown, Burt & Swanson, Claimant's Atty.
Keith D. Skelton, 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 a total award of 192° for 60% unscheduled left shoulder disability. The employer contends that the attempted rehabilitation and reemployment process which it had set in motion was interfered with by claimant's attorney and also that the Referee's award of permanent disability was excessive.

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 June 3, 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. 77-134-IF

DECEMBER 8, 1977

THOMAS E. PERRY, CLAIMANT
Allen, Stortz, Barlow & Fox, 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 claimant's claim for injury to his back.

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 June 28, 1977, is affirmed.

WCB CASE NO. 76-1723
WCB CASE NO. 76-4261

DECEMBER 8, 1977

RICHARD C. PICK, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Charles Paulson, 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 found claimant to be permanently and totally disabled as of the date of his order, April 12, 1977, and dismissed WCB Case No. 76-1723 because the issue therein was now moot.

Claimant, a cab owner/driver, suffered a compensable injury on August 18, 1975 when, while carrying a suitcase in each hand, he slipped off a curb and wrenched his back. Claimant had suffered an industrial injury in 1965 which required surgery on two different occasions for back fusion. After he recovered from these surgeries he attempted to work as a welder but was unsuccessful. He then worked as a cook on a tug for a period of time, however, the motion of the tug bothered his back. Claimant has also worked as a log truck driver, a photographer, doughnut sales route driver, and worked in a mill at different times.

Claimant is 52 years old and has an eighth grade education.

On August 27, 1975 Dr. Ho examined claimant and diagnosed a lumbosacral strain and recommended acupuncture or physical therapy. Acupuncture treatment was started on that date.

Claimant received conservative treatment from several doctors including Dr. Parsons, Dr. Mintz, and Dr. Pasquesi. The claimant was also examined by the Orthopaedic Consultants on November 21, 1975. Claimant had been seen in September 1976 at the Disability Prevention Division of the Board and after an evaluation it was determined that claimant should not lift anything heavier than 10-15 pounds, should not sit more than 1/2 to 3/4 of an hour without a break and should avoid repeated bending or stooping and do no overhead work. It was also determined that he was unable to drive a cab or a truck or do any work in a sawmill.

Claimant testified he was unable to sit or stand very long, that he could lift items from table height but was unable to bend to do any lifting. If he remains relatively quiet all day he doesn't have too much of a problem but any activity causes discomfort to increase and results in cramps in his legs and feet at night. Claimant testified that although he had had some discomfort in his back after the fusions in the 60's the pain was not great enough to stop him from working and he worked eight to ten hour shifts. After the 1975 injury claimant was unable to return to driving a cab.

The Referee stated that he was unaware of any job which claimant could perform because he could neither sit nor stand for long periods of time nor was he able to lift anything from a bending position. The Referee also noticed that while testifying claimant had the appearance of a person either in pain or in fear of precipitating pain by physical movement. The Referee found that claimant was limited before he came to work for his present employer, however, the difference now is that before the 1975 injury he was able to work as a cab driver and subsequent thereto he was not able to do so.

The Referee commented that the medical reports indicated that claimant's disability was between 25% and 34%; however, he found that that evaluation was based on physical impairment only and not on the claimant's loss of future wage earning capacity. After considering all the evidence, the Referee concluded that the claimant was permanently and totally disabled.

The majority of the Board, on de novo review, finds that the medical evidence is not sufficient to obviate the lack of motivation on the part of claimant. Although Dr. Parsons stated that he doubted that claimant would be employable, he also said that with regard to claimant's degree of permanent impairment he agreed with Dr. Pasquesi's rating, with exception of the 10% impairment of the whole man for chronic, moderate pain. (Dr. Parsons does not feel that pain can be rated as an impairment.) He felt that a permanent impairment rating of 24% of the whole man be considered. Dr. Pasquesi had found a combined impairment of 34% of the whole man which included whatever pre-existing disability there was from the previous back fusions.

On March 12, 1976 Dr. Pasquesi, after finding claimant's condition was stationary, stated that claimant probably should engage in some occupation not requiring repetitive bending, stooping, and twisting and not requiring lifting more than 50 pounds at a single time.

The Referee makes no mention of claimant's motivation, however, as early as October 1975 Dr. Ho noted that it was suggested to claimant that some light occupational activity would be more appropriate for him and that claimant was also considering the possibility of retiring. Dr. Ho essentially agreed with Dr. Pasquesi's rating of impairment.

On April 26, 1976 the claimant's vocational rehabilitation file was closed for the reason that, "claimant stated that he was not available for job placement". The evaluation summary prepared by the Vocational Rehabilitation Division indicated that because claimant's wife was working and claimant was receiving Social Security benefits claimant felt he might decide to retire because of his physical situation, and they added that that probably was an appropriate decision. Later in the same report it was noted that claimant had had therapy sessions with Dr. Fleming and that he had decided that he would retire from the labor market because of his present physical situation.

The majority of the Board feels that claimant, as a result of his August 18, 1975 injury, is entitled to a greater award than 80% to adequately compensate him for his loss of wage earning capacity, but claimant has not shown by a preponderance of the medical evidence that his physical condition when considered together with his age, education and work background is such that motivation, or lack thereof, need not be considered in determining if claimant is permanent and totally disabled.

The majority of the Board concludes that an award of 256% which represents 80% of the maximum allowable by statute for unscheduled disability adequately compensates claimant for his loss of wage earning capacity which is brought about primarily by claimant's own decision to retire from the labor market. The Board further notes that although claimant was unable to return to driving a cab after his 1975 injury, he does own his own cab and at the present time he has hired another person to drive it for him. Although this cannot be considered as a part of claimant's wage earning capacity, it certainly indicates additional income which he will receive as a result of the operation of his cab business.

For the above reasons the majority of the Board concludes that the award of permanent total disability made by the Referee was excessive and that an award equal to 80% of the maximum allowable by statute for unscheduled disability would be more appropriate.

ORDER

The order of the Referee, dated April 12, 1977, is modified.

Claimant is awarded 256% of a maximum of 320% for unscheduled low back disability. This award is in lieu of the award for permanent total disability granted by the Referee's order which, in all other respects, is affirmed.

Chairman M. Keith Wilson dissents as follows:

I dissent from the majority decision of the Board and would affirm and adopt the Referee's well reasoned opinion and his finding that the claimant is permanently and totally disabled. A

copy of the Referee's opinion is attached hereto and is made a part of this dissent.

The medical and lay evidence clearly preponderates in favor of a finding that claimant's disabilities have dictated retirement from the active work force. Vocational rehabilitation has not been deemed feasible for this precise reason. This conclusion was reached by both the Disability Prevention Division of the Board in April, 1976 and by the Vocational Rehabilitation Division of the Department of Human Resources. Dr. Parsons has concluded that the patient (claimant) is unemployable.

Motivation is one factor to be considered in these cases. Wilson v. Weyerhaeuser, 30 Or App 403 (1977). The evidence convinces me that claimant's motivation was not subject to question until the time his physical disabilities, including disabling pain, became so severe that motivation to continue in full time, gainful employment was rendered irrelevant to the decision as to the extent of loss of earning capacity.

/s/ M. Keith Wilson, Chairman

WCB CASE NO. 77-1190

DECEMBER 8, 1977

SELMA F. ROBIRDS, CLAIMANT
James W. Powers, 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 granted claimant an additional 32° for a total award of 128° for 40% unscheduled low back disability. Claimant contends that this award is 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 June 30, 1977, is affirmed.

DECEMBER 8, 1977

CLAIR VANDEHEY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Don G. Swink, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which remanded the claim to the carrier for the purpose of providing the recommended psychological treatment and for payment of temporary total disability benefits from January 4, 1977 until the same can be terminated in accordance with the statute. Attorney fees in the amount of 25% of the temporary total disability benefits and also of any increased permanent disability award that might be granted in the future were assessed. Claimant contends that the attorney fees should be paid by the carrier and not out of claimant's 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 March 24, 1977, is affirmed.

DECEMBER 8, 1977

BEHROZ ZOLFAGHARI, CLAIMANT
Jay R. Jackson, 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 a back injury.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, as supplemented by his order of June 20, 1977, 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, and supplemented and reaffirmed on June 20, 1977, is affirmed.

MARK BRITTON, CLAIMANT

Malagon, Starr & Vinson, Claimant's Atty.

Doblie, Bischoff & Murray, Defense Atty.

Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks Board review of an order of the Referee which approved a stipulation dated August 29, 1977 and dismissed claimant's request for hearing. Claimant contends that his attorney at the time the stipulation was entered into did not fully represent to him all of the facts with respect to the stipulation and as a result unless the matter is remanded to the Referee pursuant to ORS 656.295(5) he will be forever foreclosed from a determination of his entitlement to compensation for permanent partial disability as a result of an industrial injury suffered on September 15, 1976.

The stipulation was entered into prior to a hearing which had been requested, therefore, the only record before the Board on review is the stipulation which states: "That all issues raised or that could have been raised by the present pending Request for Hearing are hereby fully compromised and settled by SAIF agreeing to accept the claim as compensable and agreeing to pay claimant a penalty of \$150.", and an affidavit from the claimant setting forth certain facts which occurred prior to the stipulation.

The facts set forth in claimant's affidavit, if proven to be true, indicate that the stipulation inadequately compensated claimant. The Workers' Compensation statute was enacted with intent not to bind the worker to an agreement regarding compensation which materially overlooks his loss and expenses resulting from injury or his disability regardless of how well advised or observant he may have been at the time he entered into it. Where the face of the record shows probability of inadequacy in the original award, the Board can properly remand the matter to the Referee for further determination of claim liability though the original award was based on the agreement and stipulation. Schulz v. State Compensation Department, 252 Or 211 (1968).

The Board concludes that the stipulation does not make any provision for an award, if justified, for permanent partial disability; it merely states that it will accept the claim and agree to pay a penalty of \$150 for failure to have timely accepted such claim. The stipulation leaves much to be desired and the Board believes that it is quite possible that all of the terms of the settlement were not incorporated in the written document, or, in the alternative, that claimant was not fully advised in advance of the terms of the stipulation and settlement.

Therefore, pursuant to the authority granted the Board by ORS 656.295(5), the matter should be remanded to the Referee for a hearing on the merits on the issue of the extent of permanent partial disability, if any, suffered by the claimant.

IT IS SO ORDERED.

SAIF CLAIM NO. GC 154383 DECEMBER 12, 1977

FRANK J. ELLIS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

An Own Motion Determination, dated October 11, 1977, was entered in the above entitled matter. Certain errors were made and are hereby corrected.

On page 1, in the third line of the fourth paragraph of said order, "5%" should be deleted and "7.5%" substituted therefor.

On page 2, in the second line of the third paragraph, "112° for 35%" should be deleted and "120° for 37.5%" substituted therefor.

IT IS SO ORDERED.

WCB CASE NO. 76-5822

DECEMBER 12, 1977

CLIFFORD GAYLOR, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
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 reopened claimant's claim as of January 6, 1977 for further medical treatment, including psychotherapy, and payment of compensation for temporary total disability until his claim is closed. The employer contends that claimant has been adequately compensated by the Determination Order which had awarded him 96° for 30% un-scheduled disability; also, that claimant has failed to carry the burden of proving aggravation.

Claimant, at the age of 50, sustained a compensable low back injury on October 15, 1970. The original diagnosis was lumbosacral strain with femoral nerve involvement. A subsequent myelogram revealed a herniated disc, but claimant's physical condition

did not appear to be too severe and the doctors were optimistic that claimant could return to work. A Determination Order of May 3, 1972 granted claimant 96° for unscheduled disability.

Claimant began seeing Dr. Tsai in May of 1976. His impression in June 1976 was, "unchanged, traumatic herniation of nucleus pulposus, L5-6, more marked on the left side, related to the injury of 1970 from history". A myelogram was performed on June 18, 1976 and surgery was recommended. His claim was reopened on that date upon the doctor's advice, but claimant refused to undergo the recommended surgery. The Orthopaedic Consultants, on August 31, 1976, found claimant's condition stationary, that he was not in need of active treatment and surgery would be unwise. They felt claimant could return to some other occupation if he was so motivated and they found the residual disability to his back, as a result of the 1970 injury, was mild.

On October 25, 1976, claimant was awarded further temporary total disability but no permanent disability.

Dr. Hickman, on January 6, 1977, found that claimant's psychopathology related to the injury had worsened since 1971. He felt that because rehabilitation was not accomplished soon after his injury, the possibility of retraining claimant for some other occupation became more remote each year. With regard to the recommendation by the Orthopaedic Consultants concerning surgery, Dr. Hickman stated that claimant had told him that he was not terribly uncomfortable physically as long as he did nothing to aggravate his condition. Dr. Hickman felt that any rehabilitation program undertaken at the present time should be psychological and vocational, rather than medical.

Dr. Quan examined claimant on April 6, 1977 at the request of the carrier. Claimant denied having any psychological or emotional problems and the doctor concluded that claimant did not have enough symptomatology to justify a diagnosis. He felt that there were some personality factors which were not related to the accident, but which could possibly compromise his motivation to return to work. He found no psychiatric condition that would preclude claimant from returning to work.

The Referee found that claimant had not established a prima facie case to support his contention that he is permanently and totally disabled. She found that his physical symptomatology had not varied from the medical reports of 1971. She found his motivation was poor; claimant did not attempt to lose weight, he would not submit to a recommended operation, participate in vocational rehabilitation, nor has he looked for any work since 1971. However, based on the report of Dr. Hickman who indicated that claimant's psychological problems, related to the injury, were not stationary and that he could be helped with proper treatment, the Referee ordered claimant's claim be reopened for further medical treatment and for payment of compensation for temporary total disability until he is considered stationary.

The Board, after de novo review, disagrees with the conclusion of the Referee. Claimant has obvious poor motivation and the general consensus of medical opinion is that his physical condition has not worsened since the last award or arrangement of compensation.

Based upon the findings of Dr. Quan, the Board concludes that claimant does not have a psychological problem of enough significance to warrant a reopening of his claim. If claimant was motivated to return to work, he could do so with few problems. The award of 96% for 30% unscheduled disability previously granted claimant is adequate to compensate him for his loss of wage earning capacity.

ORDER

The order of the Referee, dated May 25, 1977, is reversed.

The Determination Orders of May 3, 1972 and October 25, 1976 are affirmed.

WCB CASE NO. 76-3429

DECEMBER 12, 1977

JERRY HOAG, CLAIMANT

Harold W. Adams, Claimant's Atty.

Philip A. Mongrain, Defense Atty.

Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

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

Claimant, 37 years old, on February 1, 1973 sustained an injury to his upper back. Claimant worked until August 1973 but has not worked since. The injury was diagnosed by Dr. Tsai, a neurosurgeon, as a bilateral thoracic sprain related to the accident and right S1 nerve irritation, which was asymptomatic as of October 30, 1973. Dr. Tsai related chest, upper back, and low back injuries to the accident.

Claimant had suffered a head injury several years prior to February 1, 1973 which was diagnosed by Dr. Parvaresh as probably resulting in brain damage with an ensuing organic brain syndrome.

Claimant has had considerable medical treatment, a great part of which has been psychiatric. The greater portion of his disability stems from psychological and psychiatric difficulties rather than from physical difficulties. Dr. Parvaresh, in April 1974, diagnosed claimant as having anxiety neurosis and indicated

that the anxiety tension and depression manifested by the claimant after his industrial injury was to some degree triggered by the industrial accident.

Dr. Russakov of the Pain Clinic, upon claimant's discharge therefrom, opined that claimant viewed himself as moderately disabled, and that he was well motivated and desirous of rehabilitating himself, but his combined physical and mental problems probably made him severely disabled.

Dr. Parvaresh did not believe claimant's psychiatric disorder at that time (April 1974) should preclude him from actively seeking training or employment and should not in the long run leave claimant with any appreciable degree of psychiatric impairment or disability. In February 1975 Dr. Parvaresh found that if claimant from an orthopedic standpoint was not significantly disabled, then from a psychiatric standpoint there were no compelling reasons why claimant could not return to his previous employment or other similar jobs. Dr. Quan, in July 1975, found claimant not sufficiently impaired to prevent work or involvement in a training program.

In contrast, Dr. Rennebohm, a psychiatrist, who treated claimant for a substantial time, reported in December 1975 that claimant was in a stable condition and was not qualified to seek or to hold an ordinary work position. Dr. Straumfjord, in August of 1975, thought that claimant's back pain provided him with an excuse for failing to compete, which could preserve his self esteem, and it was extremely unlikely that claimant would ever return to gainful employment. Dr. Straumfjord believed any attempt to induce claimant back to work would be associated with increased pain, return of anxiety and possible psychotic disorganization.

Claimant's demeanor at the hearing was found by the Referee to persuade him that claimant does, in fact, suffer a substantial subjective level of pain and severe psychological difficulty.

Claimant has had a considerable amount of college training and had attempted refresher courses, but quit because he could not handle it.

The orthopedic and neurological reports in the record are substantially negative.

The Referee found that the lay testimony established claimant was suffering a disabling level of pain, which probably was mainly psychogenic rather than physical in origin, but it did derive from the industrial injury. The Referee found Drs. Rennebohm, Winters and Straumfjord more persuasive than Drs. Quan and Parvaresh and he concluded that the claimant was permanently incapable of regularly performing any work at a gainful and suitable occupation, therefore, he was permanently and totally disabled.

The Board, after de novo review, finds, based on all the evidence that claimant is not permanently and totally disabled. The evidence clearly establishes the fact that the claimant is not motivated to return to work. He is able to do many things. Dr. Parvaresh reports that claimant spends his time reading, playing with his children, teaching them to play golf. Claimant takes care of the housekeeping chores and drives to and from town for his shopping and other necessities; he also visits his friends. Dr. Parvaresh found claimant to be adamant that he is not in any position to either seek employment or to go to school; his motivation for future training and employment is nil. Claimant's personality is one of total passive dependency.

Claimant is determined he is not going to return to school and does not plan to go to work and feels "they must take care of my needs".

Dr. Parvaresh, in his report of August 30, 1976, found no orthopedic or psychiatric problems sufficient to justify claimant's continued disability and reluctance to go for training or for work. Dr. Bassinger, in November 1973, diagnosed chronic low back sprain with a strong psychosomatic component. Dr. Quan in July of 1975 opined claimant's psychiatric impairments did not preclude him from doing work or involvement in a training program.

The evidence reveals that the claimant is physically capable of doing almost anything he wants to do. Claimant's industrial injury did aggravate a pre-existing psychological condition but it did not cause claimant to become permanently and totally disabled. The claimant is not motivated to going back to work or to being retrained. He is well educated with a good deal of college education and is only 38 years old.

The Board concludes that claimant is not permanently and totally disabled and would be adequately compensated for his loss of wage earning capacity by an award of 128° for 40% of the maximum for unscheduled disability.

ORDER

The order of the Referee, dated April 29, 1977, is modified and the claimant is awarded 128° of a maximum of 320° for 40% unscheduled permanent disability. This is in lieu of the award of permanent total disability granted by the Referee's order which in all other respects is affirmed.

SID T. McCAFFERTY, CLAIMANT
Galton, Popick & Scott, Claimant's Atty.
Davies, Biggs, Strayer, et al.,
Defense Atty.
Philip A. Mongrain, Defense Atty.
Own Motion Referred for Hearing

On November 29, 1977 the claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury which claimant suffered on May 2, 1969 while employed by Portland Car Wash, whose carrier was Employers Insurance of Wausau. The claim was accepted and closed by Determination Order dated December 24, 1969. Claimant's aggravation rights have expired.

On May 6, 1977 claimant allegedly suffered a compensable industrial injury while in the employ of Owens-Illinois, Inc., a self-insured employer, whose claims were processed by Gates, McDonald and Company. The claim was denied by Gates on June 15, 1977. The letter of denial stated that the treatment furnished claimant by Dr. Starr was related to the 1969 injury and that claimant had made a full recovery from his May 6, 1977 injury. Claimant requested a hearing on the denial by Gates (WCB Case No. 77-4254).

At the present time, the Board does not have sufficient evidence before it to enable it to determine whether claimant's present condition is related to his May 18, 1969 injury and that it represents a worsening since the last arrangement or award of compensation for said injury or is the result of the incident of May 6, 1977. Therefore, claimant's request that the Board reopen his 1969 claim pursuant to its own motion jurisdiction is referred to the Hearings Division with instructions to set it for hearing on a consolidated basis with claimant's request for hearing on the propriety of the denial of his May 6, 1977 injury. Based upon the evidence at this hearing, the Referee shall determine whether claimant's present condition is the result of an aggravation of his 1969 injury or a new compensable injury suffered on May 6, 1977.

Upon conclusion of the hearing, if the Referee finds an aggravation of the 1969 injury, he shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendation with respect to the request for own motion relief; however, if the Referee finds that claimant has suffered a new compensable industrial injury, he shall write a final and appealable order thereon.

DECEMBER 12, 1977

STEVEN P. MEEK, CLAIMANT
William B. Murray, 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 claimant's claim be re-opened for payment of temporary total disability benefits from and after December 28, 1976 and until closure 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 May 26, 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 Fund.

DECEMBER 12, 1977

JUANITA MILLION, CLAIMANT
Myrick, Coulter, Seagraves, Nealy
& Myrick, 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 carrier's denial of her right shoulder condition.

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 June 9, 1977, is affirmed.

DECEMBER 12, 1977

JOHN J. NAYLOR, CLAIMANT
Michael M. Watkins, 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.

ORDER.

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

SAIF CLAIM NO. SC 328916 DECEMBER 12, 1977

HARVEY PIERSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, at age 53, suffered an acute low back strain on September 21, 1971 when his knee gave way while loading a door onto a truck. Dr. Jones saw claimant that day and gave him instructions for conservative care at home. The claim was closed on December 17, 1971, after the Fund was unable to obtain a current status report, with compensation for time loss only.

On May 17, 1972 claimant saw Dr. Brodeur with complaints of a stiff and sore left knee which he believed was a result of bumping it on a bench in March of 1972. The doctor, however, thought that the problem was sciatic radiation of pain from the back rather than from the knee injury and, therefore, referred claimant to Dr. Grossenbacher, an orthopedic surgeon.

Dr. Grossenbacher, on May 22, 1972, found grade I spondylolisthesis and degenerative disc disease of the lumbosacral joint and nerve root irritation. Surgery was a possibility in the future.

On September 28, 1972 Dr. Shlim indicated that his examination of claimant was negative and that he should return to work. Claimant's claim for aggravation of his 1971 back injury was denied by the Fund but later accepted and a Determination Order of October 13, 1972 granted further temporary total disability benefits but no permanent disability.

Dr. Cherry, on October 26, 1972, diagnosed spondylolisthesis, degenerative changes in the low back, and effusion of the left knee which the doctor aspirated, injected and later casted. At that time, claimant was not able to return to his former employment as a carpenter.

It was stipulated that claimant's claim be reopened as of September 29, 1972 on the basis of Dr. Cherry's findings. Upon Dr. Cherry's recommendation, the Disability Prevention Division evaluated claimant in June of 1973, finding grade II spondylolisthesis and gout of the left knee. The Back Evaluation Clinic, after examination of August 3, 1973, recommended fusion of the lumbosacral vertebrae. Referral was made for Vocational Rehabilitation in July 1973 but was later canceled because claimant was expected to undergo surgery in the near future.

On August 29, 1973, Dr. Cherry referred claimant to Dr. Kimberley with the recommendation that Dr. Kimberley perform the fusion if he felt that it was indicated. Dr. Kimberley performed a two level spinal fusion from L4 to the sacrum using screws to fix the vertebral articulations. His findings were chronic lumbosacral strain, secondary to lower lumbar spine anomalies, osteoarthritis generalized and gout.

In June of 1974, claimant was doing well and working 4 hours a day as a self-employed carpenter. Dr. Kimberley, on July 10, 1974, found claimant to be medically stationary. The major limitations at that time were residual sciatica of the right leg, inconstant, related to bending and lifting together with osteoarthritis.

On August 15, 1974, claimant was granted an award of 80° for 25% unscheduled low back disability and compensation for 15% loss of the right leg. Claimant appealed this Third Determination Order and a stipulation dated October 1975 granted 192° for 60% unscheduled low back disability and 45° for 30% loss of function of the right leg, these awards being in lieu of those granted by the Third Determination Order.

Dr. Gripehoven referred claimant to Dr. Parsons and on July 20, 1977, Dr. Parsons felt that it would be beneficial to claimant if the old screws were removed to relieve the chronic radicular pain on the right side. He also recommended an exclusion myelogram to rule out other pathology. These procedures were done in August of 1977 and Dr. Gripehoven's final report found claimant stationary with residual disability at his preoperative level.

On September 2, 1977 the Fund requested a determination of claimant's claim from the Workers' Compensation Board. The Evaluation Division of the Board recommends that claimant be granted additional temporary total disability benefits from August 8, 1977 through September 20, 1977. They did not recommend any further increase in claimant's permanent disability compensation.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from August 8, 1977 through September 20, 1977, less time worked.

SAIF CLAIM NO. EC 148830 DECEMBER 12, 1977

JACK RUTHERFORD, CLAIMANT
Frank Susak, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on August 10, 1968. His claim had been closed and his aggravation rights had expired when an Own Motion Order of July 9, 1976 reopened the claim. This order provided claimant compensation for temporary total disability commencing September 17, 1975. An adequate recital of the history of the claim involved herein is contained in that order and will not be repeated.

Claimant has received a considerable amount of treatment by doctors in different specialties, including surgical, neurosurgical, psychological and psychiatric. Dr. Wilson, in October 1975, indicated that claimant had a substantial character disorder which compounded his physical complaints. He said claimant had a "psychopathic taint with the complicating features of an inadequate personality, marked dependency, etc.". He also found lumbar disease and cervical disc disease.

Dr. Lackner, claimant's treating physician, advised that no further surgery was indicated; that claimant was addicted to percodan and demerol, both of which were used in his treatment. He was referred to the Pain Clinic, but when examined, claimant was unwilling to accept full treatment for his pain and other problems which was necessary for his physical rehabilitation.

The Evaluation Division of the Workers' Compensation Board finds that without the treatment recommended at the Pain Clinic, claimant's condition is stationary. ORS 656.325 provides that the worker has the responsibility to reduce his disability and claimant, in refusing the treatment, appears to lack the motivation to do this. Evaluation recommended that claimant be granted no further award for permanent partial disability, but that he be granted compensation for temporary total disability from September 17, 1975 through September 30, 1977.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from September 17, 1975 through September 30, 1977, less time worked.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the compensation granted by this order, payable out of said compensation as paid, not to exceed \$500.

WCB CASE NO. 76-6169

DECEMBER 13, 1977

DENNIS C. BANGS, CLAIMANT
Coons & Anderson, Claimant's Atty.
Roger R. 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 affirmed the Determination Order dated November 8, 1976 granting claimant 48° for 15% unscheduled low back disability and 22.5° for 15% loss of claimant's left leg. Claimant contends his permanent partial disability is greater than that awarded to him by the Determination Order.

Claimant, at age 32, suffered a compensable injury on March 18, 1974 while working as a hot press operator. Claimant was hospitalized for about 10 days and has since undergone a great deal of examination, treatment and consultation. X-rays revealed no fractures. The initial diagnosis referred to multiple contusions of the back and to both knees. There was also an indication of a concussion.

Claimant, on May 15, 1974, was released for work. Claimant had had a normal arthrogram on April 23, 1974.

Claimant was examined by Dr. Mason at the Disability Prevention Division on September 18, 1974. He diagnosed questionable stress to the cervical, dorsal and lumbosacral spine; he found no true internal derangement of the left knee. He did find gross emotional overlay with dramatics and conversion reaction. Dr. Mason recommended a job change, but no surgery unless a physician actually observed claimant's knee locking.

On November 7, 1974 Dr. McHolick, after examining claimant, felt he had no major orthopedic problem and questioned any reason why claimant had not returned to work. Dr. McHolick stated claimant was an obese male who seems to enjoy ill health. The claimant did not display a great deal of discomfort during the interview. A myelogram had been done which was negative.

On November 29, 1974 a Determination Order granted claimant compensation for time loss only. However, Dr. Wilson, on January 22, 1975, examined claimant; x-rays revealed two separate bony fragments in the knee. Claimant also had evidence of low back sprain with no evidence of nerve root irritation or compression. An arthrogram was scheduled for January 28, 1975. The arthrogram revealed disruption of a lateral meniscus and a lateral meniscectomy was done on February 7, 1975. Claimant continued to have complaints of knee pain, but Dr. Herscher, who had referred claimant to both Dr. McHolick and Dr. Wilson, believed that no further medical treatment was needed.

On March 26, 1975 a Stipulated Order set aside the first Determination Order and reopened claimant's claim.

Dr. Wilson's notes of July 31, 1975 indicate he recommended claimant contact the Division of Vocational Rehabilitation for consideration of retraining to a light occupation. Claimant could not probably return to heavy duty work, and Dr. Wilson restricted claimant's work to employment not involving bending or lifting. Dr. Wilson referred claimant to the Orthopaedic Consultants on September 15, 1975.

On November 3, 1975 the claimant was hospitalized by Dr. Luce who diagnosed a disc disorder at L5, moderately advanced with traumatic aggravation and defect at C5-6. Dr. Luce gave claimant a total myelographic study which was negative except for slight ridging in cervical spine and slight deformity at L3.

On February 11, 1976 Dr. Wilson indicated claimant's left knee was swollen and tender over the patella and he advised claimant to continue to use crutches.

Dr. McIntosh, on May 21, 1976, performed surgery for excision of bipartite patella fragments. On July 27, 1976, Dr. McIntosh stated most of the pain in claimant's left knee was gone, but due to his back pain he could not release claimant to mild work.

The Orthopaedic Consultants examined claimant on September 4, 1976 and found his condition was stationary with no further treatment necessary. They believed that claimant had permanent disability and that the total loss of function of the low back was minimal, no loss of function to the neck and minimal loss to the left knee.

On November 8, 1976 the Determination Order affirmed by the Referee was issued.

Dr. Stainsby examined claimant on March 22, 1977. He thought claimant had a low back strain with disability rated as minimal and needed no further treatment; his disability award was adequate.

At the hearing films were shown which revealed claimant moving about with apparent ease all of which is consistent with the medical findings of minimal disability.

Claimant has an eighth grade education and presently makes jewelry and has a tropical fish business which he runs from his home. Claimant has not worked since his injury except in November-December 1976 when he attempted to run a restaurant which required him to do all the work on a 12-hour day, 7 days a week basis. This work caused both leg and back problems. The claimant does not feel vocational rehabilitation has been helpful to him since he is only interested in making custom jewelry.

The Referee found that the films indicated that claimant could do considerable physical work. These films contradicted his testimony and that of his wife and half brother. Therefore, the Referee gave little weight or credibility to such testimony. The Referee found "claimant's contentions were not probably true and that the award of evaluation was fair, just and accurate". He affirmed the Determination Order of November 8, 1976.

The Board, after de novo review, concurs with the Referee's findings and conclusions. All the medical evidence establishes claimant's disability to his low back and left knee are minimal. The films show claimant is capable of considerable physical work and activity and thus are not favorable to claimant and do not support his testimony.

The Board concurs with the Referee's assessment of the credibility of the claimant and his witnesses. The films introduced and the medical evidence contradicts their testimony.

ORDER

The order of the Referee, dated April 27, 1977, is affirmed.

WCB CASE NO. 77-1138 DECEMBER 13, 1977

JOSEPH EMMONS, CLAIMANT
Dye & Olson, 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.

Both claimant and the State Accident Insurance Fund seek Board review of the Referee's order granting claimant 25% additional unscheduled disability for a total of 75% unscheduled disability. Claimant contends he is permanently totally disabled.

The Fund contends the original Determination Order award of 50% unscheduled disability should be restored.

Claimant, a firefighter, sustained a compensable injury on October 10, 1976. He was fighting a fire and fell through a burning stairway, suffering low back injury. On January 13, 1977 a Determination Order, based on Dr. Spady's closing report of November 15, 1976, granted claimant 160° for 50% unscheduled low back disability.

On January 14, 1977 claimant suffered a cerebral vascular accident which in the opinion of claimant's physicians rendered him permanently totally disabled. No contention is made that this cerebral vascular incident was connected to the industrial injury. The claimant contends he was permanently totally disabled prior to this event.

The evidence clearly indicates that claimant could not return to work as a fireman as the result of his industrial injury and that his back condition was basically stable. Claimant had a real estate license which he voluntarily turned in to the state after his fall.

The evidence also established claimant had difficulty in conducting normal daily activities after his industrial injury and prior to his stroke. The claimant, who is 49 years old, was a highly motivated individual who had worked his way up through the ranks in the fire department and, after 26 years, held the rank of captain. He had also secured a real estate license and worked part time at real estate sales. The claimant is a high school graduate with some additional training, including bookkeeping, real estate and fire department courses.

The Referee found that claimant's loss of earning capacity was substantial because he could not return to his old job as a fireman. His loss of earning capacity was also affected by his voluntary relinquishment of his real estate license.

The Referee, however, found the claimant had failed to carry his burden of proof to show that he was permanently and totally disabled as of January 13, 1977. Claimant is a very intelligent man, with excellent motivation and had been moderately successful in his real estate sales work and property acquisitions.

The Referee concluded, based on all the medical reports, that the claimant's disabilities prior to January 14, 1977, were not so severe to bar him from sedentary activities, but his loss of wage earning capacity did justify increasing the award to 240° for 75% unscheduled disability.

The Board, after de novo review, finds that the medical evidence quite clearly establishes that the claimant is not permanently and totally disabled as the result of his industrial in-

jury. The claimant had undergone no surgery and was only receiving treatments of heat, rest, muscle relaxants and pain medication. The Referee correctly viewed only the medical reports prior to January 14, 1977 in determining the claimant's disability. Dr. Spady found claimant stationary on November 15, 1976 and based on his report claimant was awarded compensation for 50% unscheduled low back disability.

The Board concludes that the Referee's award was excessive, the award of 160° for 50% unscheduled disability was adequate and the Determination Order should be reinstated. The cerebral vascular accident is responsible for making claimant almost permanently and totally disabled, but this accident was not work related.

ORDER

The order of the Referee, dated June 23, 1977, is reversed.

The Determination Order, dated January 13, 1972, is affirmed.

WCB CASE NO. 77-5784

DECEMBER 13, 1977

ALBERT H. FISCHER, CLAIMANT

Galton, Popick & Scott, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Own Motion Order

On October 31, 1977 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered on May 13, 1963 while in the employ of Lincoln Glass Company, whose Workers' Compensation coverage was, at that time, furnished by the State Industrial Accident Commission, the predecessor to the Fund. The claim was accepted and ultimately closed. Claimant's aggravation rights have expired.

The request for own motion relief was accompanied by medical reports of Dr. Spady and Dr. Marble and copies were furnished to the Fund. On November 1, 1977 the Board advised the Fund it had received the request and asked it to advise the Board of its position within 20 days thereafter.

On November 17, 1977 the Fund advised the Board that it was unable to locate the copies and asked for additional copies. Additional copies were sent on November 21 and, on November 28, the Fund responded in opposition to the request for own motion relief. It stated that it had previously considered and denied a request to reopen the claim on September 8, 1977 and, at this time,

it found no additional medical substantiation to reopen the request. The Fund's response stated that Dr. Marble found claimant's condition was aggravated by his enormous obesity and that progressive degenerative change in a weight bearing joint would be inevitable. Dr. Marble did not feel claimant would be a good candidate for surgery until he lost between 100-150 pounds.

The Board, after giving consideration to the contents of all the medical evidence furnished in support of claimant's request for own motion relief, finds that it is not sufficient to justify reopening his claim at this time and that claimant's own motion petition dated October 31, 1977 should be denied.

IT IS SO ORDERED.

WCB CASE NO. 75-4777

DECEMBER 13, 1977

ALBERT C. GROH, CLAIMANT
Van Natta & Peterson, 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 288° for 90% unscheduled low back disability. Claimant contends he is permanently and totally disabled.

Claimant sustained a compensable injury on October 8, 1973 to his hip and right leg when he pulled a press machine over onto himself. Claimant had had an industrial injury in California early in 1950 that required back surgery. Claimant also has a chronic asthmatic condition. Following his 1973 injury claimant was treated conservatively for what was later diagnosed as a back strain superimposed on a moderate degenerative disc disease at L3-L5 and a severe degenerative disc disease at the lumbosacral joint. A myelogram was performed with negative results; based on this, claimant's asthma and prior back surgery, additional back surgery was not recommended.

Claimant did return to his regular job as a sandblaster in February 1973 and worked until June 1973, when he quit to enter a hospital for traction.

Claimant was referred to the Disability Prevention Center, Department of Vocational Rehabilitation and Pain Clinic; all were unsuccessful in helping the claimant.

The claim was closed, reopened and again closed on November 5, 1975 with an award of 240° for 75% unscheduled low back disability.

Claimant cannot return to his former job as a sandblaster

and is precluded from jobs requiring lifting, bending, squatting, stooping or prolonged sitting or standing.

Claimant is 53 years old, has a limited education and a culturally deprived background. He has normal intelligence, but is slow and his learning ability is impaired. Claimant's past work experience consists of farming and construction work.

Claimant has non-organic emotional problems characterized by inappropriate effect and withdrawal. His physical symptoms have not varied for the last two years, except that he might be a little stiffer. He was last seen by a doctor for treatment in November 1975.

The Referee found that claimant's pre-existing asthmatic condition, combined with his back condition was not so disabling as to make him permanently and totally disabled without a showing of motivation. Claimant's motivation was questioned at the Disability Prevention Center and Pain Clinic. There was no evidence claimant has sought employment since his injury.

The Referee concluded, based on claimant's age, average intelligence, lack of education, poor cultural background, poor learning ability and prior work experience which was limited to manual labor, he had suffered a substantial loss of earning capacity and was entitled to a greater award than that granted by the Determination Order of November 5, 1975. He awarded to claimant 288° for 90% unscheduled permanent partial disability.

The Board, after de novo review, finds that the evidence quite clearly establishes that the claimant is permanently and totally disabled. Claimant is 53 years old, has a limited education, is slow, his learning ability is poor, and he has worked only in farming and construction. Claimant is barred from any employment requiring lifting, bending, squatting, stooping or prolonged sitting or standing. Claimant is a credible witness.

Dr. Kiest opined that claimant was not exaggerating or faking his symptoms. Claimant tried to continue to work, but finally was unable to continue. Drs. Kiest and Smith concurred in their opinions that claimant is permanently and totally disabled. The Pain Clinic felt due to claimant's back injury and his difficulty in learning new items that it would be impossible to retrain him. The transcript suggests that claimant has difficulty in performing day to day housekeeping tasks.

Claimant's motivation is but one factor to be considered in determining permanent and total disability. The Board concludes that in this case the issue of claimant's motivation need not be considered because the other factors indicate clearly that even if claimant were greatly motivated it would still be impossible for him to obtain and hold any suitable and gainful employment. Claimant is permanently and totally disabled as of the date of the Board's order.

ORDER

The order of the Referee, dated June 8, 1977, is modified.

The claimant is to be considered as permanently and totally disabled as of the date of this order. This award is in lieu of the award made by the Referee in his order, which is otherwise affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee the sum equal to 25% of the increased award made by this order, payable out of such increase as paid; the total attorney's fee, including that granted by the Referee's order, shall not exceed \$2,300.

WCB CASE NO. 75-128

DECEMBER 13, 1977

MONA MAESTRETTI, CLAIMANT
Clarke Brown, Claimant's Atty.
Benson, Arenz, Lucas & Davis, 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 ordered claimant's claim for aggravation to be accepted by the employer and ordered the employer to pay \$650 to claimant's attorney. The employer contends the claimant's attorney waived any attorney fees and penalties at the hearing; also, there is no medical evidence to support claimant's claim for aggravation.

Claimant, at age 59, sustained a compensable injury on August 25, 1970 when she fell, injuring her low back, left buttock and hip. She was treated by Dr. Schuler and underwent prolonged therapy. Claimant's pain became more intense and it was finally determined six months after her fall that claimant had suffered a fractured pelvis. Claimant improved with the appropriate treatment. On October 27, 1971 her claim was closed by Determination Order granting her 32° for 10% unscheduled low back disability.

At the hearing claimant had numerous complaints which included pain in the cervical area, stomach distress, nervousness and pain in the left hip, low back on the left side, and left foot and leg.

Claimant was involved in a car accident just prior to her industrial injury and there was a subsequent incident where claimant was struck by a falling picture in 1972. She was struck in the cervical area and upper shoulders.

Claimant at the hearing described in detail the problems with her low back, left leg and hip. She stated the pain was more noticeable now than in 1971. The claimant testified she had enjoyed her work, but since her fall she could hardly endure it from a physical standpoint. Claimant has continually described the same complaints to her doctors.

At the hearing, the employer moved for a bifurcated hearing to test the Referee's jurisdiction to hear the matter. This was denied. The employer then moved to dismiss claimant's claim on the ground that the medicals were not adequate to confer jurisdiction because of the failure of claimant to comply with the conditions of ORS 656.273(4). The claimant produced at the hearing a statement from Dr. Roy E. Hall, claimant's treating physician, that stated in unequivocal language that claimant's condition had worsened and her condition was directly related to her prior compensable injury. The Referee took this matter under advisement.

The Referee found that the medical reports were sufficient under ORS 656.273(4) to confer jurisdiction and denied the employer's motion to dismiss. The adequacy of the physician's report is not jurisdictional.

The Referee found the claimant to be a credible witness and, based on her testimony and Dr. Hall's reports, found claimant had suffered an aggravation of her 1970 compensable injury. He remanded her claim but did not assess any penalties, only awarded claimant's attorney an attorney's fee. The Referee found, however, that claimant had not carried the burden of proof that the problems in her cervical area and in her stomach were related to this 1970 injury.

The Board, after de novo review, finds that the Referee correctly denied the employer's motion to dismiss. It concurs in his conclusion that the denial of claimant's claim for aggravation was improper and the claim should be remanded to the carrier. However, the Board concludes that the Referee should not have awarded attorney fees. The record is very clear that at the hearing claimant's attorney waived any attorney fees.

ORDER

The Referee's order, dated May 10, 1977, is modified by deleting therefrom the award to claimant's attorney of \$650 as an attorney fee payable by the employer and in all other respects 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.

CHARLES E. BAY, SR., CLAIMANT
Tom Hanlon, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Referring For Hearing

On July 27, 1977 claimant, by and through his attorney, originally requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for industrial injuries suffered on February 22, 1966. On that date claimant was in the employ of Crown Zellerbach whose Workers' Compensation coverage then was furnished by State Industrial Accident Commission, the predecessor to the Fund. Claimant also filed a claim against Crown Zellerbach for an alleged injury suffered on May 5, 1977. This claim was denied by Crown Zellerbach, as a self-insurer, on July 8, 1977, on the basis that the injury was an aggravation of an old injury. Claimant has requested a hearing on this denial.

On August 25, 1977, the Board requested claimant's attorney to furnish it medical evidence to support the own motion request, with copies to be furnished to the Fund. On November 16, 1977 the Board received a letter from claimant's attorney which stated that since the Board's letter of August 25 and until November 8, 1977, the Fund had refused to supply medical and other information on old claims relating to claimant's back problems. On November 8, 1977, the Fund supplied the medical documents in support of the request for own motion relief.

On November 30, 1977 the Fund advised the Board that the position it had taken on September 19, 1977 remained the same, to-wit: it was the Fund's opinion that claimant's recent problems were not the result of his old injuries while insured by the State Industrial Accident Commission or the Fund, but were new episodes incurred while claimant was working for Crown Zellerbach at the time Crown Zellerbach was a self-insurer.

The Board does not, at this time, have sufficient evidence before it to determine whether claimant's present condition is the result of the 1977 injury denied by Crown Zellerbach or represents an aggravation of the injury suffered on February 22, 1966. Therefore, the request for own motion relief is hereby referred to the Hearings Division with instructions to set it for hearing on a consolidated basis with claimant's request for hearing on the denial of the 1977 injury.

Upon conclusion of the hearing, if the Referee, based upon the evidence taken, finds that claimant's present condition is an aggravation of the February 22, 1966 injury and represents a worsening thereof since the last award or arrangement of com-

pensation for said injury, he shall cause a transcript of the proceedings to be prepared and submitted to the Board together with his recommendation on the request for own motion relief. However, should the Referee find that claimant's condition is not an aggravation of the 1966 injury he shall determine the propriety of the denial of the May 5, 1977 claim and enter a final and appealable order thereon.

WCB CASE NO. 76-1916

DECEMBER 15, 1977

CARL BLAIR, CLAIMANT

Malagon, Starr & Vinson, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Order

On December 2, 1977 the Board received from claimant's attorney a Petition for Reconsideration of its Order on Review entered in the above entitled matter on November 22, 1977.

The Board, after due consideration, finds nothing contained in the petition or the attachments thereto which would justify reconsidering its order.

ORDER

Claimant's Petition for Reconsideration of the Order on Review is hereby denied.

WCB CASE NO. 77-67

DECEMBER 15, 1977

BENNIE A. CARTER, CLAIMANT

Willner, Bennett, Riggs & Skarstad,

Claimant's Atty.

Jones, Lang, Klein, Wolf & Smith,

Defense Atty.

Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order awarding him 208° for 65% unscheduled permanent partial disability for his low back. A Determination Order, dated December 21, 1976, had granted claimant 160° for 50% unscheduled low back disability. The claimant contends he is permanently totally disabled, or his permanent disability is greater than 65%.

Claimant, 57 years old, sustained a compensable injury on October 3, 1974 when he drove a front end loader over an embankment. The claimant suffered a lumbar compression fracture

at L-1. The fracture healed well without any complications. Claimant was treated conservatively with a brace and is not now treating with any physicians. At the hearing claimant complained of continuing back pain that radiates into both knees. Claimant does exercises which he was instructed by Dr. Stanford to do to build up his muscles.

Claimant has been told by treating and consulting physicians that he cannot return to his former job as a heavy equipment operator because of the possible jolting and jostling of his back. He was released for light work not involving heavy lifting or bending in August 1975. Claimant asserts that the examining physicians state he will never work again. This is not true; claimant tells his doctors he will never be able to work again.

In December 1975, claimant told the Board's service coordinator he would accept light work, but the coordinator closed claimant's file because claimant had applied again for Social Security disability benefits and for union retirement benefits. Claimant has not looked for work since his injury.

Claimant has very little formal education. Claimant's work experience is in mill work, truck driving, conductor on the railroad, correction guard and then a heavy equipment operator.

The Referee found that claimant had not been adequately compensated for his loss of wage earning capacity by the award made by the Determination Order, but that claimant had not established prima facie that he was "odd-lot" permanently totally disabled and, therefore, motivation must be considered. Based on claimant's age, education, work background and lack of training potential, the Referee increased the award to 208° for 65% unscheduled (low back) disability, relying primarily on Dr. Stanford's reports.

The Board, after de novo review, finds that all the evidence clearly establishes that claimant is not permanently totally disabled. Dr. Stanford reports that if claimant can overcome his strong belief that he will be unable to work again, then he certainly can do some lighter work.

Dr. Schuler reports claimant is in poor physical condition but he is able to work. His work would have to be limited to light or moderate type of work. The Disability Prevention Division's evaluator believed that claimant could return to work provided it did not involve lifting over 50 pounds, repetitive lifting to or above shoulder level of over 20 pounds. It is noted that claimant had a psychological examination and his psychological impairment is rated at 26%.

The Board concludes, as did the Referee, that, based on this evidence, claimant failed to establish a prima facie case that he comes under the odd-lot doctrine and claimant has failed to show he is motivated to return to work. Claimant has not sought work since his injury and has been encouraged by his union to not work.

The Referee's evaluation of claimant's disability is adequate and her order should be affirmed.

ORDER

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

WCB CASE NO. 77-565

DECEMBER 15, 1977

ALAN J. DAVIS, CLAIMANT
Dale R. Drake, Claimant's Atty.
Jagua & Wheatley, 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. 74-1475

DECEMBER 15, 1977

WALTON A. GARDNER, CLAIMANT
Bedingfield, Joelson, Gould &
Barron, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On November 23, 1977 the State Accident Insurance Fund requested the Board to reconsider its Order of Remand entered in the above entitled matter on November 18, 1977.

The Board, after due consideration, finds no sufficient basis for reconsidering its Order of Remand.

ORDER

The request made by the State Accident Insurance Fund that the Board reconsider its Order of Remand entered in the above entitled matter on November 18, 1977 is hereby denied.

DOROTHY HAYES, CLAIMANT
Daniels & Corrigan, Claimant's Atty.
Samuel R. Blair, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order affirming the Second Determination Order, dated February 9, 1977, which granted claimant no additional permanent partial disability benefits. The first Determination Order, dated April 14, 1975, had awarded claimant 10% for loss of her left arm. Claimant contends that she is entitled to a greater award.

Claimant sustained a compensable injury in 1974 when she bumped her left elbow, while working as a motel maid. Dr. Spady, the treating physician, found a condition of tendinitis. He indicated on March 26, 1976 that the claimant did not desire surgical treatment and, accordingly, he felt her condition was stationary. The first Determination Order was then issued.

Fifteen months later, the claimant returned to Dr. Spady, complaining of continued and increased problems with her arm. Dr. Spady felt his original diagnosis may have been incorrect and requested a neurological examination. The carrier reopened the claim, paying temporary total disability benefits through January 3, 1977. The claimant was seen by three other physicians, all of whom concurred with Dr. Spady's original diagnosis. Dr. Spady then reiterated his original diagnosis. Dr. Spady believed claimant was unable to perform significant work because of her elbow. He again suggested surgery and again claimant refused. Dr. Spady did not think the surgery would involve an unusual or undue risk to the claimant.

The Referee found that claimant's present disability had to be evaluated with due consideration given both to any changes in her condition, and to her refusal to have the recommended corrective surgery in the left elbow. After reviewing all the evidence, the Referee concluded that claimant's condition was basically the same now as it was in 1976. The Referee could not evaluate how much disability claimant might have following a corrective surgical procedure until she had such surgery, although claimant had the right to refuse the surgery.

The Board, after de novo review, finds that the medical evidence quite clearly establishes that the claimant does not now suffer a greater disability than that for which she was awarded 32% by the first Determination Order. Claimant's refusal to submit to a fairly safe operation makes it impossible to evaluate her future disability. The Board concurs with the Referee's order.

ORDER

The Referee's order, dated June 23, 1977, is affirmed.

WCB CASE NO. 76-5982

DECEMBER 15, 1977

LEROY C. JOHN, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
J. W. McCracken, Jr., 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 May 6, 1976 which awarded claimant compensation for temporary total disability only. The claimant contends he is permanently disabled.

Claimant, presently age 32, suffered a compensable injury in November 1974 while employed as a tree faller. He strained his neck upon quickly turning and raising his head. Claimant was treated by Drs. Scheinberg and Tsai; he received traction for his neck and head but no neurosurgical treatment was recommended. Claimant returned to work.

Claimant presently has aching in his neck going up the back of the head which is brought on by rotation or tilting of the head. The pain resulting from these activities is soon followed by headaches. If claimant is not working he suffers no pain. Claimant's symptoms have been constant since the injury. Claimant has had no surgery. The medical evidence indicates claimant has a chronic cervical strain and cephalgia.

Dr. Scheinberg believed that claimant had discomfort with full extension and occasional headaches which represented no significant residual disability. Dr. Martens noted claimant had pain when extending his neck and looking up and when carrying a saw on his right shoulder, but he felt claimant could return to work as a cutter.

Claimant, in June 1976, at a hearing regarding an unrelated injury incurred in 1975, testified he was forced to quit work as a cutter due to extreme pain caused by the saw's vibration.

At this hearing, claimant testified he was unable to work as a cutter because he could not look up. He also indicated he could not return to his prior work as a choker setter because of the pushing and pulling required. Also claimant indicated he could not return to his prior work either as a tree planter or a skidder operator.

Claimant is presently employed as a general laborer for a home builder. Claimant's current job allows him to trade off with co-workers after five to ten minutes of strenuous labor. Claimant testified he would be unable to perform strenuous construction type activities on a continuous basis.

The medical evidence indicates claimant has some discomfort from headaches and reduced motion which is, at best, not significantly disabling.

The Referee found that claimant had not proven he had suffered a loss of earning capacity. Claimant's earnings are presently one-half of what they were as a cutter but the job activities and requirements of a cutter and claimant's present job are in a similar class of heavy labor, therefore, the Referee affirmed the Determination Order of May 6, 1976.

The Board, after de novo review, finds that the evidence establishes claimant is no longer able to engage in certain occupations as the result of his neck injury. Claimant's neck injury will reduce his ability to gain and hold work in the general labor market. Therefore, the Referee's order must be reversed and claimant granted 32° for 10% unscheduled disability to compensate him for this loss of wage earning capacity.

ORDER

The order of the Referee, dated June 24, 1977, is reversed.

Claimant is granted an award of 32° of a maximum of 320° for 10% unscheduled permanent (neck) disability.

Claimant's attorney is granted as a reasonable attorney's fee for his services in connection with this Board review a sum equal to 25% of the compensation granted by this order, payable out of said compensation as paid, not to exceed \$2,300.

WCB CASE NO. 77-631

DECEMBER 15, 1977

MILDRED KLANG, CLAIMANT
Martin D. Sharp, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks Board review of the Referee's order affirming a Determination Order, dated November 12, 1976, which awarded claimant 16° for 5% unscheduled low back disability. Claimant contends she is entitled to a greater award of permanent partial disability.

Claimant, at age 56, sustained an injury on September 10, 1971 when she slipped, fell and landed on the floor on her buttocks. Claimant had been employed as a cook for the school for 17 years. Claimant lost no time from work from the day of the injury to June of 1976 when she retired.

Claimant's duties included cooking and serving food and clean-up of the kitchen. This required much lifting of kettles and pans which often weighed 40 pounds. For five years prior to her injury claimant had worked during the summer vacation as a maid in a hotel. At the hearing, she testified she had not worked as a maid since her injury and that she could not do so because of the amount of bending, stooping and lifting involved.

At the hearing, the claimant testified that in addition to age, she retired because she was "uncomfortable". She described her symptoms as being the same today as they were on the day of her injury. She has pain in the low back and the coccygeal area. This pain bothers her daily, but is worse on some days and is aggravated by stooping, bending or sitting for any substantial time.

Claimant continues to do her normal household chores with the assistance of her husband who is on disability retirement for an impaired heart. Claimant is able to continue gardening by going down to her hands and knees to minimize stooping or bending.

Claimant first sought medical treatment five months after her injury. She was first seen by Dr. Kimberley, an orthopedist, who diagnosed a chronic coccygodynia and a very mild lumbosacral strain secondary to trauma. He anticipated no permanent disability. In December 1972, Dr. Kimberley found lumbar spine normal and a lesser degree of tenderness over the coccyx. He described claimant's complaint that she had low back ache after long sitting. He recommended continuance at work with no anticipated disability.

In June of 1973 claimant was seen by Dr. Schroeder who found substantially negative objective findings. He attributed claimant's continuing symptomatology to a chronic lumbar strain.

Dr. Kimberley, in September 1973, commented that low back tests were negative and that no active treatment was needed. Claimant should continue on the job, but the prognosis was guarded and claimant might have an increase in pain in the future which would require reopening of her claim for more active treatment than she was now receiving. It was his opinion in November 1973 that claimant's type of injury was prone to have exacerbations or trouble from time to time.

Dr. Schroeder in June 1976 reported that the claimant appeared to have unilateral spondylolysis at the L5 vertebral level; also, a chronic lumbar strain. He anticipated continued minor permanent residual disability with claimant's low back as

a result of her September 1971 injury. He found that claimant was medically stationary and that unless claimant's condition worsened, no specific surgical treatment was indicated.

The Referee found, based on the lay testimony and the medical evidence, that the claimant suffered a minimal physical disability and, therefore, she was not entitled to a greater award for permanent parital disability than that granted by the Determination Order dated November 12, 1976.

The Board, after de novo review, finds that the lay testimony and medical evidence describe claimant's disability as being greater than that awarded her in the Determination Order dated November 12, 1976. Claimant cannot return to the work she was able to do before her injury and the limitation placed on claimant's activities by the doctors have removed some segments of the labor market from claimant. Therefore, the Board concludes that claimant is entitled to an award of 32° for 10% permanent unsheduled disability resulting from her injury to her low back to compensate her for this loss of wage earning capacity.

ORDER

The Referee's order, dated June 10, 1977, is modified.

Claimant is awarded 32° for 10% unsheduled permanent disability. This is in lieu of the award of 16° for 5% unsheduled disability granted by the Determination Order, dated November 12, 1976, and affirmed by the Referee's order which in all other respects is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation, payable out of said compensation as paid, not to exceed \$2,300 which sum shall include the attorney's fee granted by the Referee's order.

WCB CASE NO. 76-5222

DECEMBER 15, 1977

ERNEST L. WAGNER, CLAIMANT
Del Parks, 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 for compensation for a coronary by-pass surgery to the Fund for payment of compensation as provided by law. The Fund contends that the by-pass surgery was not related to or caused by a prior myocar-

dial infarction, a claim for which had been accepted, and thus was not compensable.

The claimant, at age 60, suffered a myocardial infarction which was precipitated by the stress of his job. This was accepted by the Fund as a compensable injury. Claimant subsequently resumed his activities and returned to work on June 1, 1976. Sometime later Dr. Kochevar, claimant's treating physician, again treated claimant for slight chest discomfort and heart irregularity and referred claimant to Dr. Maurice, a cardiologist. Dr. Maurice performed coronary by-pass surgery on the claimant on July 12, 1976.

Dr. Kochevar believed that the surgery required on claimant was definitely related to his prior myocardial infarction of November 1975. Dr. Parcher, the Fund's medical director, stated his opinion that the Fund was not responsible for the surgery. Dr. Maurice stated that the surgery was indicated by virtue of severe coronary artery disease present. He related the myocardial infarction only in that it was the first manifestation of claimant's disease.

The Referee found Dr. Maurice's report difficult to interpret and Dr. Parcher's report did not state the reasons why he felt surgery was not compensable. However, the Referee found Dr. Kochevar's opinion that the by-pass surgery was necessitated by claimant's symptomatology and that the symptomatology resulted from the combined impact of the myocardial infarction with the pre-existing coronary heart disease to be persuasive that the myocardial infarction was a material contributing cause to the subsequent by-pass surgery. Therefore, he concluded that the Fund's denial was improper and that claimant's claim was compensable.

The Board, after de novo review, finds, based on the medical evidence, that the claimant's by-pass surgery is not compensable. The claimant is 60 years old and has a history of hypertension. Dr. Kochevar had referred the claimant to Dr. Maurice, a cardiologist. Dr. Kochevar, in his deposition, admitted he was not a cardiologist and was not qualified to answer certain questions regarding heart disease. The Board finds Dr. Maurice's report of August 2, 1976 to be quite understandable. It clearly reflects that the by-pass surgery was not caused by the November 1975 myocardial infarction. The myocardial infarction was the first indication of claimant's underlying artery disease and it was this disease which necessitated the by-pass surgery.

Therefore, the Board concludes that the by-pass surgery was not compensable; the medical evidence does not indicate that the myocardial infarction was a material contributing cause to the symptomatology, which in turn necessitated the surgery.

ORDER

The Referee's order, dated July 8, 1977, is reversed.

The denial of the Fund, dated August 17, 1976, is affirmed.

WCB CASE NO. 77-2768

DECEMBER 20, 1977

JEROME S. ANDRE, CLAIMANT
Galton, Popick & Scott, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

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. 77-773

DECEMBER 20, 1977

DONNA I. BENN, 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 claimant's claim to it for acceptance and payment of compensation as provided by law until the claim is closed; penalties and attorney's fees were also assessed against it.

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 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 Fund.

LLOYD A. BRINK, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on July 8, 1942 when a heavy metal piece dropped on his right ankle resulting in a severe crush dislocation. Dr. McClure, at that time, recommended claimant be granted compensation for 50% loss of the right foot. Claimant was awarded 32° of a maximum of 64° for the scheduled injury.

Claimant was referred to Dr. Chuinard by his family physician in early 1974. A brace was prescribed, but this was not sufficiently effective and, on February 22, 1977, a fusion was done. Complications developed and a cholecystostomy was performed on March 17, 1977. The latter surgery was denied by the Fund as compensable.

On May 6, 1977, claimant was hospitalized for a pulmonary embolus which originated from the right leg after the cast was removed. Thrombophlebitis was discovered and treated.

A closing medical report indicates claimant has a fused right ankle, a normal chest, and a right leg which has a tendency to swell if it is not controlled by elevation, bandages and stockings. Dr. Smith felt that a fused ankle is equal to 50% of the foot.

On November 29, 1977 the Fund requested a determination of claimant's disability. The Evaluation Division of the Board recommended, based on the opinion of Dr. Smith plus the additional problem of swelling, although controlled, that claimant should be granted an award for 50% loss of the right leg. He also is entitled to compensation for temporary total disability from January 12, 1977 through September 26, 1977.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted an award equal to 50% loss of function of the right leg. This is in lieu of and not in addition to the previous award of February 24, 1943.

Claimant is also granted temporary total disability compensation from January 12, 1977 through September 26, 1977, less time worked.

MARGARET DESHIRLIA, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks Board review of the Referee's order affirming the Determination Order, dated November 12, 1976, which granted claimant 96° for 30% unscheduled low back disability. Claimant contends she is entitled to a greater award.

Claimant, at age 49, suffered an industrial injury on January 22, 1973, when her hand slipped off of a doorknob causing her to fall forward. She did not fall to the floor, but twisted to the right to avoid striking a wall and injured her right hip and back. The claimant finished her shift that day, then sought medical treatment.

The claimant was seen the day following her injury by Dr. Miller, her family physician. On February 6, 1973 he hospitalized claimant who had had severe back pain since the fall and pain radiating down the back of the right leg to the knee and foot. He diagnosed an "acute strain involving the cervical, dorsal and lumbar muscles with some post-traumatic headaches". Claimant was examined by Dr. Cohen, an orthopedist, who concurred with Dr. Miller's diagnosis. Claimant's x-rays disclosed no abnormalities or fractures.

Dr. Miller, on July 13, 1973, stated the combination of the back distress and the emotional difficulties were prolonging claimant's recovery. He expected most of her complaints would subside given sufficient time. On January 18, 1974 he released her for regular work.

On August 23, 1974 Dr. Miller again hospitalized claimant. He diagnosed a chronic and acute low back strain with associated osteoarthritis with degenerative disc disease, colitis by history and menopausal syndrome. Dr. Miller, in an earlier report, had diagnosed cervical degenerative arthritis.

On September 24, 1974 the claimant was struck by a hit-and-run driver while the car she was in was stopped. She suffered injuries to her neck, upper back and developed a severe headache. She was seen by Dr. Miller to whom she stated that prior to the car accident the problems related to her industrial accident had been subsiding.

Claimant was released for full work activity by Dr. Miller as of December 10, 1974. The claimant had been returned to part time work as of November 4, 1974.

Dr. Miller continued to see the claimant at two to four week intervals. On April 22, 1975 Dr. Miller stated that claimant's underlying degenerative arthritis combined with her physical labor produced recurring complaints.

Claimant continued to work on and off from the time of her injury until June 6, 1975 when she twisted her back while using a buffing machine. She has not worked since. Dr. Cohen diagnosed, after examining claimant on June 19, 1975, a low back strain.

Dr. Miller, on December 17, 1975, stated that claimant advised him that she did not feel like returning to work. She had pain at times; some days she was free of distress, other days she would have a backache. The doctor concluded that it was most likely that the claimant would have intermittent periods of complaints and discomfort but that a return to work would be very beneficial, allowing her to overcome considerable back difficulty and provide less focus of her attention on her back problem. A myelogram on May 24, 1976 was normal.

On June 30, 1976 the claimant was examined by Dr. Mason at the Disability Prevention Division. He concurred with Dr. Miller's diagnosis, but questioned the degree of the strain based on the fact that there were many discrepancies in the physical examination findings compared with her complaints. He felt there was gross emotional overlay with exaggeration and overreactions to the examination procedures. He did not feel that any treatment would be effective, a job change would be advisable, but claimant's motivation to return to work was suspect.

An examination of claimant by Dr. Hal J. May, clinical psychologist, revealed that claimant was overfocused and preoccupied with the physical symptoms and considered herself severely handicapped in every area of her life. Dr. May seriously doubted she would respond to medical treatment. Her psychological classification was moderately severe to severe emotional disturbance.

Dr. Miller, on October 13, 1976, stated that claimant's condition may well have predated the industrial injury and might account for the prolonged difficulty she has had in overcoming the symptoms which arose in her industrial accident.

On November 12, 1976, a Determination Order awarded claimant 96° for 30% unscheduled back disability.

Dr. Arlen Quan, who examined claimant on April 7, 1977, commented that the claimant's personality disorder was mild and not related to her injury. He found no psychiatric impairment which would preclude claimant from becoming gainfully employed; he thought claimant was not highly motivated to return to work.

The claimant has an eighth grade education. She had been married at the age of 17 and remained married for 32 years. She was divorced in 1972. She did not work during her marriage

and had returned to the labor market in 1973 at the place of employment where she was injured. Claimant is functioning in the dull normal range of intelligence and is functionally illiterate.

The claimant has undergone no surgery as a result of her industrial accident and has received only conservative treatment.

The Referee found that the claimant's award of 96° for 30% unscheduled low back disability was correct. He felt that she was not motivated to return to work, the residuals of her industrial injury did not preclude her from returning to a large portion of the labor market. He also found that the psychological problems from which claimant suffered were not related to the industrial injury of 1972.

The Board, after de novo review, concurs with the Referee's findings and conclusions. The medical evidence fully establishes that her physical disability is, at most, mildly moderate and establishes claimant's psychological emotional problems predated the industrial injury and are unrelated to the industrial injury.

ORDER

The order of the Referee, dated April 29, 1977, is affirmed.

SAIF CLAIM NO. YA 596482 DECEMBER 20, 1977

LUCILE MAE ERVIN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant had suffered a compensable injury on February 26, 1957; her employer's Workers' Compensation coverage was furnished by the State Industrial Accident Commission, predecessor to the State Accident Insurance Fund. An Own Motion Order dated March 14, 1974 (as amended by supplemental order dated March 22, 1974) ordered the Fund to reopen the claim for further medical care and treatment, based upon a medical report from Dr. Robert J. Fry.

Subsequent to the Own Motion Order claimant has had surgery on March 17, 1975 which involved a patellar shaving procedure, a total knee replacement surgery on November 11, 1975, and a patellaplasty on February 4, 1977.

On October 11, 1977 the Orthopaedic Consultants, after examining claimant, found her condition was currently stationary. She had reached the maximum improvement from her injury and her claim should be closed. No further treatment was specifically

recommended. The physicians did not believe she could return to the same occupation with or without limitations, but she was physically capable of performing some other type of occupation in a semi-sedentary type. Total loss of function in reference to claimant's low back complaint as it exists presently was mildly-moderate, due to the injury it was minimal. Total loss of function of the right knee was moderately-severe at the present time and was due to claimant's original industrial injury.

The Fund requested a determination from the Evaluation Division of the Board. It was Evaluation's recommendation that claimant be allowed compensation for temporary total disability from March 17, 1975 through October 31, 1975 and an award of compensation equal to 70% loss of the right leg.

The Board concurs in this recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from March 17, 1975 through October 31, 1977 and is awarded compensation for 70% loss of function of her right leg.

WCB CASE NO. 76-3761

DECEMBER 20, 1977

PEGGY FORD, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On December 6, 1977 the claimant, by and through her attorney, requested the Board to reconsider its Order on Review entered on November 18, 1977 in the above entitled matter. That order affirmed the majority of the Referee's findings and conclusions but directed the Fund to pay compensation for temporary total disability to claimant from April 13 to July 19, 1976. Additionally, the Referee had found the denial was timely made and assessed no penalties nor awarded attorney's fees against the Fund.

Claimant's counsel contends that inasmuch as the Fund has withheld improperly the payment of compensation between April 13 and July 19, 1976 for over one year as of the date of his letter, that both penalties and attorney's fees should be imposed in addition to the actual amount of compensation required. Counsel relies on the rationale of Jones v. Emanuel Hospital, 280 Or 147.

The Court's holding in Jones is not applicable in this case. The Fund was entitled to rely upon the Referee's Opinion and Order which had approved the July 19, 1976 denial from the

date of that Opinion and Order and until it was modified by the Order on Review, dated November 18, 1977, and which for the first time directed the Fund to pay claimant temporary total disability benefits from April 13 to July 19, 1976. If the Fund has not made payment of these benefits subsequent to the entry of the Order on Review, then it would be subject to the imposition of penalties and attorney's fees; if it has complied with the provision of the Order on Review there is no basis for penalties or attorney's fees.

The motion to reconsider the Order on Review entered in the above entitled matter on November 18, 1977 must be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-238

DECEMBER 20, 1977

DON KNUTSEN, CLAIMANT
John R. Miller, 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 August 27, 1976 Determination Order which granted him temporary total disability only.

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 27, 1977, is affirmed.

WCB CASE NO. 77-1424

DECEMBER 20, 1977

MARGIE MCCASLAND, 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 her a total award of 256° for 80% 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 June 17, 1977, is affirmed.

WCB CASE NO. 76-2810

DECEMBER 20, 1977

BOB TOWE, CLAIMANT

Douglas A. Shepard, 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 remanded to it for payment of compensation, as provided by law, claimant's claim for a myocardial infarction suffered on or about October 28, 1975.

Claimant, who pulled wood on the dry sorter at Consolidated Pine, on October 11, 1975 experienced chest pains and left arm numbness. He saw Dr. Mathison that day who diagnosed coronary arteriosclerosis and angina pectoris. He gave claimant nitroglycerin and advised claimant not to return to work for 10 days.

Around October 21, claimant returned to light duty work and managed well; on October 28 he returned to his regular job and immediately experienced chest pains and arm numbness. He left work and the next day saw Dr. Thomas whose diagnosis was the same as Dr. Mathison's. Dr. Thomas referred claimant to Dr. Lee who performed a bypass surgery on December 11, 1975.

On April 21, 1976 the Fund denied claimant's claim.

Dr. Griswold, Professor of Cardiology at the University of Oregon Health Services Center, examined claimant and, by a report dated July 23, 1976, stated claimant suffered angina pectoris precipitated by his work activity. The EKG's were not available to Dr. Griswold so he couldn't say for certain whether claimant suffered an acute myocardial infarction but, based on incomplete data, his opinion was that there was a significant and definite relationship for claimant's symptoms precipitated by his work activity which accelerated and necessitated evaluation for surgery.

On August 10, 1976 Dr. Griswold indicated there was not sufficient medical data available to enable him to make a final and conclusive report.

On September 29, 1976 Dr. McAnulty, also a professor of cardiology at the Center, reported that because Dr. Griswold had become ill he was handling his affairs. Dr. McAnulty indicated he now had the early EKG's but none from Dr. Lee, the operating surgeon. He did have Dr. Lee's description of the cardiogram and also hospital reports from St. Vincent's Hospital where, on March 4, 1976, claimant was readmitted with a diagnosis of acute myocardial infarction, information which Dr. Griswold had not had.

Dr. McAnulty's opinion was that claimant's job was not a material contributing factor to claimant's coronary artery disease since this is a disease of long term progression and claimant had had arrhythmias as early as 1974. He believed that the work activity did materially contribute to claimant's chest pains, but noted that claimant had further chest pains subsequently while not at work. The EKG's indicated claimant had had a myocardial infarction between October 11, 1975 and November 13, 1975 but there was absolutely no way of determining if this occurred at work or not.

With regard to the question of whether the claimant's job contributed to his need for surgery, Dr. McAnulty's opinion was that a bypass surgery is one approach to relieving chest pain in people with coronary artery disease, however, he did not think claimant's employment was a contributing factor to claimant's need for surgery.

In a report of December 16, 1977 Dr. McAnulty indicated his agreement with Dr. Griswold's opinion regarding the attacks of angina at work and with the inability to determine when the myocardial infarction occurred. However, he did not feel the job aggravated or aided in the development of claimant's coronary artery disease.

Dr. McAnulty, by a deposition taken on February 9, 1977, testified that he would not change his opinion given in his September 1976 report. The work did contribute to the chest pains. Claimant has coronary artery disease and exertion can precipitate symptoms in a person with this disease, however, the work had no influence on the disease itself. The most that could be said was that claimant had temporary symptomatology.

The Referee found that the weight of the medical evidence was that the surgery was to relieve angina and angina was caused by work. The Referee gave the greatest weight to Dr. Griswold's opinion because he has the greatest expertise. He remanded claimant's claim for acceptance.

The Board, on de novo review, does not agree with the

conclusion of the Referee. The Board finds claimant had a pre-existing coronary artery disease. Claimant's work brought on symptoms of disabling pain which are compensable. The vascular surgery was performed to rectify the coronary artery disease condition and is not compensable.

Dr. Griswold indicated in his letter of August 10, 1976 that he did not have enough medical data to give a final and conclusive report, however, Dr. McAnulty not only had the early EKG's but also had Dr. Lee's description of the cardiogram taken before surgery and the hospital reports upon which to base his unequivocal opinion.

The Board concludes the greatest weight must be given to the opinions of Dr. McAnulty, therefore, the order of the Referee must be reversed and the denial affirmed.

Both Dr. Griswold and Dr. McAnulty believed that claimant's chest pains were a direct result of his work activities. The Board finds the angina attacks signaled the presence of the non-related arteriosclerosis and caused claimant to seek medical attention and to lose time from work, acting on his doctor's advice, and therefore, claimant is entitled to compensation for this time loss. But because the surgery was performed for claimant's underlying coronary artery disease, any medical treatments at the time of the surgery are not compensable.

ORDER

The order of the Referee, dated May 27, 1977, is reversed.

Claimant's claim for a myocardial infarction suffered on or about October 28, 1975 is hereby denied.

The State Accident Insurance Fund is hereby ordered to pay claimant time loss benefits, commencing October 11, 1975 and until November 13, 1975, the date claimant was referred to Dr. Lee for surgery, less time worked.

WCB CASE NO. 77-1627

DECEMBER 21, 1977

GEORGE BAGWELL, CLAIMANT
Susan E. Reese, 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 found he was not vocationally handicapped and therefore, dismissed

his request for hearing. Claimant contends that he is, in fact, vocationally handicapped and entitled to a program of 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 July 11, 1977, is affirmed.

WCB CASE NO. 76-4050

DECEMBER 21, 1977

NORMAN JACKSON, CLAIMANT
Rolf T. Olson, 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 awarded claimant compensation for permanent total disability from and after March 15, 1976.

Claimant, then a 58 year old truck driver, sustained a twisting injury to his neck while operating a forklift on February 24, 1975. On May 7, 1975, Dr. Baker, an orthopedist, performed an anterior C6-7 disc removal with curettement of osteoarthritic ridges and an interbody fusion.

Dr. Baker released claimant for regular employment on October 10, 1975. A Determination Order, dated August 2, 1976 awarded claimant 80° for 25% permanent neck disability.

The Board, on de novo review, finds the Referee chose to accept claimant's complaints on face value. He relied on Dr. Baker's reports and totally discounted the January 12, 1977 report of the Orthopedic Consultants which stated in part:

"It is our opinion, after this examination, that the patient's condition is stationary. No further treatment is indicated at the present time. The examiners unanimously agreed that the previous permanent partial disability determination and award was adequate, and did not require revision. (25 per cent of that allowed for unscheduled disability for the neck)." [Emphasis added]

On deposition, Dr. Kimberley, one of the consultants on the above examination and report, stated:

". . . it was our opinion that he could return to his former type of work with modifications, for example, a job running a forklift can vary."

Dr. Kimberley further testified:

". . . In this particular man's case, the complaints were disproportionately large when compared with the changes in the physical findings . . ."

The Board concludes that claimant is not permanently and totally disabled, but that he is entitled to receive 160° for 50% unscheduled neck disability to adequately compensate him for the loss of wage earning capacity attributable to the industrial injury.

ORDER

The order of the Referee dated June 10, 1977 is modified.

Claimant is awarded 160° of a maximum of 320° for unscheduled neck disability. This is in lieu of the Referee's order which is affirmed only with respect to the award of attorney's fee.

WCB CASE NO. 77-798

DECEMBER 21, 1977

GENEVIEVE A. MAAS, CLAIMANT
Blitsch & Case, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the Beneficiaries
of Ruby Goldberg

Reviewed by Board Members Wilson and Moore.

The Beneficiaries of Ruby Goldberg, deceased employer of the claimant, seek Board review of the Referee's order which found Ruby Goldberg was a subject non-complying employer and disapproved the Fund's denial, remanding claimant's claim to it for acceptance and payment of benefits to which she is entitled 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 July 8, 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 Fund.

SAIF CLAIM NO. WC 60747 DECEMBER 21, 1977

VIVIAN STENSON MCGEE, CLAIMANT
Malagon, Starr & Vinson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, a waitress, suffered a compensable injury on February 17, 1967 when she felt dizzy and fell, hitting her head on a grill. Originally, her pain was in the cervical, mid-dorsal and lumbar region of the spine. After an examination by the Fund, it was felt that her subjective complaints were greatly maximized. The first claim closure of June 30, 1967 granted her compensation for 9.6° of the then maximum of 192° for unscheduled disability.

Twice, in 1968 and 1969, Dr. Hagen requested that the Fund reopen claimant's claim for further treatment. In April 1971 claimant, through her attorney, requested her claim be reopened. This was denied by the Fund on May 10, 1971.

After a hearing, a Referee, on December 16, 1971, remanded claimant's claim to the Fund for acceptance and payment of compensation. This order was ultimately affirmed by the circuit court on May 30, 1972.

After claimant's doctors in Mississippi found her to be orthopedically stable, a second Determination Order was issued on July 7, 1972 which granted claimant time loss benefits up to March 24, 1972 but no additional permanent disability.

Again, on September 24, 1973, a Referee, after a hearing, ordered claimant's claim reopened and time loss paid, commencing March 24, 1972. During this period of time claimant was treated solely for her psychiatric problems. Under the care of Dr. Carter, claimant's condition improved considerably. His final report, dated October 17, 1977, recommended a moderate permanent partial disability award on a psychiatric basis and noted a mild degree of physical impairment related to her injury. Claimant still had orthopedic and neurological complaints in her neck, shoulders and arms.

Claimant has received compensation for temporary total disability from March 24, 1972 to January 3, 1975 and from November 3, 1975 through January 2, 1977. Also for an industrial injury suffered on April 12, 1977 she has received compensation for temporary total disability from April 12 through April 24, 1977 and compensation for temporary partial disability from April 25 through June 30, 1977.

On October 4, 1977, the Fund requested a determination of claimant's claim. The Evaluation Division of the Board recommended that claimant be granted an additional award equal to 30% of the maximum of 192° for her unscheduled disability.

The Board concurs with this conclusion.

ORDER

Claimant is hereby granted 96° of a maximum of 192° for 30% unscheduled disability. This is in addition to the award granted on June 30, 1967.

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

WCB CASE NO. 77-975

DECEMBER 21, 1977

FRED M. MILES, CLAIMANT
Richardson, Murphy & Nelson, 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 a Referee's order which affirmed a Determination Order, dated January 21, 1977, awarding claimant 64° for 20% unscheduled low back disability. Claimant urges he is entitled to a larger award of permanent disability.

This claimant's history has been a long one of injury and litigation. His first injury occurred in 1968 while employed by Johnson Brothers Salvage Company. He recovered fully without any permanent disability. In 1972, claimant again injured his low back while employed by Sealy Mattress Company. This claim was closed with no award for permanent partial disability.

Claimant received his real estate license and worked for a realtor during 1973 and 1974. However, in October 1973, claimant had returned to work for Johnson Brothers Salvage Company and his low back symptoms recurred. Dr. Kiest recommended surgery for repair of a spondylolisthesis. Surgery was performed in January 1974.

An aggravation claim was filed against Sealy and was denied by SAIF. This denial was upheld by the Referee, the Board and the circuit court.

A second aggravation claim was filed on July 21, 1975 against Johnson Brothers. This claim also was denied by the Fund, but ordered accepted by the Referee whose order was affirmed by the Board.

This claim was closed by the Determination Order mentioned in the opening paragraph. The extent of claimant's permanent disability is the only issue before the Board in this review.

The closing evaluation of December 9, 1976 made by Dr. Kiest indicated that claimant's condition had been improved considerably by the surgery. On examination there was a normal range of motion. Claimant could touch his toes without complaints of pain, appeared in good general physical condition and was very muscular.

Against medical advice, claimant had returned to work in the wrecking yard, loading scrap iron on a regular basis. Future difficulty appeared to be a probability if claimant did not seek retraining or lighter work. Claimant's present employer allows claimant to work at his own pace, provided he gets the work done.

The Board, on de novo review, concurs with the conclusions of the Referee that claimant has been adequately compensated by the award of 64° granted by the Determination Order of January 21, 1977.

ORDER

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

HUEY MORTON, CLAIMANT
Lindstedt & Buono, Claimant's Atty.
G. Howard Cliff, Defense Atty.
Own Motion Order

On May 16, 1977 the employer, through its carrier, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and re-evaluate its Determination Order, dated October 7, 1975 which granted claimant an award for permanent total disability.

The Board, at that time, did not have sufficient evidence before it to enable it to make a determination on the employer's request and, therefore, referred the matter to the Hearings Division with instructions to hold a hearing and take evidence on the merits of the request.

On July 29, 1977 a hearing was held and, as a result thereof, the Referee recommended that claimant's award for permanent disability be terminated.

The Board, after giving full consideration to the transcript of the proceedings, a copy of which was furnished to it by the Referee together with the recommendation, declines to accept the recommendation. The Board finds that the burden of proving that claimant was no longer permanently and totally disabled is upon the employer who requested the re-evaluation of the Determination Order dated October 7, 1975. The evidence, including film taken of some activities in which claimant was engaged subsequent to his award, is not sufficient to convince the Board that claimant is not at the present time permanently and totally disabled.

ORDER

Claimant is still considered to be permanently and totally disabled as set forth in the Determination Order entered October 7, 1975 wherein claimant's permanent total disability commenced as of October 3, 1975.

HOWARD PYLE, CLAIMANT
Merten & Saltveit, 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 granted him 40.5° for 30% loss of function to his left foot. Claimant contends that he is permanently and totally disabled or, in the alternative, entitled to 100% of the left 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 August 10, 1977, is affirmed.

SAIF CLAIM NO. SC 228904 DECEMBER 21, 1977

GEORGE ROBLES, CLAIMANT
Hayner, Waring & Stebbins, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his left knee on January 29, 1970. After conservative treatment, he was able to return to work the following month. A Determination Order of June 8, 1970 granted claimant temporary total disability benefits only.

Claimant had suffered an earlier injury to the same knee in 1968 which required a medial meniscectomy and pes anserinus transplant in October 1968. He was granted an award of 30° for 20% loss of function of the left leg.

Claimant's claim for his 1970 knee injury was reopened with further temporary total disability benefits commencing April 28, 1972 to June 20, 1972 and temporary partial disability benefits from June 20, 1972 to May 12, 1973. On June 15, 1973 claimant was awarded 15° for 10% loss function of the left leg.

Due to pain in his left knee, claimant quit working in late 1976. An examination in July 1976 had found the knee to be

very unstable and claimant had been hospitalized on July 9, 1976 for a tibial valgus osteotomy and an Ellison procedure of the left knee. Claimant requested his claim be reopened and a stipulation dated May 13, 1977 reopened the claim and granted claimant compensation for time loss commencing November 9, 1976 and continued as medically verified.

On August 15, 1977 Dr. Matteri found claimant to be medically stationary and recommended claim closure. He indicated that claimant could possibly need a total replacement of the knee in the future.

The Evaluation Division of the Workers' Compensation Board recommends claim closure with an additional award of 15° for the left leg and time loss compensation commencing November 9, 1976 through August 15, 1977.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted 15° for 10% loss of function of the left leg. This is in addition to all previous awards. Claimant is also awarded temporary total disability from November 9, 1976 through August 15, 1977, less time worked.

Claimant's attorney is granted as a reasonable attorney's fee a sum equal to 25% of the compensation granted by this order, payable out of said compensation as paid, not to exceed \$500.

WCB CASE NO. 76-3324

DECEMBER 21, 1977

WILLIAM STEWART, CLAIMANT
Powers & Carman, 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 Determination Order of June 7, 1976 which granted claimant 16° for 5% unscheduled disability.

Claimant, a 56 year old service station attendant, sustained a compensable injury to his back in May 1975 from lifting on the job. Claimant returned to work on July 17, 1975 but experienced continuing problems and Dr. Thomas recommended lighter employment for claimant and stated that he had a small permanent impairment.

On November 3, 1975 Dr. Thomas reported that he advised claimant to quit work pro tem and resume his exercises at home.

On November 18, 1975 a Determination Order granted claimant time loss only.

On December 19, 1975 Dr. Carroll, after examining claimant, diagnosed a chronic back strain and said claimant was not to work. On January 20, 1976 Dr. Carroll released claimant for modified work. On March 31, 1976 Dr. Carroll found claimant stable and diagnosed chronic dorsal sprain, almost entirely resolved, superimposed upon dorsolumbar scoliosis. Claimant had minimal residuals.

On June 7, 1976 a Second Determination Order granted claimant 16° for 5% unscheduled back disability.

On June 10, 1976 the Orthopaedic Consultants examined claimant and diagnosed degenerative arthritis of the dorsal and upper spine, with a superimposed chronic dorsal lumbar strain. Claimant's condition was stationary and claimant was capable of performing some occupation. His new job should avoid stresses to his back, particularly twisting activities and overhead activities or anything that requires long sitting as claimant must be able to get up and move about. Total loss of function due to this injury was mild.

The Referee, after considering the Orthopaedic Consultants' rating of claimant's disability as mild and Dr. Carroll's rating as minimal, concluded that there was nothing in the medical reports to support a finding that claimant's physical impairment resulting from this injury would incapacitate him from performing his regular work. He affirmed the Second Determination Order.

The Board, on de novo review, finds the award granted by the Second Determination Order to be inadequate. Claimant's work as a service station attendant brought on continuing symptoms. The Orthopaedic Consultants believed that claimant could work but he now must avoid stresses to his back, particularly twisting activities and no overhead work.

The Board finds that claimant's disability from this injury is not severe, however, all of claimant's working experience has been in the industrial field and he has sustained a moderate loss of wage earning capacity due to this injury and an award of 16° is not enough.

The Board concludes claimant is entitled to an award of 48° for 15% unscheduled disability to adequately compensate him for this loss of wage earning capacity.

ORDER

The order of the Referee, dated June 23, 1977, is modified.

Claimant is hereby granted 48° for 15% unscheduled back disability.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation awarded by this order, payable out of said increase as paid, not to exceed \$2,300.

WCB CASE NO. 76-3905

DECEMBER 21, 1977

CALVIN R. VERMEER, CLAIMANT
Charles Paulson, Claimant's Atty.
Gearin, Cheney, Landis, Aebi & Kelley,
Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests Board review of the Referee's order which sustained the denial of claimant's heart attack of March 12, 1973, based upon the legal theory that claimant had attempted to split his cause of action. On May 18, 1974 claimant had filed a claim for this attack and another which occurred on November 19, 1973, but at the hearing, after both claims had been denied, claimant's attorney said he was only concerned with the second heart attack. Later he filed the request for hearing on the March 12, 1973 attack which was again denied.

The Board, on de novo review, concurs essentially with the facts set forth by the Referee in his order. In sustaining the denial of claimant's claim, however, the Board relies on the doctrine of res judicata, which in essence, precludes claimant from litigating in a second proceeding a cause of action which was or could have been litigated in a prior proceeding.

Both the March 12, 1973 heart attack and the November 19, 1973 heart attack had been at issue at the December 2, 1974 hearing, but claimant chose not to present evidence in support of the first attack. By his own choice, claimant has waived his right to now relitigate the issue of the compensability of the March 12, 1973 attack.

ORDER

The order of the Referee, dated June 10, 1977, is affirmed.

MELVIN D. WALTER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his right foot on May 31, 1967 when a log rolled on it, causing a fracture of the second and third metatarsals and a mal-position of the 4th metatarsal head which required a surgical excision by Dr. Fry on August 12, 1967. Later claimant moved to Washington and failed to reply to correspondence or seek further medical care and his claim was closed on July 2, 1968.

After the claim closure, claimant was seen by Dr. Fry and Dr. Cooper, who found a modest amount of handicap. A Second Determination Order dated November 19, 1968 granted 13.5° for 10% loss of use of the right foot.

Dr. Fry, on February 1, 1977, requested that the Fund reopen claimant's claim for correction of deformities of the third and fourth metatarsal heads. These metatarsal heads were removed on April 12, 1977 and, on September 22, 1977, Dr. Fry indicated that claimant continued to have metatarsalgia over the first and fifth metatarsal heads, but his condition was stationary and no additional medical treatment was recommended.

On October 17, 1977, the Fund requested a determination of claimant's disability. The Evaluation Division of the Board recommended that claimant's claim be closed with an additional award of 13.5° and compensation for temporary total disability from April 12, 1977 through May 30, 1977 and also on June 6, 1977, July 11, 1977, September 6 and 19, 1977 for doctor's appointments.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted 13.5° for 10% loss of the right foot. This award is in addition to previous awards claimant has received for the loss of his right foot.

Claimant is also granted temporary total disability benefits from April 12, 1977 through May 30, 1977, and for June 6, July 11, September 6, and September 19, 1977.

HARRY R. BOSTWICK, CLAIMANT
Own Motion Determination

Claimant suffered a compensable injury on July 28, 1971 when he stepped down from a truck bed and injured his right knee. A meniscectomy was performed on July 31, 1971 and claimant returned to modified work on August 15, 1971, not being released for regular work until October 4, 1971.

Dr. Anderson, in his closing report of January 25, 1972, indicated claimant had regained a full range of knee motion with only mildly diminished right quadriceps strength. There was no ligamentous instability, although some "clicking sensation" remained.

A Determination Order of February 9, 1972 granted claimant 15° for 10% loss of function of the right leg. It should be noted that claimant had suffered a previous right knee injury and was recuperating from a meniscectomy performed in April 1971 when he re-injured his knee in the July 1971 industrial incident. He had also received an award of 15° for 10% of the right knee for the earlier injury.

Further knee surgery was performed on June 2, 1977 and the carrier voluntarily resumed time loss compensation on June 3. Dr. Bert's closing examination found full right knee range of motion with minimal swelling and he released the claimant for regular work on August 8, 1977.

On October 29, 1977 the carrier requested a determination of claimant's permanent impairment. The Evaluation Division of the Board recommends that claimant be granted further temporary total disability benefits from June 2, 1977 through August 7, 1977 but no additional award for permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from June 2, 1977 through August 7, 1977, less time worked.

DECEMBER 23, 1977

GARLAND CONNER, CLAIMANT
Rhoten, Rhoten & Speerstra,
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 December 14, 1976 Determination Order which granted no increase in permanent disability above the 48° awarded by an earlier 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 June 27, 1977, is affirmed.

DECEMBER 23, 1977

FRED DOUGLAS, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
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.

VIRGINIA HEWES, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-appeal by the SAIF

Reviewed by Board Members Wilson and Phillips.

Claimant has requested Board review of the Referee's order which granted claimant 128° for 40% of the maximum allowable for unscheduled disability to the cervical and lumbar spine, this including a prior award of 16°. Claimant has asked for an award for permanent total disability and also for penalties for unreasonable refusal by the Fund to act upon her aggravation claim within the statutory period.

The Fund has filed a cross-request for review of the Referee's order.

Claimant, an employee of Multnomah County Hospital, sustained a compensable injury to her left arm and neck March 25, 1969 when she was attacked by a mental patient. Claimant was greatly disturbed mentally and emotionally by the event. Both Dr. Thompson and Dr. Parvaresh recommended hospitalization and concentrated therapy, but claimant refused their recommendation. Her claim was closed by a Determination Order, dated August 10, 1970, awarding 16° for 5% unscheduled upper back disability.

Claimant's claim was reopened February 16, 1971 by a stipulation which allowed claimant to receive additional treatment and hospitalization, if necessary. After an extended period of treatment by Dr. Cherry, claimant's treating physician, and Dr. Parvaresh, the claim was again closed by a Determination Order, dated May 31, 1973, which granted no additional award for permanent disability.

Claimant appealed this Determination Order and, after a hearing, she was granted 96° for unscheduled psychiatric disability by the Referee in his order dated November 26, 1973. This is the last award of compensation.

In Dr. Cherry's letter of April 16, 1974 to the Fund, he reported claimant's leg had given away and she had fallen twice due to low back pain. He requested claim reopening for a neurological examination and myelogram. The Fund refused to reopen but did assume responsibility for diagnostic studies. Dr. Donald T. Smith, who examined claimant on November 18, 1974, found symptoms of a chronic lumbar strain, but he doubted they were related to the industrial injury.

On July 18, 1975, Dr. Cherry, suggested in a letter ad-

dressed to claimant's attorney that the claim be reopened for additional treatment or re-evaluation of her increased disability as a result of aggravation of her previous condition.

The Referee found, by comparing the medical reports since the last award of compensation with reports prior to that time, that claimant had met her burden of proof and had established her condition had become aggravated.

The Board, on de novo review, does not so find. Dr. Parvaresh, who performed a psychiatric re-evaluation on January 30, 1976, believed her physical state showed little change from his findings of November 2, 1973. Dr. Pasquesi felt claimant should be given a permanent partial disability award of 5% of the whole man.

The Board finds claimant has not established her entitlement to any additional compensation because of aggravation.

There is no indication that the Fund received a copy of Dr. Cherry's letter of July 18, 1975 or was aware of it, although a denial of claimant's aggravation claim was made by the Fund on December 1. The Board does not find penalties are in order, since the validity of the aggravation claim has not been established.

ORDER

The order of the Referee dated May 27, 1977, is reversed in its entirety.

CLAIM NO. B53-67399

DECEMBER 23, 1977

ALVIN T. HUNTSINGER, CLAIMANT
Doblie, Bischoff & Murray, Claimant's
Atty.
Philip A. Mongrain, Defense Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 2, 1977 claimant, by and through his attorney, petitioned the Board to exercise its own motion jurisdiction, pursuant to ORS 656,278, and award claimant additional compensation for temporary total disability and additional compensation for permanent partial disability for the residuals of his industrial injury incurred on June 14, 1959 while in the employ of International Paper Company. In support of the petition was a medical report from Dr. James R. Degge.

On September 6, 1977 Employers Insurance of Wausau, the employer's carrier at that time, the Fund and International Paper Company were advised by the Board of the own motion petition; copies of the petition and the medical attachments had been furnished to all parties by claimant's attorney.

On September 29, 1977 Employers Insurance of Wausau advised the Board that it did not have all the pertinent medical documents at that time and it was therefore unable to take a position with regard to the petition for own motion relief; it stated it would attempt to obtain additional information and make a proper response to the Board as soon as possible.

On December 6, 1977 Employers Insurance of Wausau furnished the Board a copy of two documents: (1) "Agreement", dated June 8, 1959 and (2) "Release and Settlement of All Claims", dated January 22, 1962. It is the position of the employer and its carrier that at the time of the 1959 injury the employer was not subject to the Workmen's Compensation law then in effect; that the claimant's claim was settled pursuant to the binding agreement executed outside the then proper scope of the Workmen's Compensation law; that inasmuch as the claim was not the proper subject of the Workmen's Compensation law at the time of the injury the State Industrial Accident Commission did not have jurisdiction at that time and accordingly, the Workers' Compensation Board does not have jurisdiction at this time.

The Board, after giving full consideration to this matter, concludes that the position taken by the employer in opposition to the request for own motion relief is supported by the evidence and that, at this time, the Board does not have jurisdiction under the provisions of ORS 656.278 to reopen claimant's claim.

ORDER

The petition for own motion relief received from claimant in the above entitled matter on September 2, 1977 is hereby denied.

WCB CASE NO. 74-4160

DECEMBER 23, 1977

CECIL LONG, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Gearin, Cheney Landis, Aebi &
Kelley, Defense Atty.
Request for Review by the Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of the Referee's order which affirmed an earlier Opinion and Order of July 10, 1975 finding claimant to be 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 June 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 \$350, payable by the carrier.

WCB CASE NO. 74-1199

DECEMBER 23, 1977

HARRY A. LONG, CLAIMANT
Gooding & Susak, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 29, 1977 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 November 4, 1967 while in the employ of Owens Freight Lines, whose Workers' Compensation coverage was furnished by the Fund. In support of the petition claimant furnished copies of certain medical records made by Dr. Kenneth D. German.

On July 8, 1977 the Fund was informed by letter of the own motion petition and furnished copies of it together with the medical attachments and requested to advise the Board of its position within 20 days.

On July 29, 1977 the Fund responded, stating that it had a report from Dr. German, dated June 3, 1977, which indicated that claimant in April 1977 had sought medical attention for back and leg pain and claimant had advised him at that time that he had been doing rather well until he had lifted a stove which caused severe low back pain. The Fund contended that this apparently was an independent intervening non-industrial incident.

On August 9, 1977 claimant's counsel was advised of the Fund's response and also was advised that Dr. German's report concluded with the statement that claimant's symptoms were coming from a flare-up of synovitis of articular facets along the lumbar region, secondary to the degeneration of disc disease which he has and that the flare-ups were not necessarily a worsening of his condition. The Board, based upon this report from Dr. German, requested that the claimant furnish additional medical evidence to show that claimant's present condition was related to his industrial injury of 1967 and represented a worsening since the last award or arrangement of compensation which claimant received for that injury.

On November 15, 1977 the Board received another letter from Dr. German which indicates that claimant's symptoms are exactly the same as before.

The Board, after full consideration of the medical reports from Dr. German and the facts set forth in the petition for own motion relief, concludes that any medical treatment or medication which claimant may need as a result of his 1967 injury can be furnished pursuant to ORS 656.245. There has been no sufficient showing that claimant's disability at the present time is greater than it was when he received an award equal to 75% for his unscheduled disability and equal to 20% right leg and 15% left leg. Claimant's petition for own motion relief should be denied.

IT IS SO ORDERED.

WCB CASE NO. 76-6104

DECEMBER 23, 1977

DAVID MCSWEENEY, CLAIMANT
Haley, Haley & Odman, 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 September 15, 1976 Determination Order awarding temporary total disability benefits but no compensation for permanent 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.

The Board relies on its previous ruling made in Robert E. McFarren, claimant, WCB Case No. 76-580, Order on Review, dated February 18, 1977.

ORDER

The order of the Referee, dated July 19, 1977, is affirmed.

ARTHUR L. PALMER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Jones, Lang, Klein, Wolf &
Smith, 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 ordered it to reopen claimant's claim for further medical care and temporary total disability 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. However, the Board feels that job placement by the Field Services Division of the Department is a more realistic approach to claimant's problems than psychiatric treatment and would strongly urge that the claimant consider this possibility.

ORDER

The order of the Referee, dated August 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 \$400, payable by the carrier.

LUCY H. PARTLOW, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, 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 a Determination Order dated December 13, 1976 awarding claimant 28.8° for 15% right arm disability. Claimant contends that she is entitled to no less than 128° for 40%.

Claimant, a 53 year old pickle packer, repeatedly struck both of her arms on the rim of the barrels from which she was removing pickles. Her condition became such that she consulted Dr.

Laidlaw shortly after the injury which occurred on August 28, 1975. Dr. Laidlaw released claimant to return to modified work in October 1975. Later she was referred to Dr. Bachhuber. In December 1975 nerve conduction velocity studies were made. Dr. Hill, in March 1976, diagnosed a right tardy ulnar palsy and he transposed the ulnar nerve at the elbow.

Claimant had also been treated by Dr. Rich and has been examined by the physicians at the Orthopaedic Consultants. She testified that she no longer had any difficulty with her left arm, that her symptoms were minimally improved by surgery, but she still had pain in her right elbow and forearm.

The Referee found, based upon the medical evidence, that claimant's subjective symptomatology exceeded the objective medical findings. Film of claimant's activity was shown, but the Referee found them to be of little benefit to him. The Referee felt that claimant truly believed all of her testimony, but nevertheless there was no evidence of disuse atrophy; her right forearm was 1/2 inch larger than the left, while her biceps were the same size. Therefore, he concluded that claimant's disability did not exceed 15%.

The Board, after de novo review, affirms the conclusion reached by the Referee, but urges that the Field Services Division of the Workers' Compensation Department do everything possible to place claimant in a job which she will be able to physically handle and which will enable her to remain an active member of the labor force.

ORDER

The order of the Referee, dated June 22, 1977, is affirmed.

WCB CASE NO. 77-77

DECEMBER 23, 1977

WILFRED ROUSE, CLAIMANT
J. David Kryger, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Denying Request for Board
Review & Order of Remand

The State Accident Insurance Fund has requested Board review of Presiding Referee Harold M. Daron's order, dated August 25, 1977, which denied the Fund's motion that claimant be directed to attend an examination by the Orthopaedic Consultants in Portland, Oregon.

No order of the Board may be appealed other than a final order. The Court of Appeals defines a final order as one which determines the rights of the parties so that no further

questions can arise before the tribunal hearing the matter.
Mendenhall v SAIF, 16 Or App 136, 138.

In the above case the order entered by Referee Daron cannot be considered as a final order and, therefore, is not appealable.

The Board concludes that the Fund's request for review should not be accepted by the Board.

The Board further concludes that a determination on the merits of the issue raised by claimant's request for a hearing has never been made, therefore, pursuant to the provisions of ORS 656.295(5), the Board should remand the above entitled matter to the Hearings Division to set for hearing and for the taking of evidence from both parties on the merits of claimant's request.

IT IS SO ORDERED.

WCB CASE NO. 76-4226

DECEMBER 23, 1977

BETTY LOU STOWELL, CLAIMANT
Merten & Saltveit, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, 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 carrier's denial of his claim for a carpal tunnel syndrome and also affirmed the June 9, 1976 Determination Order which granted no permanent disability above the 35% already awarded to the 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 July 5, 1977, is affirmed.

WCB CASE NO. 77-1258

DECEMBER 23, 1977

MARIA STRACK, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Atty.
Robert Walberg, 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 her claim for penalties and attorney's fees for the employer's unreasonable refusal or delay in the 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 June 28, 1977, is affirmed.

WCB CASE NO. 76-6090

DECEMBER 27, 1977

TOM A. AUSTIN, CLAIMANT
A. C. Roll, 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 dismissed his case as his aggravation rights had expired almost a full year before he filed his 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 June 9, 1977, is affirmed.

DECEMBER 27, 1977

FRANCES M. ERICKSON, CLAIMANT
and The Complying Status of
CHURCH KEY, INC., dba Wren Tavern
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
Engel & Pamajevich, Defense Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer, Church Key, Inc., dba Wren Tavern, admits it was a subject noncomplying employer for the period March 20, 1976 through November 7, 1976, but seeks Board Review of the Referee's order which found that claimant's industrial injury sustained on October 12, 1976 arose out of and in the course of her employment and remanded her claim to the Fund for proper processing as provided by law.

In January 1976, a corporation consisting of Mr. and Mrs. Spinney and his brother, commenced operating the Wren Tavern in Wren, Oregon. All parties had jobs elsewhere and claimant was hired as an employe in June 1976; in August 1976, she became the manager of the tavern. Her management duties required her to drive to Corvallis about every week or so to buy candy, cigarettes and cleaning supplies at Payless. A car was made available to her for these trips.

On October 12, 1976 claimant went to the tavern from her apartment which adjoined the tavern premises, talked to an employe in the tavern, did a few things and made out a list of items to buy for the tavern. She planned to go to Kings Valley, pick up her sister-in-law, drive to Philomath to allow her sister-in-law to buy some feed, and then go on to Corvallis to buy the tavern supplies. On her return to Wren she expected to deliver the supplies, take her sister-in-law back to Kings Valley and then drive to Portland to visit a daughter.

After assisting in opening the tavern, claimant returned to her adjoining apartment. She then left and went down the steps to get into her car. In doing this, she slipped off the cement porch hitting hard on the wooden steps. Claimant returned inside for a few minutes to recuperate and then proceeded on her errands. She picked up her sister-in-law, made purchases at Bi Mart in Corvallis and returned to Wren where she delivered the merchandise to the tavern. She then returned her sister-in-law to Kings Valley.

Claimant did not feel well and therefore did not go to Portland.

It was the employer's contention that claimant was not acting in the course of her employment at the time of the alleged injury and that this matter did not arise out of that employment.

The Referee found claimant's testimony was totally credible. He found she was injured in the course of her employment, meeting the tests of the dual purpose doctrine when she fell. The purchase of supplies was for the benefit of her employer; the subsequent picking up her sister-in-law was for her personal benefit.

The Referee concluded claimant's injury arose out of and in the course of her employment doing her job for the corporation on October 12, 1976, when she fell in going to purchase the tavern supplies.

The Board, on de novo review, concurs.

ORDER

The order of the Referee dated July 7, 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. 77-159

DECEMBER 27, 1977

MARGARET GUARISCO, CLAIMANT
Robert J. Morgan, 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 her an award of 52.5° for 30% loss of the left leg. Claimant contends that her case should be remanded for psychiatric evaluation or, in the alternative, she should be granted a greater award of permanent 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 13, 1977, is affirmed.

WCB CASE NO. 75-2959

DECEMBER 27, 1977

JUNE HOLDER, CLAIMANT

Collins, Velure & Heysell, 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 Fund's denial of claimant's claim for an alleged back injury.

The Board, after de novo review, affirms and adopts the Opinion and Order, together with the supplemental 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 16, 1976, as supplemented by order dated March 10, 1977, is affirmed.

WCB CASE NO. 77-1552

DECEMBER 27, 1977

ANDREW JOSEPH MAY, 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 granted him an increased award of 32° for a total permanent partial disability award of 64° for 20% low back disability. Claimant contends this award is 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 July 7, 1977, is affirmed.

WCB CASE NO. 76-6433
WCB CASE NO. 76-6434

DECEMBER 27, 1977

CALVIN G. NAUGLE, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Cosgrave & Kester, 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 the defendant to furnish claimant with such medical care and treatment as he may require as a result of his industrial injuries under the provisions of ORS 656.245. The defendant was also ordered to determine whether the treatment received by claimant since December 17, 1976 was necessitated by his injuries and to pay for those obligations incurred from that date until the date of the Opinion and Order. Claimant contends he is entitled to further medical treatment and time loss and that his permanent disability is greater than the amounts granted by the Determination Orders. He also contends that penalties and attorneys' fees should be assessed against the employer.

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 June 16, 1977, is affirmed.

WCB CASE NO. 77-804

DECEMBER 27, 1977

RUTH J. PURVIS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Charles Paulson, 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 192⁰ for 60% unscheduled back disability. Claimant contends that she is entitled to an award for permanent total disability or, in the alternative, that the award granted by the Referee should be increased.

The Board, on de novo review, finds a misstatement in the Referee's order on page 2, where he stated claimant had secured her high school GED [Exhibit 1-13]. This exhibit indicates

claimant's symptomatology worsened and she did not complete her program of study and did not receive her GED.

With this exception the Board affirms and adopts the Referee's order.

ORDER

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

WCB CASE NO. 76-6087
WCB CASE NO. 75-4945

DECEMBER 27, 1977

BRINGFRIED RATTAY, CLAIMANT
Martin, Bischoff, Templeton & Biggs,
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 Fund's denial of claimant's aggravation 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 May 4, 1977, is affirmed.

WCB CASE NO. 77-579

DECEMBER 28, 1977

THORNE E. BROWN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, 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 granted claimant a total award of 160° for 50% unscheduled low back 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 May 25, 1977, is affirmed.

WCB CASE NO. 76-6536

DECEMBER 28, 1977

PHILIP FERRY, CLAIMANT
Buss, Leichner, Barker & Nesting,
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 a total award of 60° for 40% loss of function of the right leg.

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

However, the Board finds that any consideration of claimant's loss of wage earning capacity would not be relevant as claimant suffered a scheduled injury and the loss of function of that scheduled member is the sole consideration.

ORDER

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

WCB CASE NO. 76-3530

DECEMBER 28, 1977

DONALD JOHNSON, CLAIMANT
Martin, Bischoff, Templeton & Biggs,
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 the right to appeal the Determination Order of June 30, 1976.

Claimant, after suffering a compensable injury on March 23, 1975, received an award of 64° for 20% unscheduled low back

disability by a Determination Order of June 30, 1976.

A few days after receiving the Determination Order, claimant received a notice from his car dealer indicating that they intended to pick up his car because of delinquency in the payments. Claimant called and told the dealer that he had just received an award for his industrial injury which he intended to appeal. The dealer first called the Fund in Salem to inquire about the award and then informed the claimant that he had been told that claimant could request and get a "lump sum" payment which he could use to pay off the balance of the car payments.

Claimant called the Fund and advised them that he needed a partial payment of the award in order to pay off his car, although he had been informed by his attorney that a "lump sum" payment would automatically waive claimant's right to appeal the Determination Order. After talking with a representative of the Fund, claimant and his wife believed that only by taking a complete settlement would claimant waive his rights to a hearing; that by taking a partial advance payment, he would not. Based upon this understanding, claimant signed the papers, thereby completing the transaction.

Mrs. Klous, the Fund's representative, testified at the hearing that she always directed the attention of the claimants to the box on the lump sum form which indicated that they would waive their rights to appeal if they received a lump sum payment. She has performed the same job since 1973 and was well informed of the law regarding such cases. However, Mrs. Klous was quite frank in stating that she did not remember what she had said to claimant or even what took place during the interview.

The Referee concluded that the real problem in this case was that claimant was represented by an attorney and that the misunderstanding and subsequent legal questions could have been taken care of had the Fund dealt directly with claimant's attorney. Based on the failure of the Fund to do this, the Referee found claimant was entitled to request a hearing on the June 30, 1976 Determination Order.

The Board concurs with the Referee's conclusion that claimant is entitled to a hearing but for a different reason. The Board finds that the information given claimant by the Fund was either incorrect or at least not complete enough to make it clear to claimant and his wife that claimant would lose his right of appeal even if he only asked for and received a partial lump sum payment; it was claimant's understanding that by not taking the full amount due him, he could still appeal the Determination Order.

The Board finds that the Fund failed to fully explain to claimant all the factors involved, including his waiver of a right to a hearing, therefore, claimant is entitled to proceed with his hearing.

ORDER

The order of the Referee, dated May 31, 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. 76-5248

DECEMBER 28, 1977

JOY REIGER, CLAIMANT

Scott & Norman, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Request for Review by Claimant

Reviewed by Board Members Wilson, Moore and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the denial of claimant's claim, dated September 10, 1976, but ordered the Fund to pay claimant time loss benefits from June 28 to September 10, 1976, less time worked, if any, as if this had been a compensable claim.

The issues before the Referee had been compensability of claimant's claim, her entitlement to penalties and attorney's fees because of the Fund's alleged misconduct in processing her claim by issuing a late denial and not paying proper time loss benefits.

Claimant had been employed for some time by the Linn County Assessor in Albany and her medical history reveals that she had had certain problems regarding discomfort of her back and neck over a period of the last two years; these problems were treated with success by Dr. Hews, a chiropractic physician.

On June 28, 1976 claimant was training to do a different job for the same employer and it was necessary for her to sit in a certain chair which had been adjusted and, to some extent, customized by the employee who regularly used it. After she had been seated in this chair for most of the morning, she noticed a peculiar sensation in her back and a sensation of pain radiating down her lower left leg which increased throughout the day. She saw Dr. Hews and was treated by him for approximately two weeks and then sought medical help from Dr. Neal who hospitalized her. From that time on, her main treating physician was Dr. Tsai.

On July 21, 1976, Dr. Tsai's impression was that of a left L-5 radicular compression, most likely due to herniation of the nucleus pulposus at L4-5 on the left side, precipitated while at work on June 28, 1973, based upon the history related to him by claimant. He initially recommended traction, but when this proved ineffective in relieving claimant's symptoms, Dr. Tsai performed a laminectomy on August 2, 1976.

Dr. Parcher, medical director for the Fund, testified that claimant's low back, left hip and left leg condition which required the surgery was not caused, or materially contributed to, by claimant's work-connected activities. He felt the prolonged sitting, leaning forward and reaching with her arms extended, did not cause any substantial stress or weight to be placed on her back. He believed claimant's condition came about because of a ruptured disc which was the result of a long-standing degenerative arthritic condition.

Claimant was off work on July 9 and 10, 1976 and again during the period which she was hospitalized for diagnostic studies and surgery. She was released for work on or about October 1 and returned to work on October 18, 1976. She was paid time loss benefits for the period from July 20, 1976 to August 3, 1976.

The Referee found, based upon the testimony of a co-worker of claimant's, that claimant had made complaints about the chair in which she was sitting, but he also noted that this chair was maintained by appropriate sponge rubber padding on the back and seating positions and there was some indication that such padding had been utilized because claimant had a bad back condition. He also noted that the chair was adjustable.

The Referee found that claimant had failed to prove by a preponderance of the evidence that she had suffered a compensable claim. Taking into consideration claimant's pre-existing back condition, the physical attributes of the chair in which she was sitting, her work activities on the date of the alleged injury, and the expert opinion of Dr. Parcher, the Referee concluded that claimant's work activities did not cause nor were they a material factor in claimant's conditions which later required surgery. He sustained the denial.

The Referee found, however, that claimant was entitled to be paid time loss benefits from the date of the first notice of the claim, June 28, 1976, and to receive such benefits until the date of the denial, September 10, 1976. Claimant had given notice of the claim on June 28, 1976 and the Fund was obligated to pay time loss benefits no later than 14 days thereafter until it denied the claim, less, of course, any days which claimant was able to work during that period.

The Referee found that, inasmuch as claimant's claim was eventually found to be not compensable, penalties and attorney's fees provided for by ORS 656.262(8) had no application or operative effect, relying upon the ruling of the Court of Appeals in Mary M. Jones v. Emanuel Hospital, 29 Or App 265.

The majority of the Board, on de novo review, finds that Dr. Parcher, upon whose opinion the Referee relied very strongly, did not examine nor even talk to claimant before making his determination. Dr. Parcher had stated that he considered Dr. Tsai, who

did the surgery, to have more expertise in the field of back surgery than he had.

The majority of the Board is very persuaded by the ruling in Costello v. Georgia-Pacific Corp., 77 Ad Sh 8, page 795, cited in claimant's brief. In Costello there was both testimony of a doctor who had examined and treated claimant and of one who reached his opinion and conclusion based solely on the medical record. Following the rationale of Costello and giving more weight to the reports of Dr. Tsai than the opinion of Dr. Parcher, the majority of the Board concludes that the claim was compensable. The denial of claimant's claim was improper and under the provisions of ORS 656.262(8) penalties should be assessed against the Fund and claimant's attorney's fee should be paid by it.

ORDER

The order of the Referee, dated July 8, 1977, is reversed.

Claimant's claim is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing June 28, 1976 and until the claim is closed pursuant to the provisions of ORS 656.268.

Claimant is awarded an additional sum equal to 15% of the amount of compensation due her between June 28, 1976 and September 10, 1976, pursuant to the provisions of ORS 656.262(8).

Claimant's attorney is awarded as a reasonable attorney's fee for his services at the hearing before the Referee the sum of \$750, payable by the State Accident Insurance Fund.

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

Board Member Moore dissents as follows:

This reviewer finds an overemphasis placed on the fact that claimant sat in a certain chair for approximately two hours when she was assigned to train for a new job. She sat in a different chair, however, her customary chair was nearby and had she chosen to do so, simply by rolling it along the floor, she could have substituted her own chair. She could have changed chairs had she been suffering any discomfort or had the chair been materially different than her own. In the absence of evidence of not being permitted to change chairs, it appears very unlikely that claimant was forced to, or did, sit in any unusual posture or any strained position at any time.

With respect to Dr. Tsai vs. Dr. Parcher, as to expertise, knowledge of the case, etc., this reviewer is of the opinion that the weight given to the testimony of an expert is based on how much

of the particular patient's history is really known to the expert. There is no way of knowing what claimant told Dr. Tsai and it does appear from the reports in evidence that claimant amplified the differences between "her chair" and the "loaned chair".

Dr. Tsai did not say the work caused or aggravated the condition or that the work precipitated the injury. Instead, he said, based upon the history given by claimant, the condition was precipitated "while at work".

At the hearing, when Dr. Parcher was asked whether or not sitting in the chair was a material contributing factor in the herniation of the intervertebral disc for which claimant sought treatment he replied:

"I don't believe that it would be considered as a materially contributing factor . . . Due to the minimal, trivial mechanics involved in a spine in the sitting position, which is not the usual way that we place any force, unusual force, on the disc at any place. It is in a more acute strained, bending, lifting, with the spine in a flexed position rather than in a sitting position. The mechanics are entirely different."

Rather, the doctor felt that claimant's condition came about because of a ruptured disc, which was the result of a long-standing degenerative arthritic condition, an idiopathic condition. His opinion was based upon a medical probability.

The Referee found claimant had not sustained the burden of proving a compensable claim. This reviewer affirms and adopts the order of the Referee.

/s/ George A. Moore, Board Member

WCB CASE NO. 76-6174

DECEMBER 29, 1977

EVERETT BRYANT, CLAIMANT

Malagon, Starr & Vinson, 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 in addition to ordering the Fund to pay the medical bill submitted by Dr. Degge together with penalties and attorney's fees.

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 8, 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. 76-5887

DECEMBER 29, 1977

PAUL P. DONOHUE, CLAIMANT
Dye & 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 which remanded claimant's claim to it for acceptance and payment of compensation to which claimant was entitled.

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

ORDER

The order of the Referee dated August 2, 1977, as amended by an August 4, 1977 order, 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 Fund.

WCB CASE NO. 77-233

DECEMBER 29, 1977

VERA GEIL, CLAIMANT
Dye & 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 which remanded claimant's claim to it for

acceptance and payment of compensation to which she is entitled together with penalties and attorney's fees.

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 15, 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 Fund.

WCB CASE NO. 77-838
WCB CASE NO. 77-1818

DECEMBER 30, 1977

GLEN D. SMITH, CLAIMANT
Spence, O'Neal & Banta, 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 that portion of the Referee's order which affirmed the Determination Order of March 14, 1977 on claimant's back disability. Claimant contends that his back condition is not medically stationary and not in compliance with the Opinion and Order of Referee Drake dated April 23, 1976.

Claimant sustained two industrial injuries to two body areas while employed for two different employers. The first injury occurred on August 2, 1972 while claimant was working as a chokersetter and he lifted a barrell of oil and his foot slipped. Claimant felt a knife-like pain in his upper back. This is the injury we are concerned with at this Board review.

The second injury occurred when claimant was a security guard for World Wildlife Safari on January 13, 1974 when someone hit him in the head with a pop bottle. Claimant developed bad headaches and stuttering. The Referee granted claimant 80° for 25% unscheduled disability for this head injury.

The sole issue at Board review is claimant's need for further medical care to his back and his contention he is not medically stationary. Claimant's back condition was diagnosed as thoracic spine sprain.

A Determination Order of October 19, 1973 granted claimant 48° for 15% unscheduled back disability.

Claimant had an exacerbation of his back condition while working and in November 1974 Dr. Reiber requested the Fund to reopen claimant's claim. The Fund reopened the claim. On November 3, 1975 Dr. Ochs found claimant's condition again stationary with permanent disability. On November 28, 1975 a Second Determination Order granted claimant 32° for 10% unscheduled back disability giving claimant a total award of 25%.

On February 5, 1976 Dr. Dewey, a clinical psychologist, diagnosed severe post traumatic neurosis with severe depression with personal inadequacy feelings. Dr. Dewey recommended psychiatric treatment.

Claimant appealed the Second Determination Order and, after a hearing, an Opinion and Order of April 23, 1976 was issued. The issues before the Referee were additional medical treatment or extent of permanent partial disability. Referee John F. Drake remanded claimant's claim to the Fund for additional medical care and to refer claimant to the Pain Rehabilitation Clinic. If claimant was not accepted then the claim was remanded for whatever psychiatric or physical treatment that was recommended by Dr. Brown. In March of 1976, Dr. Brown had recommended psychotherapy, medical care and a vigorous program of physical rehabilitation. He opined that claimant's severe depression was injury related.

Claimant was referred to the Pain Rehabilitation Clinic in August 1976. Dr. Russakov of the center diagnosed chronic back pain and headaches and probable severe conversion reaction. Claimant did quite well at the Clinic and upon discharge was much improved. The discharge diagnosis was significant depression secondary to injury, preoccupation with somatic concerns, bright average to superior intellectual abilities. The prognosis was guarded to fair. Based on no physical problems claimant was minimally disabled with residual functional capacity for whatever work he chose, but claimant did have a significant psychogenic component.

On December 14, 1976 Dr. Brown concurred with the findings of the Clinic.

On March 14, 1977 a Third Determination Order granted claimant time loss benefits only from March 18, 1976 through December 14, 1976, less time worked.

On May 4, 1977 Dr. Ochs indicated that claimant was still under his care for his back condition and was still disabled.

The Referee found that claimant had been adequately awarded for both his psychological and back condition in the awards he has received and he affirmed the Determination Order.

The Board, on de novo review, finds that the Third Determination Order of March 14, 1977 was premature. The Evaluation Division of the Board evidently closed the claim on a report from

Dr. Norris-Pearce who never saw claimant for his back condition. Dr. Norris-Pearce's report concerned claimant's head injury for which he had treated claimant and confusion arose because of different claim numbers.

Claimant's treating physician, Dr. Ochs, in his last report of May 1977, finds claimant still disabled and still under his care. Therefore, claimant is entitled to compensation for temporary total disability until closure is authorized pursuant to ORS 656.268.

ORDER

The order of the Referee, dated June 16, 1977, is reversed.

Claimant's claim is remanded to the Fund with compensation for temporary total disability commencing December 15, 1976, less time worked, until closure is authorized under the provisions of ORS 656.268.

Claimant's attorney is hereby granted as a reasonable attorney's fee 25% of the compensation granted by this order, not to exceed \$500.

WCB CASE NO. 76-4473

JANUARY 3, 1978

HAROLD E. DAVIS, CLAIMANT
Arthur L. Tarlow, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Stipulation and Order of Dismissal

This matter having come on regularly before the undersigned referee upon the stipulation of the parties, claimant acting by and through his attorney, Arthur L. Tarlow, and employer acting by and through Philip A. Mongrain, of its counsel, and it appearing that the matter has been fully compromised between the parties and that this order may be entered,

NOW THEREFORE,

IT IS HEREBY ORDERED that the claimant be and he is hereby awarded psychiatric treatment upon the written recommendation of Dr. Ray Grewe, and

IT IS FURTHER ORDERED that claimant be awarded a scar revision operation upon the written recommendation of Dr. Ray Grewe, and

IT IS FURTHER ORDERED that claimant be granted temporary total disability from July 30, 1976 until two months after the scar revision operation takes place, and

IT IS FURTHER ORDERED that Arthur L. Tarlow, claimant's attorney, be and he is hereby awarded attorney's fees in the sum of \$1,150.00 made payable by this order, and

IT IS FURTHER ORDERED that Arthur L. Tarlow, claimant's attorney, be and he is hereby awarded attorney's fees equivalent to 25% not to exceed \$500.00 of the additional compensation made payable by this order, and

IT IS HEREBY ORDERED that claimant's petition be and it is hereby dismissed.

WCB CASE NO. 77-1029

JANUARY 4, 1978

WILFORD BRAYDON, CLAIMANT
Galton, Popick & Scott, 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 February 8, 1977 Determination Order granting temporary total disability but no further permanent disability 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 June 27, 1977, is affirmed.

WCB CASE NO. 77-584

JANUARY 4, 1978

TROY E. CHEEK, SR., 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 Phillips.

The claimant seeks Board review of the Referee's order.

The claimant suffered a compensable injury on June 19, 1976 when he bent over to remove a large chunk of cement from a work road and felt immediate sharp pain in the upper, unfused portion of the lumbar spine with bilateral sciatic pain down to the knees. From that time onward claimant's left ankle has tended to turn outward, a difficulty that was still present at the time of the hearing and for which he must keep the ankle wrapped nearly all the time.

Claimant's claim had been closed by a Determination Order, dated October 27, 1976, which granted him 32° for 10% unscheduled low back disability.

A January 11, 1977 letter from Dr. Christensen was treated by the Fund as an aggravation claim, which was denied on January 20, 1977, on the ground that an intervening accident had exacerbated claimant's pre-existing back condition.

Prior to claimant's June 1976 injury, he had had various compensable injuries for which he had seen numerous physicians and which required three spinal fusions.

Dr. Kiest, in his closing evaluation in August of 1976, thought claimant did not have any permanent impairment resulting from his June 1976 injury. He found claimant medically stationary. In September of 1976, Dr. Kiest concurred with the Orthopaedic Consultants, who examined claimant in September 1976 and found that the claimant had a chronic sprain secondary to the June of 1976 injury in the unfused portion of his spine that resulted in a mildly moderate impairment, but that he required no further medical treatment.

Dr. Alton Christensen, a general practitioner, saw the claimant only once on December 8, 1976 and, in a sketchy report, related loss of range of back motion only and concluded that claimant had aggravated his June 1976 injury.

In March of 1977, the claimant was evaluated by a different group of Orthopaedic Consultants who concluded claimant's condition was the same now as it was in September 1976.

Claimant, now 43, has an eighth grade education and has obtained a GED. Claimant has high average non-verbal skills, but low normal verbal skills, with few constructive emotional resources and a severe basic personality trait disturbance that interferes with his adjusting to society.

The claimant had worked as a ranch hand, railroad section

maturely closed nor that his condition had worsened since the October 1976 Determination Order. The Referee concluded that the claimant was not in need of additional medical treatment other than the palliative treatment prescribed by Dr. Christensen. The Referee gave little weight to Dr. Christensen's report and relied on the claimant's treating orthopedist and the Orthopaedic Consultant's report.

The Referee did feel the claimant was entitled to an additional award of permanent partial disability. Therefore, he rated claimant's permanent disability at 25% for an increase of 48°.

The Board, after de novo review, concludes that the claimant is entitled to 35% unscheduled permanent partial disability for injury to his low back and 20% loss of function to the left leg and 15% loss of function to the right leg. Claimant cannot stand in any one place without moving around or his legs will go numb and he can hardly climb stairs without holding onto something. The Orthopaedic Consultants, in their March 15, 1977 report, indicate that claimant's leg symptoms had increased since their September 1976 examination. The claimant, at the time of their first examination, had tingling and numbness in his legs but now had pain extending down the back of each thigh almost to the kness which is worse on the left side. The pain is aggravated by sitting straight up or by any increase in activity. Claimant gets charley horse-like cramps in his calf while sitting. The Orthopaedic Consultants found that claimant is unable to completely straighten his knees and that there was give away weakness on both sides, but worse on the left side. They opined that claimant's loss of function in his legs was moderate. Therefore, the Board finds claimant has sustained a loss of function in the left leg of 20% and a loss of function in the right leg of 15%.

ORDER

The Referee's order, dated June 15, 1977, is modified and claimant is granted an award of 112° for 35% unscheduled disability to his low back, 20% loss of function of his left leg and 15% loss of function to his right leg.

The Determination Order, dated October 27, 1976, is likewise modified to reflect the award set forth above.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increase in compensation, payable out of said compensation, not to exceed \$2,300.

JANUARY 4, 1978

LINDA J. HART, CLAIMANT
Malagon, Starr & Vinson, Claimant's Atty.
Keith D. Skelton, 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 affirmed the denial of her claim.

The claimant alleges she suffered a compensable injury on December 27, 1976 when in the course of her employment she pulled a pile of veneer out of a bin, injuring her low back. This claim was denied on January 14, 1977 by the defendant.

Claimant had begun her normal shift at 4:30 p.m. on the day of the alleged injury and approximately an hour into her shift she contends she injured her back. She continued to work until approximately 6:30 p.m., at which time there was a break, when she reported the injury to a millwright, who was the appropriate person to report such injuries. She left work after reporting the injury but before her shift was finished. Later that evening, she sought medical treatment. The doctor, who examined claimant in the hospital emergency room, found tenderness over the sacroiliac joint and stiffness in the low back area, but no neurologic deficit. He diagnosed low back strain. The claimant did not return to work.

On March 4, 1977, while bending over at home, she had a sudden onset of low back pain with radiation into both thighs and her tailbone.

The Referee found that the injury was not compensable. He found that all the witnesses who testified at the hearing were credible. The Referee concluded that the claimant had not met her burden of proof. He based this conclusion on three things: (1) the testimony of the witnesses presented by the defendant who testified that the claimant appeared to be in pain when she came to work, (2) the fact claimant had a history of prior back symptoms, and (3) the absence of any heavy lifting or obvious accident at work.

The Board, after de novo review, reverses the order of the Referee. The Board finds that the evidence establishes that claimant did, in fact, sustain a compensable injury on December 27, 1976. The employer's witnesses not only contained contradictions among themselves that goes to credibility, but also claimant met her burden and presented her evidence and all proof which she could present in this case. We find claimant's witnesses the most credible and her claim compensable.

ORDER

The order of the Referee, dated May 31, 1977, is reversed.

The claim is remanded to the carrier for acceptance until closure is authorized under ORS 656.268.

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in the amount of \$650, payable by the carrier.

WCB CASE NO. 76-6826

JANUARY 4, 1978

PATRICK A. HAY, CLAIMANT
Gerald R. Pullen, 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 denial of claimant's claim.

Claimant, at the time of the injury a 16-year-old newspaper carrier, alleges he sustained an injury on June 10, 1976, the last day of school. About 7:00 p.m. claimant left his residence to make collections on his newspaper route. After doing all the collecting he intended to do, he proceeded home by the shortest possible route on his bicycle. The route he took was through Grant Park. While riding through the park he was hailed by a friend and they had a conversation. The friend borrowed claimant's bicycle and did a few wheelies. When claimant's bicycle was returned, he also did a few wheelies, and while doing so was severely injured. Claimant had been with his friend for approximately 45 minutes. The claimant's claim was denied by the carrier.

The Referee found that the denial was correct. The Referee concluded that although the claimant had left home for a business purpose and was carrying his route book and funds collected, claimant's work period was interrupted by the claimant's play period of a much greater duration and the claimant was injured while playing with his friend. Therefore, the Referee found the accident did not occur in the course of, nor arise out of, claimant's work.

The Board, after de novo review, concurs with the findings and conclusions of the Referee. Claimant had worked 15 minutes for his employer; he had ceased working and was playing with a friend when his injury occurred. He had deviated from his employment at the time of his injury. Therefore, the Board finds claimant's injury was not compensable.

ORDER

The Referee's order, dated June 16, 1977, is affirmed.

JANUARY 4, 1978

JOSEPH MEDEIROS, CLAIMANT
Dye & Olson, 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 March 30, 1977 Determination Order awarding no permanent disability for an injury suffered on July 17, 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 August 22, 1977, is affirmed.

JANUARY 4, 1978

WILLIAM PARTLOW, CLAIMANT
Thomas M. Mosgrove, 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 the Referee's order which granted claimant an award of 120° for 80% loss of his left leg. Claimant contends the award is inadequate and he is permanently and totally disabled.

Claimant, a 61 year old manager of court apartments, slipped on some stairs and twisted his knee on May 3, 1972. Dr. Church saw claimant on May 30 and diagnosed severe chondromalacia and torn medial meniscus. On June 2, 1972 claimant was hospitalized and a left knee medial meniscectomy was performed and a left chondroplasty.

On February 12, 1973 Dr. Church released claimant to modified work but claimant was still having considerable pain. On February 13, 1973 Dr. Church performed a closing examination and diagnosed chronic degenerative osteoarthritis. Claimant could perform light work but no heavy work involving kneeling, squatting or lifting. Claimant was stationary with definite permanent disability.

A Determination Order of March 5, 1973 granted claimant 45° for 30% loss of the left leg.

In a report of March 10, 1975 Dr. Church indicated he had last seen claimant on September 4, 1974 with complaints of low back pain and left hip pain. At that time he diagnosed degenerative osteoarthritis lumbar spine left trochanteric bursitis, chronic low back strain and malposture. He recommended vocational rehabilitation.

In his report of December 16, 1975 Dr. James wrote that claimant's pain was so bad he wanted surgery and on January 22, 1976 Dr. James performed a high tibial osteotomy.

In an October 26, 1976 closing examination Dr. James indicated claimant's pain had been lessened by the surgery but his knee was unstable unless he wore a knee cage brace and without it his knee gave way. Claimant could carry out functions of his daily life but his knee would require rest and he had a definite limitation in walking tolerance and activity level to a considerable degree. Claimant was stationary but could not return to the active labor market.

A Determination Order of January 7, 1977 granted claimant an additional 15° for 10% loss of the left leg.

Claimant testified he has searched for jobs but has found nothing. He worked as a janitor for about seven months after the injury but was fired for being absent due to his leg pain.

The Referee found this disability was solely in the scheduled area and that claimant suffered a significant loss of function of his left leg and he awarded him 120° for 80% loss of the left leg.

Claimant contends he is permanently and totally disabled under the provisions of ORS 656.206 as amended in 1975 pertaining to scheduled injuries. The Board must point out that disability is rated based upon the law in effect at the time of the injury, not after subsequent closures or amendments to a statute. The Board, on de novo review, concurs with the conclusions reached by the Referee.

ORDER

The order of the Referee, dated June 10, 1977, is affirmed.

MARTHA PILCHER, CLAIMANT
Holmes & James, 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 her an award of permanent partial disability of 96° for 30% for injury to her low back. Claimant contends that she is permanently and totally disabled.

Claimant suffered a compensable injury on February 27, 1975. She was employed as a custodian and injured her low back while lifting a five-gallon bucket of water. Dr. James E. Dunn examined her and diagnosed a possible spondylolysis and/or a spina bifida occulta. Dr. Dunn reported subjective findings of dull aching pain in claimant's low back area with intermittent radiation into the lower spine and occasionally into the buttocks. A Determination Order of September 28, 1976 granted time loss only.

Claimant was again seen by Dr. Dunn in 1977 and related the same complaints. His examination revealed that forward bending was unlimited. His impression was that there was permanent partial disability related to pain and discomfort with any type of job requiring lifting in excess of 15 pounds and with bending or twisting.

Dr. Peterson found claimant stationary in April of 1977. His examination revealed a satisfactory range of motion in the low extremity. He concluded her condition was permanent. He recommended that she refrain from prolonged standing as well as frequent bending and lifting with no lifting over 20 pounds.

Currently, claimant's back hurts constantly even with medication and causes her to get up during the night. She describes the pains as running up her leg into her back and being more prominent on the left side. She is now taking pain pills and tranquilizers. She wears a corset type brace. She is unable to stand or sit for prolonged periods and walking more than 250 yards is difficult. The claimant also has a hard time stooping. She no longer can do yard work, move furniture, wash windows, paint or carry loads. However, she still can vacuum, cook, wash dishes and drive a car for about two hours.

The claimant is 58 years old and has a high school education. She has had various work experiences.

The claimant has attempted to find work through the State Employment Office where she has been on three occasions. She also sought employment at local businesses.

The Referee found that the claimant was not permanently and totally disabled. The medical evidence indicated that claimant was able to do light to moderate work and her background would indicate she has some work skills. The Referee concluded that the reason claimant has not been able to return to work has not been solely due to her physical disability, but rather due to the lack of current demand for employees in the areas in which she has sought work. However, the Referee did determine that the claimant had suffered a permanent loss of wage earning capacity. He felt that the claimant must abstain from prolonged standing, frequent bending and lifting, and lifting over 20 pounds. He rated her disability at 96° for 30% of the maximum allowable by statute for unscheduled permanent partial disability.

The Board, after de novo review, modifies the Referee's order. The claimant is entitled to an increased award of permanent partial disability in the amount of 64° for 20%, making a total award of permanent partial disability of 160° for 50% unscheduled low back disability. Dr. Peterson and Dr. Dunn both limited the claimant's activities and recommended she should not be employed in jobs that required prolonged standing, frequent bending and lifting, and lifting over 20 pounds.

The Board further directs the Field Services Division of the Department to attempt job placement for this claimant. She is able, according to the medical reports, to perform light to moderate work and should be so placed.

ORDER

The Referee's order, dated June 24, 1977, is modified.

The claimant is awarded an additional 64° for 20% unscheduled permanent partial disability to her low back. This is in addition to the 96° for 30% unscheduled permanent partial disability awarded in the Referee's order.

It is further ordered that claimant's attorney be granted an amount equal to 25% of the increased compensation, not to exceed \$2,300, payable out of said compensation as paid.

It is further ordered that the Field Services Division of the Workers' Compensation Department is directed to attempt job placement with this claimant.

JANUARY 4, 1978

LUCILLE THOMPSON, CLAIMANT
A. C. Roll, Claimant's Atty.
Rankin, McCurry, Osburn & Gallagher,
Defense Atty.
Order

On December 20, 1977 the Board received claimant's petition for reconsideration of its Order on Review entered in the above entitled matter on December 1, 1977. The primary ground asserted in behalf of this petition is that the Board "acted in excess of its authority in overturning the Referee's credibility determinations and fact findings based upon the Referee's personal view of the work place and work body movements required of claimant".

The Board is unaware of any statute or any ruling of the Court of Appeals which states that it is bound by the Referee's personal observations and findings on a claimant's credibility. Furthermore, in the present case, the Board found that the lay testimony was sufficient to overcome the medical evidence.

The Board finds nothing contained in claimant's petition to justify a reconsideration of its Order on Review entered on December 1, 1977 in the above entitled matter and, therefore, the petition for reconsideration should be denied.

IT IS SO ORDERED.

JANUARY 4, 1978

DONALD WEST, CLAIMANT
Merten & Saltveit, 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 denied him additional time loss benefits from September 22, 1976 to July 7, 1977, the date claimant underwent further surgery on his foot.

Claimant sustained a crushing injury to his left foot in April 1972 and received an award of permanent partial disability of 30% loss of the left foot. Claimant returned to work for his employer on July 28, 1972 and continued his employment there until

October 1, 1976. In response to the general question of why he stopped working, claimant responded with several reasons, testifying:

"Well, my foot was hurting; and there was going to be a layoff of some of the younger men there; so I took the layoff instead of the younger men. In the meantime they lost the contract for the material I was building."

Claimant also testified that he was 65 on May 18, 1976 and that he began receiving Social Security retirement benefits as of that date and continues to do so.

Claimant's son, who was also his supervisor, testified that he had several discussions with his father concerning the layoff. He testified that his father was contemplating retirement and that he hoped his father would retire and that the condition of the foot was part of his father's decision to accept the layoff.

The employer's place of business had been moved from a 23,000 square foot building to a 45,000 square foot building. The additional space for work caused the claimant to have to cover an area approximately 12,000 square feet. The relocation of some of the machinery also caused claimant to engage in additional walking. Claimant thought he would like to go back to work if he could avoid the increased walking.

The claimant's employer had made certain accommodations on the job so that the claimant would not have to walk so far. The employer testified that he did have employment for the claimant. When he discovered the claimant was still on unemployment, he had notified the unemployment office of a job availability. At the hearing, claimant seemed uninformed and interested.

The Referee found that the claimant left his job in October of 1976 not because of his foot, but because he wanted to retire and wanted to be accommodating and let other men have the work. It appeared to the Referee that these considerations seemed more important to the claimant than the fact that his foot hurt. Based on this information, the Referee concluded that the claimant was not entitled to any additional time loss from the date he left employment until July 7, 1977. The Referee noted that since the hearing, claimant's foot had been operated on and the carrier denied reopening but assumed responsibility under ORS 656.245.

The Board, after de novo review, finds that the Referee correctly decided that the claimant was not entitled to any additional time loss payments. The issue of the claimant having surgery after the hearing was not properly before the Board. The Board concludes, based on the medical evidence, that the claimant was medically stationary. His reasons for leaving the job in October of 1976 apparently involved his wish to allow other men to work and the fact that

his employer had lost the contract on which the claimant was working. Claimant did not indicate in his testimony that he left his employment because of his foot hurting. Therefore, the Board affirms the Referee's order.

ORDER

The Referee's order, dated July 8, 1977, is affirmed.

WCB CASE NO. 77-1755 JANUARY 5, 1978
WCB CASE NO. 77-2422

DONALD BEARD, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Lindsay, Nahstoll, Hart & Krause,
Defense Atty.
Request for Review by Argonaut

Reviewed by Board Members Wilson and Moore.

Argonaut Insurance Company seeks Board review of the Referee's order which remanded the aggravation claim to it for the payment of benefits to the claimant, in addition to penalties and attorney's fees.

On April 17, 1975, while Argonaut Insurance Company was insuring his employer, claimant sustained a compensable low back injury. A laminectomy was performed in August of 1975 and claimant was released for work effective October 13, 1975 and claimant returned to work for his employer. A Determination Order of April 12, 1976 awarded claimant 48° for 15% permanent partial disability resulting from his back injury.

Claimant, in April of 1976, experienced what he described as two popping incidents while at work. He was driving a Hyster and had immediate onset of pain when something popped in his back. He lost no time from work because of this injury. The pain experienced by claimant subsided shortly after the incidents took place.

The claimant continued to work for his employer in a heavy labor type of employment. This was against the recommendations of Dr. Lisac who had performed the operation in 1975.

On January 28, 1977 claimant was laid off by his employer. Due to his seniority, claimant was called back in to apply for a different job as a loader-stacker at the back of a planer. He worked at this job for several hours and concluded he could not handle the job because of the pain he experienced. The following day, he could

not get out of bed. He did not sustain any accidental injury at this time, but simply found he was unable to work because it was beyond his physical capacity.

Argonaut was the insurer for the employer on the date of claimant's original injury up until July of 1976. In January of 1977 the employer's Workers' Compensation carrier was Employee Benefits Insurance Companies.

The claimant filed the claim in February of 1977 for his injury. This was denied on March 2, 1977 by Argonaut. EBI also denied this injury. Pursuant to both denials, the Compliance Division of the Workers' Compensation Department issued an Interim Order requiring Argonaut to pay temporary total disability benefits until the responsibility was determined at a hearing.

On February 21, 1977 Dr. Wade reported that the claimant related his pain to his work activities. The claimant was taken from one job and moved to another which required a great deal of heavy lifting. Claimant related to the doctor that he had been having some difficulties since April of 1976, but when he undertook a more strenuous type of job, the pain gradually became increasingly severe. Claimant alleges he was unable to continue that job due to the increase in pain.

Claimant's physicians, Drs. Lisac and Cockburn, report that from December 1975 up until January 1976 claimant continued to experience back pain on a daily basis.

Dr. Wade, on April 20, 1977, opined the problem with the claimant was that he had returned to hard physical work, which Dr. Lisac had recommended against at the conclusion of his laminectomy, and as a result claimant was now having problems with recurrent strains to his low back. He further opined that if the claimant was involved in a lighter form of activity or work he would be able to live within the confines of his impairments.

The Referee found that, based on all of the medical evidence, the claimant had sustained an aggravation of his 1975 injury and had not sustained a new injury as contended by Argonaut. He further found that Argonaut Insurance Company had acted unreasonably in denying the claim and therefore he felt justified in awarding penalties and attorney's fees.

The Board, after de novo review, affirms the Referee's finding of aggravation of the claimant's prior injury. The Board concludes that the claimant has met his burden of proof to establish that, in fact, there is an aggravation. However, the Board concludes that the Referee should be reversed as to the award of penalties in this instance. Argonaut did not act unreasonably in denying the claim based upon Dr. Wade's report of February 21, 1977 which indicates that the claimant's low back problems are related to claimant's continuing work activities. Further, the report

indicates that claimant had been experiencing more problems since April of 1976 and has made a job change which increased his lifting activity, gradually increasing his pain to the point that he is unable to continue with his employment. The claimant related his condition to his work activities, therefore, the denial of Argonaut was not unreasonable, arbitrary or in bad faith and the award of penalties was improper and is reversed.

Additionally, the Board finds that the award of \$1,000 attorney's fees to claimant's attorney is excessive and improper. The claimant, in this case, was an interested party and as such the Board feels that an award of attorney's fees of \$750 are adequate in this matter.

ORDER

The Referee's order, dated June 10, 1977, is modified.

That portion of the Referee's order which awarded penalties is reversed.

Further, that portion of the Referee's order awarding an attorney's fee is modified. Claimant's attorney is by this order granted an attorney's fee of \$750.

The Referee's order, in all other respects, is affirmed.

WCB CASE NO. 77-999
WCB CASE NO. 77-2067

JANUARY 5, 1978

PETRA LACKEY, CLAIMANT
Fredrickson, Tassock, Weisensee,
Barton & Cox, Claimant's Atty.
Gearin, Landis, Aebi, Defense Atty.
Don G. Swink, Defense Atty.
Request for Review by Industrial
Indemnity Insurance Co.

Reviewed by Board Members Wilson and Phillips.

The employer, by and through its carrier, Industrial Indemnity Insurance Company, seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation from April 1, 1977 until closure is authorized. Penalties and attorney fees were also assessed against Industrial Indemnity.

Claimant, 61, has been a registered nurse over 40 years. From 1972 to 1974 claimant worked as a psychiatric nurse for Woodland Park Hospital and then for Gresham Community Hospital from 1974 until March 1977 when she quit. Claimant alleges an occupational disease commencing around 1972 to her low back and hip.

Claimant worked nights alone with only the help of an untrained male assistant. Her job required her to work with alcoholics, drug addicts, the mentally ill and epileptics. Her work entailed wrestling with patients when restraining them to give them medication or shots. The work was physically very strenuous.

Claimant testified that in 1972 she hurt after each and every wrestling bout. In the beginning rest and hot packs helped her, but the condition worsened.

Claimant saw Dr. Ford in 1972 and again in 1973. In June 1975 claimant was hospitalized for conservative care and the diagnosis was degenerative disc disease of the lumbosacral spine, hypertensive cardiovascular disease, obesity and chronic reactive depression.

In December 1976 Dr. Cherry examined her and x-rays revealed marked degenerative arthritis with reduced joint space at L4-5, L2-3, L1-2, bursitis of trochanters and osteoarthritis of both feet. Claimant was quite symptomatic.

Dr. Ford's report of January 31, 1977 indicated claimant had been his patient since September 1972 and claimant had osteoarthritis of her hips, knees and ankles at that time. Claimant's work activities aggravated this condition but he couldn't honestly say it caused her problems.

February 4, 1977 Woodland Park Hospital denied claimant's claim of January 24, 1977.

On April 14, 1977 Gresham Community Hospital denied claimant's claim.

On April 22, 1977 Dr. Ford reported he felt it was impossible for claimant to continue her work due to her osteoarthritis.

The Orthopaedic Consultants examined claimant on May 18, 1977 with a diagnosis the same as Dr. Ford and Dr. Cherry. The physicians opined that claimant's work aggravated the underlying condition. Claimant was medically stationary and her total loss of function was moderately severe, but due to this injury, mild.

The Referee found that the medical evidence indicated claimant's osteoarthritis was aggravated by her work. The last injurious exposure rule is applied and Gresham Community Hospital is liable. Further the Referee found that this employer's carrier, Industrial Indemnity, issued its denial on April 14, 1977 and claimant filed her claim in January 1977. He assessed penalties and attorney fees for unreasonable resistance and remanded the claim for acceptance.

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

ORDER

The order of the Referee, dated June 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 \$300, payable by the carrier, Industrial Indemnity Insurance Company.

WCB CASE NO. 76-6752

JANUARY 5, 1978

MIRTA LIPIZ, CLAIMANT
Rader & Rader, 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 affirmed the Determination Order, dated November 22, 1976, awarding claimant temporary total disability compensation from March 4, 1974 to November 1, 1976 only. The claimant contends that she suffered permanent disability resulting from her injury.

Claimant, at age 35, developed wrist and forearm pain while employed as a furniture assembler. She has been examined and cared for by numerous physicians and surgeons. Claimant also has been seen by a psychiatrist but there is no report from him in the record.

In June 1974 claimant's symptoms were diagnosed as bilateral carpal tunnel syndrome. A carpal tunnel release was performed on the right. No significant improvement was noted. Claimant has undergone various tests including an electromyograph on two occasions, x-rays, muscle biopsies, and wide range of drug therapies. Despite all these tests, none of the physicians have been able to achieve a definite diagnosis.

Claimant is from Cuba and speaks very little English. The medical history that was obtained by the doctors and claimant's testimony at the hearing were translated by an interpreter.

The claimant alleges she currently suffers from pain and weakness in both her forearms. The physicians who examined her could not find any objective findings, but only subjective complaints of muscular pain in both arms. There is no question in their minds that claimant suffers pain but they are at a loss to diagnose the exact etiology.

Dr. John R. Flannery stated on September 18, 1975 that, although the findings are minimal, he was convinced that claimant

was not malingering and her symptoms were very real.

On August 19, 1974, Dr. Edward W. Davis said he believed that the claimant's working condition aggravated her complaints.

The medical reports and testimony indicate that claimant does have pain in both right and left hands and forearms, but there are no objective findings of any physical impairment or loss of function.

The Referee found no medical evidence that the claimant would benefit from further medical care and treatment. He concluded that the claimant's condition was medically stationary on November 1, 1976 and that claimant had failed to carry her burden of proof that she has suffered any permanent physical impairment or loss of physical function. He affirmed the Determination Order of November 22, 1972.

The Board, after de novo review, finds that the claimant does have some disability. The Board finds in the medical evidence that claimant suffers continuing pain in both right and left arms directly related to her injury. This pain disables claimant. Therefore, the Board concludes that claimant's disability should be rated at 19.2° for 10% loss of physical function to each arm. The Board suggests that claimant be referred to the Disability Prevention Center for vocational rehabilitation.

ORDER

The order of the Referee, dated March 31, 1977, is reversed.

The claimant is granted an award for 19.2° for 10% loss of function to her right arm and 19.2° for 10% loss of function to her left arm.

Claimant's attorney is granted a sum equal to 25% of the compensation granted by this order as a reasonable attorney's fee, this sum to be paid out of the compensation awarded claimant payable as paid, not to exceed the \$2,300.

WCB CASE NO. 76-5958

JANUARY 5, 1978

HAROLD E. MIDDLETON, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Atty.
Ronald J. Podnar, 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 an award of 48° for 15% unscheduled right hip disability.

Claimant, presently age 55, suffered a compensable injury in October 1974. He was employed as a utility man in a plywood plant when he fell some eight feet from a ladder and landed on his right side. He suffered broken ribs, a fracture of the right hip at the femoral neck and a punctured lung. Claimant was released for regular work on March 17, 1975.

In his October 1975 closing report, Dr. Adams, claimant's treating physician, indicated the fracture had healed and noted a one-half inch shortening of the right leg, some thigh atrophy and some limitation of motion.

The Determination Order of October 18, 1976 awarded 30° for 20% loss of the right leg.

On November 30, 1976, the Orthopaedic Consultants examined claimant and made the same diagnosis as Dr. Adams in his closing report. The physicians rated claimant's right leg disability at 30% loss function.

Claimant has pain in his hip. He cannot run or jump. He walks with a limp, which is aggravated by him carrying something or having to walk fast. In addition, he can hardly move in a squat or crouched position.

Claimant has worked for the last 18 years at the employer's business. He worked as a sanderman, dryer feeder and utility man and can still do all these jobs. Claimant is now employed at the same job he was at the time of the injury. His duties are to help the millwright with repairs and to maintain equipment along with oiling and greasing. Claimant does have difficulty climbing on and about machinery and squeezing into tight or awkward places and is described by a co-worker and his wife as slower, less mobile, awkward and clumsy.

The Referee found claimant had a loss of earning capacity in terms of his ability to gain and to hold work in the general labor market. The Referee based this on the fact that if claimant lost his current job and sought work in the general labor market, his age would be a handicap in respect to formal retraining and would further reduce the number of work alternatives open to him, as well as his physical disability. The Referee, therefore, found the scheduled disability award adequate and further awarded claimant 48° for 15% unscheduled right hip disability.

The Board, after de novo review, finds that the claimant is entitled to an increase of 10% for loss of use of the right leg based on the report of the Orthopaedic Consultants. The Board further finds the claimant is not entitled to any award for his right hip disability. Claimant's hip problems is not in the pelvic area and the acetabulum is not involved and therefore, the injury is to the leg and that is the only disability award claimant is entitled to.

ORDER

The Referee's order, dated February 18, 1976, is hereby modified.

Claimant is hereby granted an additional award of 15° for 10%, giving claimant a total award of 45° for 30% loss of the right leg. This award is in lieu of and not in addition to any award granted by the Referee.

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

WCB CASE NO. 76-3125

JANUARY 5, 1978

LEO NEILAN, JR., CLAIMANT
Galton, Popick & Scott, 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 that portion of the Referee's order which granted penalties and attorney fees.

This case involves one employer and two carriers. Claimant sustained a compensable injury on May 11, 1974 to his left knee and the Fund was the carrier. After this injury claimant returned to work and on June 2, 1975 claimant's left knee symptoms returned and Travelers Insurance Company was the carrier at that time.

After the June 2, 1975 incident a 307 order designating Travelers as the paying agent was issued.

A Determination Order was entered on March 14, 1975 which granted claimant no award for temporary total disability compensation nor any award for permanent partial disability. Claimant appealed. After a hearing, a Referee ordered claimant's claim reopened for benefits and reimbursement by the Fund to Travelers for any compensation it had paid to claimant and dismissed the claim against Travelers. He further ordered the Determination Order set aside and awarded claimant a penalty for the time loss that was due to him payable by the Fund. This order of the Referee was affirmed through the circuit court.

On March 22, 1977 claimant received the penalty that had been ordered by the Referee on January 30, 1976.

Claimant contended that the defendant's failure to pay penalties as ordered in a reasonable time is grounds for further penalties. The Referee ruled he had no authority to grant a penalty on a penalty.

The Referee further found no evidence that Travelers had ever been reimbursed for the compensation for temporary total disability it had paid to claimant as directed by the order designating a paying agent. He concluded that this failure to comply was unreasonable delay in the payment of compensation and ordered claimant be paid an amount equal to 10% of the sum before determined to be due to Travelers.

The Referee further granted claimant compensation equal to 22.5% for 15% loss of the left leg and to pay claimant's attorney a reasonable attorney fee of \$550.

The Board, on de novo review, agrees with the award granted by the Referee to claimant for his left leg disability. However, the Board does not agree with the issues of penalties and attorney fees.

There is no provision in the statute to allow a penalty to be assessed against one carrier for failure to reimburse another carrier and for that penalty to be paid to the claimant.

Furthermore, the attorney fee granted to claimant's attorney of \$550 is improper. Claimant's attorney is entitled to 25% of the increased compensation granted by the Referee's order and that is all.

ORDER

The order of the Referee, dated April 8, 1977, is hereby modified.

The penalty granted to claimant in the amount of 10% of the ordered reimbursement assessed against the Fund and the attorney fee of \$550 ordered by the Referee are hereby reversed.

Claimant's attorney is granted 25% of the increased compensation granted by the Referee's order as and for a reasonable attorney fee.

In all other respects the order of the Referee is affirmed.

ARTHUR PULS, CLAIMANT

Malagon, Starr & Vinson, Claimant's Atty.

Jones, Lang, Klein, Wolf & Smith,

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 remanded claimant's claim to it for acceptance and payment of compensation.

Claimant, at age 46, allegedly suffered a bowel injury on February 9, 1977 while pushing on a tree during the course of his employment as a timber cutter. While straining in an awkward position, claimant became nauseated and broke out in a sweat. He saw Dr. Murdock the following day, who performed an exploratory laparotomy, drainage of pelvic abscess and right transverse loop colostomy. The diagnosis was a pelvic abscess due to a perforated sigmoid diverticulum. Three major factors led Dr. Murdock to the belief that claimant's condition was related to the severe straining he was involved in on the day of the onset of symptoms. First, the fact that acute perforated sigmoid diverticulitis is very rarely the first manifestation of diverticular disease in a patient of claimant's age and the doctor's feeling that a severe degree of straining could have led to a perforation of a diverticulum. Secondly, the fact that claimant had no "premonitory" symptoms caused Dr. Murdock to suspect that he had an underlying diverticulitis prior to his illness. The final factor indicated that the temporary relation between claimant's strain and the onset of symptoms was too striking to be ignored. The doctor was uncertain whether or not the straining claimant engaged in on the job was causally related to his perforated diverticulum, however, he felt it was reasonable to assume that it was.

Dr. Shlim, assistant clinical professor of surgery at the University of Oregon Medical School, disagreed with the conclusions of Dr. Murdock after hearing the testimony at the hearing and examining the exhibits. He indicated that claimant's condition at the time of surgery was unrelated to any activity whatsoever and he felt it was very common to attempt to relate the symptoms to some known episode which occurred near the time of the onset of the problem. He noted that the fact that claimant was under unusual stress had nothing to do with putting pressure on the bowel, even when the stress was in the abdominal area. Only the muscles around the rectum would be able to apply pressure to the bowel. It is also very common, in claimant's condition, for the person to have no symptomatology whatsoever, no matter how slight, to warn the patient of impending problems. Dr. Shlim stated that if claimant's bowel had actually ruptured as a result of severe stress, he would have been unable to wait until the following day to see his doctor, in

fact, he would have been unable to even lie down; he would require an immediate operation.

The Referee found the opinion of Dr. Murdock, claimant's treating physician, to be the more persuasive of the two doctors' and, based on this conclusion, found claimant's severe straining suffered at work just prior to the onset of symptoms to be a material contributing factor in his condition requiring surgery. He, therefore, ordered the carrier to accept the claim and pay claimant compensation to which he was entitled.

The Board, after de novo review, considers the testimony of Dr. Shlim to be very persuasive. The doctor was very emphatic in his statements and was able to produce current medical literature that corroborated with his opinion completely. It is the Board's opinion that Dr. Shlim's background and expertise in this particular field caused his opinion to carry far more weight than that of Dr. Murdock. Therefore, the Board finds that claimant's condition is not materially related to the incident at work and that the carrier's denial should be affirmed.

ORDER

The order of the Referee, dated July 27, 1977, is reversed.

The denial of the carrier, dated April 4, 1977, is affirmed.

WCB CASE NO. 76-3774

JANUARY 5, 1978

DELLA M. RIGGS, CLAIMANT
Schumaker & Bernstein, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, 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 July 12, 1976, which granted an award to claimant of 32% for 10% unscheduled shoulder disability. Claimant contends, as she did at the hearing, she is entitled to a greater award of permanent partial disability.

Claimant, 37 years old, alleges that after being employed four months in assembly work, she began to experience pain in her arms and shoulders. She left her employment after having worked there for approximately nine months.

Claimant sought medical treatment for her pain with various physicians. She told them she was required to put 80 pounds of pressure on a lever to flatten rivets in the handle of knives and was re-

quired to lift objects weighing in excess of 50 pounds. The claimant is 5'1" tall and weighs approximately 190 pounds.

Claimant initially received conservative treatment from Dr. Cook, who referred her to Dr. Bird. Dr. Bird, in October 1975, indicated claimant should not do any work requiring lifting over 10 pounds or putting more than 10 pounds pressure on her biceps. He opined she could do work such as packing small articles into boxes.

Dr. Hardiman, who also treated claimant, released her for work on December 15, 1975, but restricted claimant to work not requiring any overhead work. Claimant did return to work for one day with her employer but quit because she was returned to her same job and could not physically perform it.

In April of 1976, Dr. Hardiman reported claimant had complained of continuing pain in her shoulders. He found range of motion almost normal. His impression was chronic shoulder pain, probably related to degenerative rotator cuff disease. He felt claimant's condition was stable.

Claimant was examined twice in May of 1976 by Dr. Van Osdel of the Disability Prevention Division. He diagnosed tendinitis which was resolved. He found claimant had a full range of motion of both shoulders and elbows. Dr. Van Osdel reported claimant had a moderate depressive reaction with chronic mild anxiety. He released her from the Disability Prevention Division on May 20, 1976.

In September 1976, the claimant was examined by the Orthopaedic Consultants. The physicians diagnosed chronic bicipital tendinitis, chronic tendinitis of the shoulder cuff, and obesity. They felt claimant needed job placement or retraining since she was unable to return to her former job. They rated the loss of function in both shoulders as minimal.

Claimant testified to continuing pain. She is able to drive only short distances of two or three miles before she has to stop and rest for an extended period of time. Films introduced showed claimant driving a stick shift camper-equipped compact pickup. The film showed her behind the wheel and operating the vehicle. Claimant contends her son sat beside her and steered the vehicle. She later admitted he was in the back of the vehicle when the film was taken.

The employer introduced evidence that the force required to operate the riveting equipment was between 4-6 pounds. Also it is apparent claimant was mistaken in the amount of weight she was required to lift.

Dr. Quan, a psychiatrist, examined claimant on January 14, 1977. He diagnosed anxiety neurosis, which pre-existed the injury. He noted that claimant did not appear to be strongly motivated to

return to work and was not impaired from so doing by an adverse psychiatric condition.

The employer introduced evidence that they have a variety of jobs for which claimant is qualified and physically capable of performing. Claimant has not sought to contact her employer regarding any of them.

The Referee concluded that, based on all the evidence, claimant had sustained a compensable injury, but had not met her burden of proof to establish she was entitled to a greater award of permanent partial disability and therefore affirmed the Determination Order of July 17, 1976. The Referee commented that he questioned the credibility of the claimant since it was established she greatly exaggerated her job description to the treating physicians.

The Board, after de novo review, concludes that the Referee's order should be affirmed. The credibility of the claimant was a key issue in this hearing and the Referee's evaluation is entitled to great weight. It was clearly established that she exaggerated her job requirements and her current physical difficulties. Therefore, based on all the evidence, the Board affirms the Referee's order.

ORDER

The Referee's order, dated May 12, 1977, is affirmed.

WCB CASE NO. 76-4902

JANUARY 5, 1978

CARL STARR, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, 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 him an increased award of 144° for a total award of 256° for 80% unscheduled low back disability. Claimant contends that he is permanently and totally disabled. The Fund cross-appealed the Referee's order contending that the June 30, 1976 Determination Order which granted claimant 112° for 35% disability 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 June 3, 1977, is affirmed.

WCB CASE NO. 76-275
WCB CASE NO. 76-2480

JANUARY 5, 1978

DAVID SWEARINGEN, CLAIMANT
Thomas O. Carter, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

Two claims were consolidated for hearing and Board review.

The first industrial injury was sustained by claimant in November 1972, while employed at IBM Corporation. The Determination Order issued May 5, 1977 awarded no compensation for time loss or permanent disability.

The second industrial injury occurred on June 30, 1975 while claimant was in the employ of J.C. Penney, and was closed by Determination Order dated December 3, 1975 awarding compensation for 15% loss function of the right leg.

At the hearing, the issue was the extent of disability in both cases. The Referee deferred making a finding on this issue and instead remanded the matter to the Disability Prevention Division of the Board, through the second employer, J.C. Penney, with compensation for temporary total disability payable until closure under ORS 656.268, and awarded attorney fees.

The employer, J.C. Penney, has requested Board review alleging that the Referee did not have jurisdiction to remand this matter to the Disability Prevention Division for further determination of disability, and that claimant had not sustained his burden of proving the Determination Orders in both cases were inadequate.

The Board, on de novo review, finds the Referee did not have jurisdiction to remand this matter to the Disability Prevention Division or Evaluation Division for reevaluation and determination. The only circumstances under which a Referee can assume this jurisdiction is contained in OAR 436-61-060 and these criteria are not involved in this case.

The Board further finds that the primary sources of claimant's problems are widespread myofascitis which claimant has had since 1958 and bilateral capsulitis of both hips, associated with

the underlying disease. There is no evidence of a psychological problem.

The Board concludes, therefore, that the Determination Order issued in each case has adequately compensated claimant for the permanent disability attributable to the respective industrial injury of 1975.

ORDER

The order of the Referee, dated May 26, 1977, is reversed.

WCB CASE NO. 77-385-E JANUARY 5, 1978

TRENTON WANN, CLAIMANT
Malagon, Starr & Vinson, Claimant's Atty.
Thwing, Atherly & Butler, 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 claimant's claim be reopened as of March 19, 1976 and claimant be provided benefits provided by law including, but not limited to, the recommendations of Drs. Carter, Golden and Cherry. The employer contends claimant failed to carry his burden of showing that the symptoms of which he complained to Dr. Golden were related to the injury of June 1966 and that reopening should be as of the date of the order granting own motion jurisdiction.

Claimant suffered a compensable injury on June 21, 1966 when he was struck by a tree limb. He was treated for laceration of the left side of the head, contusion of the left shoulder, headaches and eye abnormalities, as well as skull fracture, fracture of the right petrous pyramid together with inner ear and trigemina nerve trauma. Lumbar spine symptoms were also found. Claimant had a back injury in 1963 and did have surgery.

The claim was closed on July 28, 1968 with temporary total disability to June 10, 1968, less time worked, and permanent disability of 20% loss of use of the left arm and 10% loss of an arm by separation for unscheduled disability.

In early 1976 claimant requested his claim be reopened. On June 1, 1976 the Board, in an Own Motion Order, denied reopening of the claim and subsequently Dr. Golden's report of September 24, 1976 and Dr. Carter's report of September 21, 1976 were submitted to the Board with a new request to reopen; on January 5, 1977 the Board issued its Own Motion Order reopening the claim.

Dr. Cherry's September 9, 1976 report indicated he had treated claimant since 1964. He noted that the claimant did not have any headache complaints prior to his June 1966 woods injury. He opined that the headaches were caused by the 1966 woods accident and not by the August 1966 car accident. Drs. Carter and Golden concurred.

The Referee found claimant's claim should be reopened effective March 19, 1976 with temporary disability (less time worked) together with treatment recommended, specifically for headache, depressive neurosis, alcoholism and for causalgia of the left shoulder and left arm.

The Board, after de novo review, finds that the medical evidence clearly establishes claimant's claim should be reopened for treatment of the headache problem only. The effective date of the Own Motion Order is January 5, 1977 because there was not sufficient medical evidence until November 1, 1976 that claimant had suffered any time loss. Therefore, the Board modifies the Referee's order because the medical evidence does support the need for medical treatment for the headaches. The Board notes, however, that the issues can be broadened on an appeal from the Board's Own Motion Order. Further, the carrier cannot defer payment of compensation ordered by a Board's Own Motion Order any more than it can in any other instance where an order is entered ordering the payment of such compensation.

ORDER

The Referee's order, dated May 24, 1977, as supplemented by an order dated June 23, 1977, is modified.

Claimant's claim is hereby remanded to the employer for acceptance and payment of compensation effective January 5, 1977, less time worked, together with medical treatment for his headache condition, until closure is authorized.

WCB CASE NO. 76-6164

JANUARY 6, 1978

MARION ADAMS, CLAIMANT
Malagon, Starr & Vinson, Claimant's Atty.
Dean M. Phillips, 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 reopened claimant's claim as of October 5, 1976 until closure is authorized pursuant to ORS 656.268, plus awarded penalties and attorney fees.

Claimant, a 47-year-old jitney driver, sustained a compensable injury to his back on or about July 15, 1975. A load of veneer became tangled with a storage chain and the claimant, while using a 2' x 4' to straighten the load, strained his back.

Dr. Degge found claimant stationary on October 4, 1976 and released him for work on October 5, 1976. The Determination Order of November 2, 1976 awarded temporary total disability from August 2, 1976 through October 4, 1976, but made no award for permanent disability.

Dr. Eaves, in his letter of November 18, 1976, stated he did not feel the claimant was able to return to work at that time. He also reported that the claimant was under treatment by Dr. Herbert, a chiropractor. The insurance carrier did not reopen the claim.

The Referee found that when the claim was closed on November 2, 1976, based on Dr. Degge's report of October 4, 1976, the claimant was not medically stationary. The Referee ordered the claim reopened as of October 5, 1976 until closure was authorized pursuant to ORS 656.268, awarded a 25% penalty of the compensation due under his order and an attorney fee of \$500 plus an attorney fee of 25% of and out of any award for permanent disability when the claim is again evaluated for closure.

The Board, after de novo review, modifies the Referee's order. The Board finds that Dr. Eaves' letter of November 18, 1976 was a request to reopen the claimant's claim. Therefore, the Board concludes that the claim should be reopened as of November 18, 1976 with penalties and attorney fees.

ORDER

The Referee's order, dated June 29, 1977, is modified.

The claimant's claim is ordered reopened as of November 18, 1976 until closure is authorized pursuant to ORS 656.268.

The Referee's order, in all other respects, is affirmed.

WCB CASE NO. 76-6533

JANUARY 6, 1978

GERALD ALLPHIN, CLAIMANT
Malagon, Starr & Vinson, 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 granted claimant an award of 176° for 55% unscheduled permanent disability. Claimant had been awarded 48° for 15% unscheduled permanent partial disability, as well as temporary total disability by two prior Determination Orders.

Claimant, at the age of 24, suffered a compensable injury on July 30, 1974 to his low back and left hip when he was struck by a rolling log while employed as a choker setter.

The injuries suffered by claimant are a low back strain and lumbosacral disc injury. All of the treatment has been conservative and he has undergone no surgical operations. A myelogram proved negative.

Claimant has an eighth grade education. His work experience includes dry wall construction, truck driving, veneer lathe spotting, choker setting and chasing landing in the woods.

Since his injury, the claimant has worked as a log truck driver, small engine repairman, and chain saw repairman and salesman. Claimant felt he was unable to perform physically the truck driving and small engine repair jobs. He did not work in a satisfactory manner in a chain saw job and was fired. However, the claimant was still eligible for additional training, but he requested his vocational rehabilitation program be terminated.

Claimant testified he feels he could sell used cars, do auto tune-ups, sell insurance and sell auto parts.

Dr. Rockey opined claimant's loss of function of his neck and back due to this injury was mild. He did suggest a job change. He noted that claimant should avoid work requiring heavy lifting or repetitive bending.

The Referee found that the claimant had substantial loss of earning capacity based on his education, work experience and injuries. He concluded that the work claimant is able to obtain and to perform may be substantially less remunerative than logging in which claimant could no longer work. Therefore, the Referee concluded claimant was entitled to an award of 176° for 55% for unscheduled permanent partial disability.

The Board, after de novo review, finds that based on all the evidence the amount awarded by the Referee is excessive. The medical evidence clearly establishes that the claimant suffers only mild residuals as a result of his injury. Further, the claimant made the choice himself not to seek other employment and not to cooperate with the Division of Vocational Rehabilitation. Therefore, the Board would modify the award of the Referee and reduce it to an award of 80° for 25% unscheduled permanent partial disability.

The Board would suggest that the claimant work with Voca-

tional Rehabilitation to receive additional training to become a productive member of the work force again.

ORDER

The Referee's order, dated July 12, 1977, is modified.

By this order, claimant is awarded 80° for 25% unscheduled permanent partial disability resulting from injury to his low back, in lieu of and not in addition to any prior awards.

WCB CASE NO. 76-3754

JANUARY 6, 1978

MICHAEL J. BAILEY, CLAIMANT
Galton, Popick & Scott, 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 claimant's claim to it for acceptance and 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 July 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 \$500, payable by the Fund.

WCB CASE NO. 73-3728

JANUARY 6, 1978

HENDRIKA BAKKER, CLAIMANT
Toran & Radich, Claimant's Atty.
Don G. Swink, 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 remanded her claim to the employer for acceptance and payment of compensation, but did not grant her any award for penalties or attorney fees.

Claimant was employed at Baza'r Inc. on July 18, 1973, when she was stopped by a security person, who opened up claimant's shopping bag to inspect the contents. The security person pulled out part of the contents of the bag. There was some physical contact between the two parties.

Claimant filed her claim on August 27, 1973, alleging, "Battery - accusation of felony or theft in presence of public and fellow employees". Her claim was denied by the insurance carrier on October 24, 1973.

Claimant had also filed a civil case for assault and battery. This case was tried with a verdict for the employer on the basis that claimant's cause of action for damages was barred by the Workers' Compensation law. This was appealed to the Supreme Court which, on June 17, 1976, affirmed the lower court's order restricting claimant to remedies provided by the Workers' Compensation law.

The Referee found, based on the Supreme Court decision, that the claimant's claim was covered by Workers' Compensation laws. Based on all the medical evidence, the Referee found claimant has shown that her emotional problems were materially contributed to by her employment at Baza'r. Therefore, he concluded claimant had sustained a compensable injury which materially contributed to her psychiatric problems. The Referee did not grant penalties and attorney's fees because (1) the denial was made within 60 days as provided by law and (2) the subsequent delays were due to claimant's pursuing her civil case, and therefore, even though the delays were concurred in by the insurance carrier, there was not any unreasonable conduct by the carrier.

The Board, after de novo review, modifies the Referee's order. The Referee properly found that the injury was compensable. However, the Referee should have awarded a penalty and attorney's fees because the carrier did not comply with ORS 656.262(4). The insurance carrier should pay a penalty of 25% on all temporary total disability benefits due from the date of the injury until the date of denial plus an attorney's fee.

ORDER

The Referee's order, dated March 31, 1977, is modified.

The claimant, by this order, is granted a penalty of 25% of the temporary total disability benefits due from July 18, 1973 through October 24, 1973.

Further, the claimant's attorney shall be paid the sum of \$250, payable by the employer.

The Referee's order, in all other respects, is affirmed.

JANUARY 6, 1978

JEAN ALICE CURO, CLAIMANT
J. Gary McClain, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, 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 found the incident occurring on November 2, 1976 was not a new injury and the responsibility of Liberty Mutual, but was an aggravation of an injury of April 15, 1976 and the responsibility of the Fund.

Liberty Mutual had been designated the paying agent pursuant to ORS 656.307 on March 18, 1977.

Claimant, then 49 years old, struck her forehead on a fixed vertical pipe on March 15, 1976. She suffered severe headaches immediately and Dr. Lowell's diagnosis was marked contusion of the scalp, anteriorly, mild cerebral concussion.

The Orthopaedic Consultants, who diagnosed cerebral concussion, cervical strain with post-traumatic, post-concussion headaches, recommended claim closure and a Determination Order issued August 27, 1976 granted no award for permanent disability.

Just prior to this determination, claimant had begun work at Penney's in their drapery department. At this time she described her headaches as continuing and tolerable. On November 5, 1976 she was accidentally hit on the back of her head jolting her towards her sewing machine. The severe pains started all over again.

Claimant again sought medical treatment and was eventually hospitalized by Dr. McGraw, a neurologist, on February 23, 1977. She has not worked since.

Dr. Rosenbaum stated he was unable to state precisely the relative contribution claimant's second head injury may have played in causing her headaches, though from her history it did appear that the second injury played a lesser role than the first.

The Referee, citing In the Matter of the Compensation of Edwin Sailor, WCB Case Nos. 72-2079, 72-3078, September 7, 1973, 10 Van Natta 203, which held where there is no clear factual basis to distinguish which of two employers is liable for an obviously compensable condition, policy considerations, i.e., the concern of the Workers' Compensation law is the protection of the injured worker,

may be resorted to, found in this case that aggravation was warranted, based both on the facts and on the Board's policy.

He, therefore, remanded the matter to the Fund to be accepted for the payment of compensation under law.

The Board, on de novo review, concurs.

ORDER

The Referee's order, dated June 30, 1977, is affirmed.

WCB CASE NO. 76-5638

JANUARY 6, 1978

FRANK GIESBRECHT, 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 Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which found claimant to be 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 June 24, 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 Fund.

WCB CASE NO. 76-6496

JANUARY 6, 1978

JOHN LANCASTER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn
& O'Leary, 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 affirmed the November 5, 1976 Determination Order granting no further increase in compensation above that granted by the November 4, 1975 Determination Order in the amount of 64⁰ for 20% 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 26, 1977, is affirmed.

WCB CASE NO. 76-5119

JANUARY 6, 1978

ANTIOCO M. PACHECO, CLAIMANT
Wendell Gronso, 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 granted to claimant an award of permanent total disability.

In February of 1976, the claimant, at age 52, suffered a compensable injury when he fell off a hay wagon and experienced upper back and left shoulder pain. All treatment was conservative.

In March of 1976 the claimant was hospitalized and given physical therapy for a period of two days by Dr. Clifford Weare. Dr. Weare's final diagnosis was a sprain or contusion of the upper lumbar and dorsal area including the left shoulder.

The claimant was released for light work in May of 1976. However, he was only able to work 1-1/2 days before he developed pain and stopped working.

Dr. Thrasher examined claimant in June of 1976 and opined that even though the claimant had many complaints, there were so few objective findings, that he was hospitalizing the claimant for a complete medical examination. He noted that the x-rays were negative and that there was absolutely nothing medically to go on save subjective complaints of pain by the claimant. Dr. Thrasher, in an October 1976 report, indicated that he did not find anything to justify a claim for long term benefits or to indicate permanent impairment.

The claimant's claim had been closed as of August 27, 1976 by Determination Order which awarded to claimant temporary total

disability compensation for the period of March 26, 1976 through July 13, 1976, less time worked, but no award for permanent disability.

Dr. Weare, in a December 1976 report, indicated that the claimant's condition was the same as it was in March of 1976. He noted that the claimant was unable to work and had been unable to work since March 30, 1976. It was Dr. Weare's opinion that claimant will never be able to return to physical labors such as ranch work which he had done previously. He noted that because of the claimant's age, his difficulty with the English language and education, the claimant was unemployable for any gainful occupation in the geographic area of Burns.

The claimant has worked as a migrant farm laborer all of his life. He was born in Mexico and received no formal education or training. He cannot speak or read the English language. All of claimant's work experience is in low skilled manual labor at which he would work for a period of seven to eight months a year.

Since his injury, claimant has complained of pain which disables him and prevents him from doing any work at all. This pain is in the upper back, lower back and left shoulder area along with the right leg. Claimant also testified that the right leg sometimes is numb.

The Referee found that the claimant was, in fact, permanently and totally disabled. The Referee concluded that the claimant was barred from any farm work or heavy labor, which was the only type of work he had ever done in his entire life. He noted that claimant has no training or other skills which would allow him to be engaged in light work. Based on claimant's age, his total lack of formal education and the language barrier, the prospects of a successful retraining program were extremely dim and similarly mitigated against an informal on-the-job training program. The Referee noted that the medical evidence did not rule out any light work for the claimant. However, the Fund did not introduce any evidence or make a showing that there was any farm work or any type of work that claimant could do any longer.

The Board, after de novo review, finds that the claimant is not currently totally disabled. The Board finds that claimant is precluded from doing heavy farm manual work, but there are many lighter types of work for which he could be retrained. The medical evidence does not, in any way, indicate that the claimant would not be able to engage in a lighter type of employment. The Board concludes that, based on the medical evidence, claimant could be retrained in a sedentary type job in a larger community. Therefore, the Board modifies the order of the Referee and awards to claimant 160° for 50% unscheduled disability because he is precluded from heavy farm labor type of employment.

ORDER

The order of the Referee, dated July 29, 1977, is modified.

By this order, claimant is granted an award of 160° for 50% unscheduled disability to his low back. This award is in lieu of any prior awards granted to claimant.

WCB CASE NO. 76-3535

JANUARY 6, 1978

In the Matter of the Compensation
of the Beneficiaries of
MERRILL RAY, DECEASED
Lively & Wiswall, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the Beneficiaries

Reviewed by Board Members Moore and Phillips.

The Beneficiaries of Merrill Ray (hereinafter referred to as claimant) seek Board review of the Referee's order which affirmed the denial by the State Accident Insurance Fund.

There is little dispute over the facts. The decedent had been hired as a pipe fitter in Eugene and assigned to a job in Roseburg, approximately 70 miles from Eugene. The employer had given decedent a vehicle to drive to and from work; he had been allowed to drive the vehicle home after work each night.

On February 17, 1976 the decedent had left home at 7:00 a.m., picked up two co-workers, driven to Roseburg, worked and returned to Eugene at about 6:15 p.m. The decedent had filled the truck with gas at his employer's business before he left for his residence. On the way home, he had stopped at a tavern, arriving between 7:00 p.m. and 7:30 p.m. He had drunk some beer with some other people until around 10:30 p.m. At that time, the bartender had poured the decedent some coffee and talked to him until after midnight. The bartender had called the decedent's wife and asked her to come and pick him up because he had become sick. Shortly after midnight, the decedent had tried to leave the tavern but the bartender persuaded him to return to the tavern. However, the decedent had left the tavern and was seen driving away from the bar by the bartender in what appeared to be a normal manner. The bartender also claimed the decedent had walked normally.

Shortly after leaving the tavern, the decedent's vehicle had left the road, overturned and thrown decedent out of the vehicle, crushing his head and causing his death.

Dr. Wilson, the county medical examiner and pathologist,

testified that at the time of his death, decedent had 0.32 blood alcohol content. Dr. Wilson opined decedent would have had to drink about thirteen 12-ounce bottles of beer in order to reach this content or level.

The claimant first filed her claim on April 14, 1976 with the employer. The employer sent a Form 801 to her on April 30, 1976 which she completed and returned to the employer on May 18, 1976. The employer sent it to the Fund on May 24, 1976. No compensation was paid to the claimant and the Fund did not issue its denial until July 7, 1976.

The Referee found that the workman's death had not arisen out of his employment, therefore, the claimant's claim was not compensable. Further, the Referee concluded that the claimant was not entitled to any penalties for violation of ORS 656.262(4).

The Board, after de novo review, concurs with the Referee's affirmation of the Fund's denial of the widow's claim. However, the Board finds that ORS 656.262(4) does apply to the widow's claim and the Referee should have awarded penalties and attorney's fees.

A claim for widow's benefits is not to be treated different from a worker's claim and must be processed in the same manner. Benefits for temporary total disability must be paid from the date of injury or death and until the claim is denied.

The Referee's order must be modified to allow claimant benefits for temporary total disability from February 18, 1976 (date of claimant's death) to July 7, 1976 (date of denial) and award claimant compensation and grant her attorney an attorney's fee payable by the Fund.

ORDER

The Referee's order, dated June 23, 1977, is modified.

Claimant is hereby granted compensation for temporary total disability from February 18, 1976 to July 7, 1976. In addition a sum equal to 25% of such compensation for temporary total disability is granted to claimant.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the compensation awarded by this order payable out of said compensation as paid, not to exceed \$500.

AIRLETTA SANDERS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On October 10, 1967 claimant filed an occupational disease claim for lateral epicondylitis (tennis elbow) which first became evident in August of that year. The first Determination Order, dated November 6, 1967 granted no permanent disability. Over a period of time subsequent to that date, claimant received several awards totaling 30% loss of the right arm.

By Own Motion Order of the Board, dated August 4, 1975, claimant received further medical care for her condition together with temporary total disability from April 25, 1975. Since that time claimant has received a substantial amount of treatment and surgery for other unrelated problems as well as for her industrial injury.

Dr. Stanford indicated that claimant was presently stationary by his letter of November 29, 1977. He found that she moves her arm well with only some tenderness. He felt she was ready to begin employment as a medical assistant.

On December 16, 1977, the Fund requested a determination of claimant's claim from the Board. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted further temporary total disability from April 25, 1975 through November 29, 1975, but concludes that she has been adequately compensated with regard to her permanent disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability benefits from April 25, 1975 through November 29, 1975, less time worked.

WCB CASE NO. 77-224 JANUARY 6, 1978

DELLANO WOOD, CLAIMANT
William Bradley Duncan, 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 his heart condition.

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 June 17, 1977, is affirmed.

WCB CASE NO. 76-6006

JANUARY 11, 1978

LOU BEEM, CLAIMANT
Nicholas Zafiratos, 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 October 7, 1976 Determination Order granting 16° for 5% unscheduled low 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 August 10, 1977, is affirmed.

WCB CASE NO. 75-1912

JANUARY 11, 1978

PAT BOWERS, SR., CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On November 14, 1977 the Compliance Division of the Workers' Compensation Department received a letter from the claimant which had previously been sent to the State Accident Insurance Fund. The Board hereby construes this letter as a request to it to exercise its own motion jurisdiction and order the reopening of the claimant's claim and payment of additional benefits by the Fund. In support of his request, claimant enclosed copies of several medical reports.

On December 14, 1977 the Board advised the Fund to respond within 20 days, stating its position on claimant's request.

On December 19, 1977, the Fund responded, stating that it had previously considered reopening claimant's claim but had to reconstruct the file as it had been destroyed, thereby causing considerable delay. The Fund indicated that claimant had suffered an industrial injury on March 26, 1966 which resulted in no time loss or permanent disability. Claimant later bought the business for which he was working and sold it in March 1972; thereafter he lived a semi-retired life.

On June 11, 1976 the Fund entered into a disputed claim settlement with claimant, although it was questionable whether claimant's problems at that time were related to his injury of 1966. The Orthopaedic Consultants, after examining claimant on August 26, 1975, recommended no further treatment and could not state whether claimant's condition had worsened since 1967. In the Fund's opinion, nothing was submitted since the settlement which would warrant a reopening of the above claim.

The Board, after full consideration of the medical reports submitted by claimant in support of his request and the response of the Fund, concludes that claimant has not shown sufficient evidence to warrant a reopening of his claim. Claimant's petition for own motion relief should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-2549

JANUARY 11, 1978

EARL E. BROWN, 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 Phillips.

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

Claimant, at age 58, sustained a compensable injury to his back on October 2, 1974 when he slipped and fell down a steel stairway. Dr. Peterson, on October 15, 1974, diagnosed acute low back strain superimposed on degenerative disease. A hemilaminectomy at right L4-5 and diskectomy at L4-5 were performed by Dr. Peterson on November 18, 1974. On February 25, 1975, the doctor indicated that claimant would probably not be able to return to mill work, noting that claimant was continuing to do exercises in an effort to return to a functional status.

On December 2, 1975, Dr. Peterson stated that claimant's

condition remained unchanged. He felt claimant might be rehabilitated, although he did not have many years left to be gainfully employed. He found claimant's condition stationary, stating that claimant had recovered from the herniated disc and his continuing problems were related to his underlying degenerative disease of the lumbar spine.

The Orthopaedic Consultants, on March 10, 1976, diagnosed laminectomy and discectomy, L4-5 (right), chronic lumbosacral sprain, by history, and degenerative arthritic changes in the dorsal lumbar spine. They found claimant's condition to be medically stationary and recommended no further treatment; the loss of function due to the injury was moderately severe. They felt claimant could not return to his same occupation, although job placement in light work was feasible. Dr. Peterson, on April 5, 1976, agreed with this and released claimant to light work on April 27, 1976. He felt that claimant would not be able to perform any gainful employment requiring prolonged sitting, lifting or frequent bending. Claimant tried a different job with his employer but was unable to continue because of markedly increased back pain.

On April 4, 1977, as Determination Orders granted claimant 160° for 50% unscheduled low back disability.

Claimant has a ninth grade education but no vocational training. He has worked for the same employer for almost 20 years.

The Referee, after considering claimant's age, education, work experience, the moderately severe rating of the Orthopaedic Consultants, Dr. Peterson's opinion and claimant's credible testimony, found that claimant was permanently and totally disabled. Claimant had not looked for work, but the Referee was convinced that if he had he could not obtain and hold regular gainful employment.

The Board, after de novo review, cannot make a finding of permanent total disability. Claimant has not sought work nor attempted any work other than the four days he worked for his employer driving the tractor-sweeper. The employer has suggested that there are other occupations claimant could very probably perform such as stamping lumber for the lumber grader.

The Board is very persuaded by the report of the Orthopaedic Consultants which indicated that claimant's disability was moderately severe (low range of the category) and that he probably could do some form of light work. Based on this report, the Board concludes that an award for 80% unscheduled disability is adequate.

ORDER

The order of the Referee, dated September 9, 1977, is modified.

Claimant is hereby granted 256° for 80% unscheduled low back disability. This is in lieu of the award granted by the Referee's order, which is affirmed in all other respects.

WCB CASE NO. 76-6744

JANUARY 11, 1978

CAROL HARRISON, CLAIMANT
Herbert R. DeSelms, 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 an alleged injury of October 17, 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 June 2, 1977, is affirmed.

WCB CASE NO. 77-1068

JANUARY 11, 1978

ALFRED MAY, CLAIMANT
Malagon, Starr & Vinson, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, 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.

SAIF CLAIM NO. WC 60747

JANUARY 11, 1978

VIVIAN STENSON MCGEE, CLAIMANT
Malagon, Starr & Vinson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On December 21, 1977 an Own Motion Determination was entered in the above entitled matter which erroneously granted claimant 96° of a maximum of 192° for 30% unscheduled disability. The

order should have granted claimant 57.6° of a maximum of 192° for 30% unscheduled disability. In all other respects the order should be reaffirmed and ratified.

IT IS SO ORDERED.

SAIF CLAIM NO. RC 241550 JANUARY 11, 1978

ONEL L. MCKINNEY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered an industrial injury to his lower extremities on April 7, 1970 while falling a tree. Knee surgery, consisting of medial meniscectomy and medial and cruciate ligament repairs in the posterior capsule with a pes anserinus transplant, was performed on April 10, 1970. In addition, the right lower extremity was contused.

A Determination Order of November 23, 1970 granted claimant 38° (25.3%) for the left leg and 8° (5.3%) for the right leg. By an Opinion and Order, dated March 15, 1971, a Referee granted claimant a total award of 70° (46.7%) for the left leg and affirmed the right leg award of 8°.

At the request of Dr. Slocum, the Fund reopened claimant's claim on April 13, 1973. On April 25, 1973 a left lateral meniscectomy was performed. Dr. Slocum's closing examination of July 6, 1973 revealed the left knee range of motion was from 5° to 135° with findings of mild rotatory instability and an x-ray finding of osteophyte formation.

A Second Determination Order was issued on August 27, 1973 granting temporary total disability from March 5, 1973 through July 7, 1973, with no further permanent partial disability.

A May 2, 1974 Stipulation awarded claimant an additional 35° for the left leg for a total left leg award of 105° (70%).

A Form 802 indicated that the Fund voluntarily commenced time loss payments, effective November 8, 1976.

A left knee arthrotomy with anterior cruciate ligament repair was performed on February 10, 1977. Claimant was referred to Vocational Rehabilitation on May 18, 1977 and, as of the middle of December 1977, he was still involved in that program.

Dr. Slocum's closing evaluation of July 27, 1977 revealed left knee range of motion from 0 degrees to 120 degrees; claimant's leg lengths were equal with mild left muscular atrophy; there were

no varus or valgus instabilities. Claimant, at that time, complained of left knee joint pain, although he had noted improvement after his most recent surgery. He also reported occasional knee swelling. The doctor found that claimant demonstrated passive posterolateral and anterior luxations with medium subpatellar crepitation, particularly on weight bearing.

On August 8, 1977 the Fund requested a determination of claimant's claim from the Workers' Compensation Board. The Evaluation Division of the Board recommends that claimant be granted temporary total disability from November 8, 1976 through July 27, 1977. Since claimant's total left leg awards equal 105° for 70% loss of function, the Division recommends that the claim be closed with no further award for permanent disability.

The Board concurs with the recommendation of the Evaluation Division.

ORDER

Claimant is hereby granted temporary total disability benefits from November 8, 1976 through July 27, 1977, less time worked.

WCB CASE NO. 76-7102

JANUARY 11, 1978

LAWRENCE MONTGOMERY, CLAIMANT
Benton Flaxel, Claimant's Atty.
Chandler, Walberg & Whitty, 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 granted claimant 48° for 25% loss of the left arm. The employer contends that the 9.6° awarded claimant by the December 21, 1976 Determination Order was adequate.

Claimant, a dryer grader, began experiencing problems in his left elbow about two years prior to the date of his compensable injury, November 26, 1975. On that date he saw Dr. Holbert who diagnosed a medial epicondylitis of the left elbow. On February 3, 1976 Dr. Bert performed a flexor origin release on the left and claimant was released for regular work on March 16, 1976.

On June 24, 1976, Dr. Bert noted that claimant had no pain in the elbow as long as he was not working. He indicated that claimant had a full range of motion, minimal tenderness and a well-healed scar. He found good grip strength and no sensory deficit and felt claimant's claim could be closed. Claimant was again released for regular work on June 28, 1976.

On September 13, 1976, Dr. Bert indicated that claimant's continuing pain was probably aggravated by his work but he felt that if claimant was careful he should be able to keep on working. On October 7, 1976, Dr. Bert advised the employer that he did not believe that claimant's work activity was the sole cause of the elbow problems, but he agreed with the claimant that the main aggravation, i.e. increasing pain, comes about while claimant is doing his usual job. Dr. Bert, on October 25, 1976, rated claimant's residual disability at 5% of the total function.

The Referee found claimant to be a credible witness. Claimant's testimony at the hearing indicated that the constant motion of pulling veneer off a round table caused intermittent pain in his elbow. Claimant stated that the longer he worked the more his arm ached and that he couldn't lift as much weight as before. He stated that, although he was able to move his arm as he could before, he lacked the endurance in his left arm as a result of the pain.

The Referee, based on claimant's testimony, found that the award of 9.6° was inadequate and increased it to 48° for 25% loss of function of the left arm.

The Board, after de novo review, feels that the award made by the Referee was excessive. The medical reports of Dr. Bert were very persuasive in their finding of minimal residual disability. Based on these reports, the Board finds that an award of 28.8° for 15% scheduled disability is adequate to compensate claimant for the loss of function of his left arm.

ORDER

The order of the Referee, dated June 30, 1977, is modified.

Claimant is hereby granted 28.8° for 15% loss of function of the left arm. This is in lieu of the award granted by the Referee's order which, in all other respects, is affirmed.

SAIF CLAIM NO. B 8186

JANUARY 11, 1978

JACK ROBINSON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 26, 1977 the Board had received a request from the claimant to exercise its own motion jurisdiction and reopen his claim for an injury suffered on July 31, 1963. The Board advised claimant on May 2, 1977 that before it could act upon claimant's request it would be necessary for claimant to submit to the

Board and the State Accident Insurance Fund a current medical report indicating that claimant's condition at the present time was directly attributable to his 1963 industrial injury and that his condition had worsened since the last award or arrangement of compensation for the 1963 injury.

On June 4, 1977 the Board received a report from Dr. Brooke which stated his opinion that eventually claimant would have to have additional treatment, the same treatment which he had recommended to claimant in 1965; he felt the course of problems regarding claimant's knee was probably one of the sequela of his 1963 injury but felt it would be appropriate to solicit another medical opinion.

Based upon this, claimant's request to reopen his claim was denied, however, the order denying the request stated that claimant was not precluded from obtaining additional medical information and if such medical information was obtained and was sufficient to justify reopening the Board would act upon it.

On November 4, 1977 the Board received a copy of a letter from Dr. Phifer addressed to Dr. Brooke stating that claimant had degenerative arthritis of the left knee, involving primarily the medial joint compartment; claimant may have a frayed or lacerated medial meniscus or a band of fibrous tissue involving the synovial membrane over the femoral condyle. Dr. Phifer recommended an arthrogram and, if indicated, an arthroscopy of the knee to see if surgical remedial lesion exists.

Following an exchange of correspondence between the Board, the Fund and the claimant, the Board was informed by the Fund on December 19, 1977 that it would be responsible for the provision of additional medical treatment for claimant's left knee.

ORDER

Claimant's claim for his industrial injury of July 31, 1963 is remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on the date the claimant submits to the medical treatment recommended by claimant's physicians and until his claim is again closed pursuant to the provisions of ORS 656.278.

WCB CASE NO. 76-6265

JANUARY 11, 1978

BETTY RUTSTEIN, CLAIMANT
James R. Jennings, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

On August 31, 1977 an Opinion and Order was entered by Referee Neal which dismissed claimant's request for hearing on the issue of whether claimant had suffered a disabling injury because prior to the actual hearing the Evaluation Division of the Workers' Compensation Department had re-evaluated claimant's claim and found her claim to be disabling.

On September 14, 1977 the claimant requested Board review of the Referee's Opinion and Order, however, on December 6, 1977 claimant's attorney advised the Board that he was now aware that the only issue before Referee Neal had become moot because of the issuance of the Determination Order on August 11, 1977 which awarded claimant 7.5° for 5% loss function of the left leg and that it would be preferable to dismiss the pending appeal and return the matter to the Hearings Division for a hearing on the issue of extent of disability.

The Board concludes that all issues before it for review are moot. Claimant, if not satisfied with the award made by the Determination Order of August 11, 1977, must request a hearing on the adequacy of that award. This claim involves a scheduled disability and loss of wage earning capacity is not a factor to be considered.

ORDER

The claimant's request for Board review of the Referee's Opinion and Order entered in the above entitled matter on August 31, 1977 is dismissed.

SAIF CLAIM NO. AC 386

JANUARY 11, 1978

RALPH SCHWAB, CLAIMANT
F. P. Stager, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On August 13, 1976 claimant had requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a right knee injury which he had suffered on January 10, 1966. Claimant's claim has been closed and his aggravation rights have expired.

Claimant also suffered an injury to his lower back on November 15, 1971 which ultimately was closed by an order entered on September 17, 1973. Subsequently, claimant filed a claim for aggravation of the low back condition which was denied by the State Accident Insurance Fund and claimant, on May 5, 1976, requested a hearing on this denial (WCB Case No. 76-1189).

The Board did not have sufficient evidence to make a determination with respect to the merits of claimant's request to reopen his 1966 claim and therefore referred the request to its Hearings Division for a hearing to be held in consolidation with claimant's hearing on the denied aggravation claim.

On December 20, 1977 Referee Kirk A. Mulder, after taking evidence at a hearing which was closed on December 1, 1977, recommended that claimant's claim for the injury to his right leg suffered on January 10, 1966 be reopened. Referee Mulder also recommended that if the Board reopened the claim for the right leg injury it also should direct a re-evaluation of claimant's unscheduled back disability or, in the alternative, make a direct referral to the Workers' Compensation Department for unscheduled re-evaluation or remand the back claim to him for such re-evaluation.

The Board, after reviewing fully the transcript of the proceedings before Referee Mulder, a copy of which was furnished it together with the Referee's recommendation, concludes that claimant's claim for the injury to his right leg suffered on January 10, 1966 should be reopened for the payment of compensation, as provided by law. However, with respect to the Referee's recommendation that a re-evaluation be made of claimant's unscheduled back disability, the record shows that on December 20, 1977 Referee Mulder also entered an order directing the Fund to accept claimant's claim for aggravation and provide claimant with benefits to which he is entitled by law. The Fund has a right to appeal this order under the provisions of ORS 656.295, therefore, the back condition cannot be considered by the Board under the provisions of ORS 656.278.

ORDER

Claimant's claim for a right knee injury suffered on January 10, 1966 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on March 22, 1976 and until closed pursuant to the provisions of ORS 656.278, less time worked.

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

JANUARY 11, 1978

BILL STIFEL, CLAIMANT
Dye & Olson, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Order

On December 21, 1977 claimant, by and through his attorney, requested the Board to modify its Order on Review entered in the above entitled matter on December 7, 1977 on the grounds that certain portions of the language contained in said Order on Review were ambiguous.

The Board, after giving full consideration to claimant's request, finds no ambiguity in its Order on Review nor does it find any justification for modifying said order.

ORDER

Claimant's request for the Board to modify its Order on Review entered in the above entitled matter on December 7, 1977 is hereby denied.

JANUARY 11, 1978

FRANCIS C. WELLS, CLAIMANT
Murphy, Anderson & Cegavske, Claimant's Atty.
Long, Neuner, Dole, Caley & Kilberg, Defense
Atty.
Own Motion Order

Claimant, by and through his attorney, on April 27, 1977 had written the Board requesting that a hearing be held pursuant to the provisions of ORS 656.278. His request was based upon a letter report from Dr. Slocum dated February 11, 1977. Inadvertently, the matter was directed to the Hearings Division and a hearing was held at Roseburg, Oregon on September 15, 1977. At this hearing, Referee John F. Drake discovered the error and, on the following day, entered his Order of Dismissal and Referral of Petition to Workers' Compensation Board.

Claimant suffered a compensable injury on July 15, 1968 while in the employ of Roseburg Lumber Company whose Workman's Compensation coverage was furnished by Fireman's Fund Insurance Company. The claim had been closed and claimant's aggravation rights have expired.

On September 20, 1977 Fireman's Fund was advised by the Board of Referee Drake's order and also that the Board was now considering the matter under its own motion jurisdiction; Fireman's

Fund was requested to advise the Board within 20 days of its position with respect to claimant's request to reopen his claim.

On October 11, 1977 Fireman's Fund, by and through its attorney, responded, stating that it would resist the request for reopening but would not resist furnishing continuing medical care pursuant to the provisions of ORS 656.245. It was the position of the carrier that Dr. Slocum's letter report of February 11, 1977 was not sufficient to justify reopening.

The Board, after due consideration of all of the medical reports and the correspondence from both parties, concludes that there is sufficient evidence to justify exercising its own motion jurisdiction and remanding the claim to Fireman's Fund for the surgery which Dr. Slocum recommends.

ORDER

Claimant's claim for his July 15, 1968 industrial injury is hereby remanded to the employer, Roseburg Lumber Company, and its carrier, Fireman's Fund Insurance Company, to be accepted and for the payment of compensation, as provided by law, commencing on the date claimant enters the hospital for the surgery recommended by Dr. Slocum and until his claim is closed pursuant to the provisions of ORS 656.278.

WCB CASE NO. 77-1568

JANUARY 12, 1978

ROY BABCOCK, CLAIMANT
Harold Adams, 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 aggravation 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 August 22, 1977, is affirmed.

WCB CASE NO. 77-2072

JANUARY 12, 1978

VIRGIL J. BARNES, CLAIMANT
Harold W. Adams, 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 his claim for a low back injury allegedly suffered on January 5, 1977.

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 26, 1977, is affirmed.

WCB CASE NO. 76-2730

JANUARY 12, 1978

In the Matter of the Compensation
of the Beneficiaries of
DELBERT BARZEE, DECEASED
Bailey, Welch, Bruun & Green, 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 by the Board of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation as provided by law.

The 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 March 29, 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 Fund.

Board Member Moore dissents as follows:

I respectfully dissent from the majority of the Board and would reverse the Referee. Although I find claimant suffered an occupational disease from the hard physical labor type occupation he pursued for 22 years which work aggravated his underlying arthritic condition, nevertheless, this occupational disease was temporary and claimant was asymptomatic after his June 1973 hospitalization and returned to his regular occupation and sought no medical treatment until October 6, 1974.

The only evidence of causation given at the hearing was by Dr. Unger. Dr. Unger had not seen claimant since July 1973.

In early October 1974 claimant went hunting and stepped on a rock that slipped out from under him causing him to fall. He felt a "pop" in his back. On October 6, 1974 claimant was admitted to the hospital for this condition which arose from the incident off the the job and thereafter underwent surgery.

It is my opinion that the medical reports at that time substantiate that claimant sustained an intervening incident. Claimant had sought no medical treatment since July 1973 and his deer hunting incident was severe enough for him to give a history upon hospitalization that his back pain was so bad he "could hardly make it to his car" and "he had been relatively free of trouble for some time". Dr. Miller, who had performed the laminectomy in 1974, indicated claimant had done well until the deer hunting incident.

The Referee based his decision in part on the opinion of Dr. Unger. I give little weight to Dr. Unger's opinion as he had not treated claimant for one and a half years and last saw claimant in 1973.

Therefore, I conclude claimant suffered an intervening trauma which subsequently necessitated surgery and which was unrelated to the 1973 temporary work related exacerbation of his underlying arthritic condition.

/s/ George A. Moore, Board Member

JANUARY 12, 1978

CLARENCE L. BROOKS, CLAIMANT
Bodie, Minturn, VanVoorhees, Larson
& Dixon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On November 29, 1977 an Opinion and Order was entered in the above entitled matter which ordered the State Accident Insurance Fund to pay claimant additional compensation equal to 184° but inadvertently failed to award claimant's attorney a sum equal to 25% of this increased compensation.

On December 2, 1977 the claimant, by and through his attorney, requested Board review of the Referee's Opinion and Order, thereby divesting the Referee of any further jurisdiction over the matter. The Board, which now has jurisdiction, concludes that the Opinion and Order should be amended by adding thereto following the last paragraph on page 3, the following:

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

In all other respects the Referee's Opinion and Order, as entered on November 29, 1977, shall remain unchanged as of that date.

JANUARY 12, 1978

HARVEY T. CLINE, CLAIMANT
Grant, Ferguson & Carter, 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 him an increased award of 32° for a total award of compensation equal to 192° for 60% unscheduled low back disability and related emotional problems. Claimant contends that he is entitled to permanent total disability compensation or, in the alternative, a greater award of permanent 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 June 30, 1977, is affirmed.

WCB CASE NO. 77-2220

JANUARY 12, 1978

JOEL KAIN, CLAIMANT
Dye & Olson, 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 claimant's claim for an alleged back injury.

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 22, 1977, is affirmed.

WCB CASE NO. 76-1839

JANUARY 12, 1978

THOMAS LaFRANCHISE, CLAIMANT
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 carrier's denial of claimant's claim for his back condition and affirmed the March 21, 1977 Determination Order which granted him no permanent partial disability compensation for his right hip and leg injury.

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. Having concluded that the Opinion and Order of the Referee should be affirmed, the defendant's motion to dismiss on the ground that they did not receive notice of the request for review by the appellant is therefore rendered moot.

ORDER

The order of the Referee, dated April 6, 1977, is affirmed.

WCB CASE NO. 76-1557

JANUARY 12, 1978

JAMES E. MADSEN, CLAIMANT
Malagon, Starr & Vinson, Claimant's Atty.
William H. Replogle, 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 him a total award of 112.5° for 75% loss of function of the left leg. Claimant contends that he is entitled to an award for permanent total disability or, in the alternative, an award of 100% permanent partial disability.

The disposition of this case is controlled by statute. Claimant has suffered a scheduled disability and his award must be based upon the loss of function of the scheduled member. The maximum award for such scheduled member is fixed by statute. The fact that claimant is now substantially unemployable cannot be considered subjectively to enhance the measure of the loss of function beyond the statutory limit.

The claimant's own testimony indicates he still has considerable use of his left leg. The Board agrees that claimant has retained at least 25% use of his left leg and affirms and adopts as its own 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 10, 1977, is affirmed.

SAIF CLAIM NO. FC 171222 JANUARY 12, 1978

FRANK REID, CLAIMANT
Allen G. Owen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 3, 1977 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278 and reopen his claim for a September 26, 1968 industrial injury.

The Board, at that time, did not have sufficient evidence before it to determine the merits of claimant's request and, therefore, referred the request to the Hearings Division to set for a hearing and take evidence on the issue of whether or not claimant's left leg surgery which he underwent on March 8, 1977 was related to his September 26, 1968 industrial injury. The Board further directed that this matter be heard in consolidation with WCB Case No. 77-1074 which involved the denial by the Fund on January 19, 1977 of claimant's claim for his left leg condition. The 1968 injury involved his right leg.

At the hearing, the claimant withdrew his request for hearing in WCB Case No. 77-1074 and elected to proceed only on his request for own motion relief.

The Referee, after hearing all of the evidence, concluded that it was more probable than not that claimant's September 26, 1968 accidental injury caused, or was a material contributing factor to, his November 26, 1976 disabling left leg condition and, therefore, the Referee recommended that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and remand said claim, including the medical benefits incurred in connection with his disabling left leg condition, to the State Accident Insurance Fund for acceptance and payment of compensation, as provided by law, until the claim is again closed pursuant to the provisions of ORS 656.278.

The Board, after reviewing the transcript of the proceedings and the Referee's recommendation, accepts said recommendation.

ORDER

Claimant's claim for an industrial injury suffered on September 26, 1968 is hereby remanded to the Fund for acceptance and payment of compensation, as provided by law, including medical benefits incurred in connection with claimant's disabling left leg condition, commencing on March 8, 1977 and until closed pursuant to ORS 656.278, less time worked.

SAIF CLAIM NO. WODC 4089 JANUARY 12, 1978

RONALD D. SCALES, CLAIMANT
Gary K. Jensen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, a 39 year old fireman for the City of Springfield, experienced chest pains on December 9, 1970 while fighting a fire. The following day, while on a business trip, he again experienced the same pains. After suffering chest pain again on December 14, 1970, claimant was hospitalized. The initial diagnosis was "myocardial infarction" and the Fund accepted the claim as an occupational disease. Claimant was allowed to return to work on

April 12, 1971 and on June 22, 1971 a Determination Order granted temporary total disability benefits only.

On September 12, 1976 claimant again suffered an acute myocardial infarction and the Fund reopened his claim. Since that time, claimant's condition has become such that a three or four vessel coronary by-pass procedure has been suggested but claimant is undecided about the operation.

On August 3, 1977 the Fund requested a determination of claimant's claim. The Evaluation Division of the Workers' Compensation Department concludes that claimant will never be able to work again whether or not surgery is performed and recommends that claimant be declared permanently and totally disabled. It also recommends that claimant be granted compensation for temporary total disability from September 12, 1976 through the date of the Board's Own Motion order.

The Board concurs with the recommendation of the Evaluation Division.

ORDER

Claimant is awarded temporary total disability benefits commencing September 12, 1976 and until the date of this order.

Claimant is to be considered permanently and totally disabled as a result of his compensable heart condition from the date of this order.

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

WCB CASE NO. 77-3139

JANUARY 12, 1978

HAROLD SEIGLER, CLAIMANT
David Hilgemann, Claimant's Atty.
Cheney & 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 claimant 80° for 25% unscheduled back disability. Claimant contends that this award should be increased further.

Upon de novo review, the Board concurs in the facts set forth in the Referee's order, a copy of which is attached hereto, and based upon Dr. Buza's reports concurs in the Referee's award of 80° for 25% unscheduled disability.

However, claimant's criminal record can be used only to impeach claimant's credibility and cannot be considered in a determination of the extent of his disability.

ORDER

The order of the Referee, dated August 15, 1977, is affirmed.

SAIF CLAIM NO. KC 120599 JANUARY 17, 1978

EDNA AICHELE, CLAIMANT

William A. Galbreath, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Own Motion Order

On March 14, 1977 claimant, by and through her attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656. 278 and reopen her claim for an industrial injury suffered on March 20, 1968 while employed by Milton-Freewater Convalescent Hospital, whose Workmen's Compensation coverage was furnished by the Fund.

The Board, at that time, did not have sufficient evidence to enable it to make a determination on the merits of claimant's request, therefore, it referred the matter 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 for said injury.

After a hearing, on November 17, 1977, the Referee, on December 12, 1977, recommended that claimant's claim should be reopened by the Board under its own motion jurisdiction.

The Board, after reviewing carefully the transcript of the proceedings which was furnished to it by the Referee together with his recommendation, adopts as its own the findings and conclusions contained in the Referee's Own Motion Recommendation, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

Claimant's claim for her March 20, 1968 industrial injury is remanded to the State Accident Insurance Fund for acceptance and for the payment of compensation, as provided by law, commencing March 26, 1976 and until the claim is closed pursuant to ORS 656.278, less time worked.

JANUARY 17, 1978

DAVID W. ANDERSON, CLAIMANT
Philip L. Nelson, 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 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 July 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 \$100, payable by the Fund.

CLAIM NO. 4-06920

JANUARY 17, 1978

CLARA B. LAHAIE, CLAIMANT
C. H. Seagraves, Claimant's Atty.
Lyle Velure, Defense Atty.
Own Motion Determination

Claimant suffered low back pain on December 29, 1967 while lifting sheets during the course of her employment as a department manager for Montgomery Ward. The original diagnosis was "severe degenerative L.S. disc disease and symptoms of a protruded L.S. disc". Dr. Campagna performed surgery on March 25, 1968; on September 5, 1968 he found her to be medically stationary. A Determination Order, dated October 14, 1968, granted claimant compensation for time loss and 48° for 15% permanent partial disability.

The carrier reopened claimant's claim on June 29, 1970 after claimant had been examined several times by Dr. Bolton. On October 27, 1972, Dr. Campagna again performed surgery, attributing claimant's problems to her industrial injury of 1967.

Claimant was seen at the Disability Prevention Center during the fall of 1973. Her condition was found to be stationary and

she was advised to do only light work. Claimant felt she was completely disabled.

After additional surgery in April 1974, a Second Determination Order, dated December 2, 1974, awarded claimant additional compensation for time loss from October 9, 1972 through September 25, 1973 and an additional 112° for her low back disability, making a total award of 160°.

Claimant continued to have complaints and returned to Dr. Campagna on January 17, 1975. The claim was again opened and by Stipulation, dated February 24, 1975, the parties agreed that October 9, 1972 was the correct date for commencement of the additional time loss compensation but left all other issues open to appeal. Dr. Campagna, at the time of his January 1975 examination, had recommended "swim therapy" and on December 1, 1975, he advised that symptomatic treatment was all that was necessary.

After a hearing, a Referee's order, dated December 8, 1975, granted claimant additional time loss benefits from September 26, 1973 through September 10, 1974 and assessed a penalty based on the compensation for permanent partial disability due and owing between February 24, 1975 and June 2, 1975.

After further treatment and surgery during the early part of 1976, Dr. Campagna found claimant stationary on November 4, 1976 and recommended no further increase in compensation. Dr. Campagna's report of November 4, 1976 indicated that claimant's condition was no worse at that time than it was on December 8, 1975.

On December 14, 1977, the employer requested a determination of claimant's claim. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted additional temporary total disability benefits from March 4, 1976 through November 4, 1976 and extended benefits from November 5, 1976 through December 14, 1977 per OAR 436-65-010(5)(9). They felt that claimant had been adequately compensated for her permanent disability with the combined awards totaling 160° for 50% unscheduled low back disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability benefits from March 4, 1976 through November 4, 1976, less time worked, and extended temporary total disability benefits from November 5, 1976 through December 14, 1977 per OAR 436-65-010(5)(9), less time worked. This is in addition to the previous awards received by claimant.

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

JANUARY 17, 1978

NOAH MICKEY, CLAIMANT

Doblie, Bischoff & Murray, Claimant's Atty.

Joe B. Richards, 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 claimant's claim for a back injury 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 August 3, 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. ZC 223848 JANUARY 17, 1978

ART PAULS, CLAIMANT

J. David Kryger, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Own Motion Order

On June 2, 1977 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an injury suffered on December 10, 1969. The Fund denied responsibility for claimant's condition; it felt claimant's problems were a direct result of working in his chicken barn in the fall of 1976.

A Board order, dated June 13, 1977, referred claimant's request to the Hearings Division with instructions to hold a hearing and determine whether or not claimant's current problems are a result of his December 10, 1969 industrial injury and constitute an aggravation thereof.

After a hearing on November 16, 1977, Referee Daughtry forwarded a transcript of the proceedings together with his recommendation to the Board.

The Board, after thorough consideration of the transcript of the proceedings and the Referee's recommendation, adopts the rec-

commendation of the Referee, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

Claimant's petition for own motion relief, pursuant to ORS 656.278, is hereby denied.

WCB CASE NO. 77-1844

JANUARY 17, 1978

JIMMY LEE RUST, CLAIMANT
Maurice V. Engelgau, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On January 4, 1978 the Board received from claimant, by and through his attorney, a motion to dismiss the request for review filed by the State Accident Insurance Fund in the above entitled matter on the ground and for the reason that the Fund did not file timely its request for review pursuant to ORS 656.289(3).

The Referee's order was entered on August 26, 1977 and the State Accident Insurance Fund mailed a request for Board review on September 9, 1977, well within the 30 days allowed by statute. The Supplemental Order of the Referee, dated September 19, 1977, was entered after the Referee had lost jurisdiction over the above entitled matter and, therefore, has no effect upon the previous request for Board review by the Fund.

The Board concludes, after reviewing all of the files and records supplied in support of claimant's motion, that the Fund timely filed its request for review and, therefore, the motion to dismiss should be denied.

IT IS SO ORDERED.

WCB CASE NO. 76-1126

JANUARY 17, 1978

KARL SIMMS, CLAIMANT
Sam Suwol, 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 found claimant's claim to be for a non-disabling injury and remanded it to the Fund for processing and payment of benefits 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 May 2, 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. 76-4643

JANUARY 17, 1978

ALFRED VAN BLOKLAND, CLAIMANT
Cosgrave and Kester, Claimant's Atty.
Cheney & Kelley, 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 July 16, 1976 Determination Order granting temporary total disability compensation only.

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 12, 1977, is affirmed.

WCB CASE NO. 77-843

JANUARY 17, 1978

DORIS VERMILLION, CLAIMANT
Harold Adams, Claimant's Atty.
Merlin Miller, 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 the relief she was requesting and dismissed her request for hearing. Claimant contends that at the time of closure, on February 11, 1977 (as of January 10, 1977), she was not vocationally stationary and therefore entitled to further temporary total disability 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 June 29, 1977, is affirmed.

WCB CASE NO. 76-4545

JANUARY 19, 1978

RAY C. ARMSTRONG, CLAIMANT
Marvin S. Nepom, 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 found claimant to be permanently and totally disabled.

Claimant, a 47-year-old asphalt raker, sustained a compensable injury on September 7, 1974 while performing his job. The diagnosis was acute lumbosacral strain and hypertrophic osteoarthritic changes. Dr. Begg fitted the claimant with a low back support and prescribed physical therapy, muscle relaxants and pain medication. A Determination Order, dated February 11, 1975, closed the claim with an award of compensation for temporary total disability.

Dr. Begg, on April 8, 1975, noted claimant's back motion backwards was reduced 50% as was his lateral bending and asked that the claim be reopened. The Fund, on April 25, 1975, denied responsibility for treatment for claimant's right epicondylitis, and, on June 3, 1975, denied claimant's claim for aggravation. Claimant requested a hearing and also appealed the Determination Order.

Dr. Halferty, on October 8, 1975, examined claimant and thought claimant had a chronic lumbosacral strain related to degenerative intervertebral joint disease in the lower lumbar level and migratory inflammatory processes involving in the past, the right lateral epicondyle, the left shoulder and the neck. An Opinion and Order, dated November 24, 1975, remanded the aggravation claim to the Fund for processing, but affirmed the denial by it of claimant's condition of right epicondylitis.

Claimant has a 4th grade education and has a poor vocational aptitude. Dr. Perkins, a psychologist, believed that the claimant was a poor candidate for vocational retraining if he was unable to return to his former type of work.

Dr. Begg thought claimant would be unable to return to any heavy labor work. He concurred with the Orthopaedic Consultants' opinion that claimant's loss of function of the back due to this injury was in the upper range of mild. Dr. Begg felt the claimant could possibly return to janitorial work, but if not that he would be a serious problem for rehabilitation.

The claimant's claim was finally closed by a Determination Order, dated August 26, 1976, which granted him 64° for 20% unscheduled disability resulting from his back injury.

Claimant has a steel plate in his skull as the result of an automobile accident, which causes him to get dizzy and experience numbness on the top of his head.

Claimant testified he has pain in his lower back and down his right leg into his right ankle. He walked with a limp. He has not worked since this injury.

The Referee found that the claimant had proven a prima facie case of being within the "odd-lot" category and since the employer didn't meet its burden of proof that there was some form of work regularly and continuously available to claimant, the Referee found that the claimant was permanently and totally disabled.

The Board, after de novo review, finds, based on all the evidence presented in this case, that claimant is not permanently and totally disabled. Dr. Begg and the Orthopaedic Consultants concur that claimant's loss of function is in the upper mild category and that he can do some work. The claimant is able to work in his yard and assist others in moving. He also is able to drive his pickup and move various items for other people.

The Board modifies the Referee's award of permanent total disability and grants claimant 240° for 75% unscheduled disability for his low back injury. The Board further directs that the Field Services Division actively work with the claimant in job placement.

ORDER

The Referee's order, dated July 14, 1977, is modified.

The Claimant is awarded 240° for 75% unscheduled disability for injury to his low back. This is in lieu of the award made by the Referee's order which is affirmed in all other respects.

ALICE A. BRANTON, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a low back injury on January 15, 1965 sweeping the floor while employed by the Crowfoot School District. The Fund accepted her claim. She was examined by several doctors who basically felt she was overweight, had an unrelated pelvic mass and thyroid problem and had an aggravation of a rheumatoid spondylitis. The Fund closed her claim on September 16, 1966 with temporary total disability benefits and an award for 25% unscheduled disability.

Claimant returned to work in September 1966 but a September 18, 1969 medical report indicated that she had to quit because of her back condition. After a thorough medical evaluation, it was felt that claimant had a low back strain and possible L5-S1 disc protrusion. On March 6, 1970 the Fund reopened her claim, accepting responsibility for the right L4-5 laminectomy, disc removal and L5 decompression which had been performed on February 19, 1970 by Dr. Tsai. On August 11, 1970 Dr. Tsai indicated claimant's condition was medically stationary although she continued to have right leg complaints.

Claimant went to the Back Evaluation Clinic where an award for 25% unscheduled disability was recommended. Because claimant had already been awarded an award for 25% the Fund closed her claim on September 25, 1970 with time loss benefits only.

On July 25, 1975, Dr. Tsai recommended that claimant's claim be reopened. This was accomplished by an Own Motion Order, dated October 3, 1975. Claimant underwent surgery on October 15, 1975 and Dr. Tsai again found her stationary on January 29, 1976, recommending an additional 5% award. This was granted by the Fund.

Claimant's condition worsened after she fell from a fence in June 1976 and she sought medical attention from Dr. Cronk on January 25, 1977. The claim was again reopened and Dr. Cronk performed surgery on May 13, 1977. He found her condition stationary on November 8, 1977, and felt she was markedly improved over her pre-operative status. He advised against her returning to custodial work.

On December 22, 1977 the Fund requested a determination of claimant's claim. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted further temporary total disability from May 13, 1977 through December 22, 1977 but no additional compensation for permanent partial disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability from May 13, 1977 through December 22, 1977, less time worked.

Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the compensation granted by this order, payable out of said compensation as paid, not to exceed \$500.

SAIF CLAIM NO. YC 93445 JANUARY 19, 1978

ROGER W. DAVIS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, a 33-year-old fire fighter-ambulance driver, experienced low back pain getting out of bed while on duty on September 6, 1967. He was admitted to the hospital on September 28, 1967 when the pain became worse while he was mopping the fire house floor.

On October 11, 1967 Dr. Tsai performed L4-5-S1 laminotomies and disc removals. Claimant returned to work on December 1, 1967 and on July 30, 1968 his condition was found to be medically stationary. A Determination Order of August 7, 1968 granted claimant time loss benefits to December 1, 1967 and 32° for 10% unscheduled low back disability.

Claimant began experiencing low back spasms and severe low back pain on November 29, 1971 and was hospitalized the next day. Surgery was again performed and claimant was released for light work on May 20, 1972. Dr. Tsai's closing examination of July 18, 1972 indicated a slight increase in residuals over the findings of July 30, 1968. The Second Determination Order of August 4, 1972 granted additional compensation for temporary total disability and an additional 16° for 5% unscheduled disability.

Claimant again began experiencing back problems which required consultation and surgery by Dr. Tsai in December of 1975. The Fund voluntarily reopened claimant's claim as of December 16, 1975.

The surgery performed in December of 1975 was not very successful and Dr. Cronk performed an L4-5-S1 fusion on January 25, 1977. Dr. Cronk, on July 18, 1977, indicated that claimant still had a variety of vague complaints and his clinical situation was only slightly improved by the surgery. He did feel that claimant's condition was then medically stationary and that he was restricted in the same way as most post-back surgery patients.

Claimant is now 43 years old, has a high school education and has been medically retired from his job since August 1976.

On December 7, 1977 the Fund requested a determination of claimant's claim. The Evaluation Division of the Workers' Compensation Department finds that claimant has the capacity for gainful employment although he may need assistance in finding a suitable job. He is, in their opinion, entitled to compensation for temporary total disability from December 16, 1975 through December 7, 1977 and to an additional award of 48° for 15% unscheduled low back disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from December 16, 1975 through December 7, 1977, less time worked.

Claimant is also granted 48° for 15% unscheduled low back disability. This is in addition to the previous awards received by claimant.

CLAIM NO. B53-127108

JANUARY 19, 1978

JOE G. LINDSAY, CLAIMANT
Proctor & Puckett, Claimant's Atty.
Roger R. Warren, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his left elbow in a logging accident on December 14, 1968. A Determination Order, entered on March 24, 1969, granted no permanent partial disability. Claimant's condition became aggravated and surgery was performed on January 17, 1975 involving an ulnar nerve transplant and removal of boney spurs. A Second Determination Order, issued March 31, 1976, granted claimant compensation for 25% of the left arm.

Dr. Lilly reported on October 25, 1976 that surgery was again required. It was performed on November 3, 1976 and a loose body from the left elbow was removed. Claimant was released to work on March 1, 1977. On June 24, 1977 he was examined by Dr. Stainsby who reported the elbow had 80% of normal extension and 50% of normal flexion. Pronation was slightly diminished and the ulnar nerve function was normal.

On September 9, 1977, the carrier requested a determination of claimant's claim. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted temporary total disability benefits from October 25, 1976 through

February 28, 1977 and an additional 19.2° for 10% loss of the left arm, which would give claimant a total award of 67.2° for 35% loss of function of that limb.

The Board concurs with the recommendation of the Evaluation Division.

ORDER

Claimant is granted temporary total disability benefits from October 25, 1976 through February 28, 1977, less time worked.

Claimant is granted 19.2° for 10% loss of function of the left arm. This is in addition to all previous awards.

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

SAIF CLAIM NO. YC 282472 JANUARY 19, 1978

EDWARD A. MILLER, CLAIMANT
W. A. Franklin, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant twisted his right ankle on December 21, 1970 when he stepped on a 2" X 4" block and fell. The injury was diagnosed as a sprain and his claim was first closed on March 19, 1971 with no award for permanent disability.

Dr. Baskin, on September 13, 1971, requested that claimant's claim be reopened. He had been treating claimant since January 4, 1971 with recurrent inversion injuries to the ankle.

An arthrotomy was performed by Dr. Baskin on October 6, 1971 and on July 14, 1972 claimant's right ankle was fused, using fibula as graft. The ankle was re-fused on October 2, 1973 and again on May 14, 1974.

Dr. Baskin, on September 2, 1975, indicated that claimant was having problems with his left ankle possibly as a result of the added stress being placed on it because of the right ankle disability. On September 30, 1975 an arthrotomy of the left ankle was performed. Dr. Baskin found claimant's condition stable on March 8, 1976 and the Second Determination Order, dated April 21, 1976, granted claimant compensation for 60% of the right foot and 10% of the left foot.

On Opinion and Order, dated July 2, 1976, granted claimant compensation for permanent total disability, based on his problems with both ankles. The Board and the circuit court reversed this

award and affirmed the Second Determination Order.

Dr. Baskin, in February 1977, reported knee degeneration related to the ankle fusion. He performed a lateral meniscectomy of the right leg on April 13, 1977. He found claimant's right knee condition to be basically normal and his medical condition to be stable with evidence of permanent impairment on August 23, 1977.

On September 14, 1977 the Fund requested a determination of claimant's claim. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted an additional award of 15° for 10% loss of function of the right leg and temporary total disability benefits from April 13, 1977 through August 9, 1977.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability benefits from April 13, 1977 through August 9, 1977, less time worked.

Claimant is granted 15° for 10% loss of function of the right leg. This is in addition to the previous award made by the Determination Order, dated April 21, 1976.

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

WCB CASE NO. 77-529

JANUARY 19, 1978

ROGER NEWNAM, CLAIMANT

Doblie, Bischoff & Murray, 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 awarded to claimant 80° for 25% for his neck and low back disability.

Claimant, a 41-year-old boxcar loader or jitney driver, suffered a compensable injury on May 2, 1975 when he pulled on a lever to shut a boxcar door and strained or pulled some of the muscles in his back and neck.

Claimant received conservative treatment from Dr. Easterline and was referred to Dr. Spady in July 1973. Claimant had had

no prior injuries. Dr. Spady felt claimant's condition was stationary and he was in no need of surgical treatment as of December 16, 1975, but suggested claimant wear a lumbosacral support. Claimant was treated by Dr. Wedel, a chiropractor, through 1976.

Dr. Spady, on September 8, 1976, noted claimant's condition had not changed much from his last examination and that claimant did not have too much in the way of serious impairment of function and could return to his former job.

The Orthopaedic Consultants reported on September 20, 1976 the claimant had a constant dull aching pain in his neck which was increased with jarring movements or turning his head and neck and he continued to wear the lumbosacral support. Claimant told them he felt his condition was stationary but that he was not able to return to his former job and would like to be retrained. Their diagnosis was mild degenerative cervical disc disease, C-4, C-5, minimal degenerative lumbar disc disease, L-4, L-5, sprain of the cervical area and an unrelated minimal carpal tunnel syndrome. They felt claimant was medically stationary and he could return to his former job with the qualifications that he not do a great deal of twisting and turning of his neck and head. The loss of function of the neck was minimal; they found no loss of function of the low back.

A Determination Order, dated December 29, 1976, awarded claimant 32° for 10% unscheduled neck disability.

The Orthopaedic Consultants reexamined claimant on February 21, 1977 and reported that the claimant first had returned to his former job, then he was placed on another job which involved more turning and twisting of his back which he could not tolerate. He was off work and returned on January 10, 1977 as a part time fork lift operator and tallyman, a combination of jobs that permitted him to drive part of the time and part of the time be on his feet. The claimant felt he would be able to do this job without a great deal of difficulty. The Orthopaedic Consultants commented that claimant's neck condition was the same, but he had suffered a mild loss of function of the lumbar spine due to his injury and he could continue indefinitely with his current job if he avoided repetitious bending and twisting of the low back.

Claimant has a 9th grade education and has worked for this employer for 14 years. Almost all of his work experience has been in the heavy labor field.

The employer did provide a surveillance film which showed the claimant engaging in his recreational activities and other activities in which he moved his arms, legs and shoulders without apparent limitation.

Claimant testified he has had to modify the way he performs his job to avoid stress on his back. He further stated he must wear his back brace all the time and that as both the work day and work

week progress his neck pain worsens. He currently is taking no prescribed medication.

The Referee found claimant had suffered a greater loss of earning capacity than that for which he had been compensated. The Referee believed that claimant tended to exaggerate his symptoms, but was credible when he described certain types of employment in the mill he could no longer do.

The Referee concluded that, based on the reduction of jobs for which claimant may be eligible outside his current job and the medical evidence of the loss of function to his neck and back, the claimant was entitled to an award equal to 80°.

The Board, after de novo review, finds that the medical evidence does not justify the increase given by the Referee. The claimant is presently able to perform a modified job for his employer. The Orthopaedic Consultants rated the loss of function to his neck as minimal and to his back as mild. Dr. Spady found no serious loss of function. The films demonstrate that the claimant is not seriously or even moderately disabled because of his industrial injury.

The Board, based on its findings, concludes that an award of 48° for 15% unscheduled disability to his neck and low back would adequately compensate claimant for his loss of wage earning capacity.

ORDER

The Referee's order, dated July 7, 1977, is modified.

Claimant is awarded 48° for 15% unscheduled neck and low back disability. This award is in lieu of the award made by the order of the Referee, which in all other respects is affirmed.

SAIF CLAIM NO. A 465385 JANUARY 19, 1978

LEMUEL PERRIGAN, CLAIMANT
Lyman C. Johnson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on March 4, 1955 which was diagnosed as "fractures, transverse process, L2, right and left, L3, left". He was hospitalized for 5 days and returned to work one month later. The file was destroyed, but apparently claimant was awarded time loss benefits only.

On April 11, 1977 Dr. Pease asked that claimant's 1955 claim be reopened for additional treatment. He indicated that he had treated claimant in 1960, finding degenerative spurs, upper

lumbar, and x-rays taken in 1965 indicated progressive changes, most at D12-L1. On May 24, 1977 claimant's attorney asked for a reopening under own motion.

On August 9, 1977 the Fund indicated that claimant's claim was being reopened for further treatment. Claimant is also suffering mild thrombophlebitis from another on-the-job injury. He has not worked for the last two years and he is presently under anticoagulant therapy. The Orthopaedic Consultants, in their November 9, 1977 report, found that claimant could perform light to medium work, but he could not return to his former logging job. In Dr. Pease's opinion, claimant is permanently and totally disabled.

The State Accident Insurance Fund requested a determination of claimant's claim. The Evaluation Division of the Workers' Compensation Department concluded that claimant's current problems were not due to his 1955 injury, therefore, he is entitled only to time loss benefits from November 22, 1976 through December 6, 1977.

The Board concurs with the recommendation of the Evaluation Division.

ORDER

Claimant is hereby granted temporary total disability compensation from November 22, 1977 through December 6, 1977, less time worked.

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

WCB CASE NO. 76-3535

JANUARY 19, 1978

In the Matter of the Compensation
of the Beneficiaries of
MERRILL RAY, DECEASED
Lively & Wiswall, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the Beneficiaries

On January 6, 1978 an Order on Review was entered in the above entitled matter. The order neglected to grant claimant's attorney a reasonable attorney's fee for his services at the hearing before the Referee payable by the Fund. The Order on Review should be amended by inserting between the last two paragraphs on page 2 of said order the following paragraph:

"Claimant's attorney is awarded as a reasonable attorney's fee for his services at the hearing

before the Referee \$200 payable by the State Accident Insurance Fund."

In all other respects the Order on Review entered January 6, 1978 in the above entitled matter is ratified and reaffirmed.

SAIF CLAIM NO. PB 154343 JANUARY 19, 1978

BENHAM R. SELL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, at the time a 44-year-old fire patrolman, suffered a compensable injury on September 21, 1965 while fighting a forest fire. The diagnosis was a right ankle sprain. He was released for work on December 1, 1965 and the claim was closed on August 25, 1966 with no award for permanent partial disability.

Further medical services were required on the right ankle in September 1969 and surgery was performed by Dr. Smith on December 8, 1969, at which time several loose bodies and spurs were removed. On January 12, 1970 claimant returned to work wearing a leather ankle support and his condition was found to be stationary on July 27, 1970. The claim was again closed on August 21, 1970 with additional time loss benefits and compensation for 20% loss of function of the right foot.

The Fund again reopened the claim as a result of a medical report dated August 24, 1976. Claimant was hospitalized on February 22, 1977 for a Charnley type ankle fusion by Dr. Bert. He returned to work on July 25, 1977 and Dr. Bert, in his August 22, 1977 report, indicated that claimant's ankle was, at that time, solidly fused with virtually no other findings and his condition was medically stationary.

On October 25, 1977 the Fund requested a determination from the Workers' Compensation Board. The Evaluation Division of the Board recommended that claimant be granted further temporary total disability benefits from February 22, 1977 through July 24, 1977 and an additional award of 15° for 15% loss of the right foot.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from February 22, 1977 through July 24, 1977, less time worked.

Claimant is also granted compensation equal to 15° for 15% loss of function of the right foot. This is in addition to his previous award.

MELVIN D. WALTER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On December 21, 1977 an Own Motion Determination was entered in the above entitled matter. The injury occurred on May 31, 1967, at which time the maximum allowable for loss of use of a foot was 100° rather than 135°. Therefore, all references in the aforesaid Own Motion Determination to 13.5° for 10% loss of use of the right foot should be corrected to read 10° for 10% loss of use of the right foot.

In all other respects the Own Motion Determination, dated December 21, 1977, should be ratified and reaffirmed.

IT IS SO ORDERED.

MARIAN CRUMPACKER (CHAMBERLAIN), CLAIMANT
Murray Taggart, Claimant's Atty.
Donald R. Duncan, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Prowler Ind.

Reviewed by Board Members Moore and Phillips.

Prowler Industries, Inc., seeks Board review of the Referee's order which remanded claimant's claim for an injury of March 3, 1975 to it for the payment of compensation until the claim was again closed pursuant to ORS 656.268.

Claimant suffered a compensable injury on September 29, 1971 while employed by Indian Hills Motor Inn, whose Workers' Compensation coverage was furnished by the Fund. A Determination Order, dated April 6, 1973, awarded claimant 32° for 10% unscheduled disability for injury to her low back.

On November 12, 1974, claimant suffered another injury while employed by a subsidiary of Prowler Industries, Inc., hereinafter referred to as Prowler. A Determination Order, dated April 15, 1975, awarded claimant compensation for temporary total disability only.

On March 3, 1975, while still in the same employment, claimant was again injured. Leatherby Insurance Company provided Workers' Compensation coverage for Prowler.

A dispute arose as to whether or not claimant suffered an aggravation of her first injury or had suffered a new injury. By an order, dated March 22, 1976, Leatherby Insurance Company was designated as the paying agent pursuant to ORS 656.307.

At the hearing claimant testified that she lost 6-8 months of work after the injury to her low back at Indian Hills. She worked for another employer for a short time before starting to work for the subsidiary of Prowler.

Claimant described her second injury as stretching-type injury. She felt she pulled muscles in her neck and back; she was off work for about two days, made a claim and then returned to work.

Claimant's 3rd injury was to her neck and because of this injury claimant has not worked since November 1975.

Claimant was still having problems as a result of her injury at Indian Hills when she became employed by Prowler.

Two employers for whom she worked between the Indian Hills job and the Prowler job and for a period when she had been laid off from Prowler, testified that the claimant did not complain of any problems and they did not notice that she had any problems with her work.

Dr. Hendricks examined claimant after her first injury at Prowler and opined she suffered an aggravation of her first injury at Indian Hills. His diagnosis was neck and low back pain.

Dr. Cooksley reported on August 27, 1976 that from the history he took, claimant had apparently recovered to an asymptomatic state from her injury at Indian Hills without apparent residuals. He further stated that since her last injury on March 3, 1975, claimant had been totally incapacitated for any type of work and her description of this last accident appeared to be consistent with the injury which resulted.

The Referee found that the injuries of November 12, 1974 and March 3, 1975 constituted both aggravations of the original injury and new injuries. He found that these two later injuries were a more substantial contributing factor both by way of aggravation and new injury than the original injury.

The Referee concluded, based on Dr. Hendricks reports, the denial of Prowler, although not unreasonable, was in error and he remanded the claim back to it for the March 3, 1975 injury.

The Board, after de novo review, agrees with the Referee's order. Dr. Cooksley's report is more persuasive than Dr. Hendricks'.

Based on Dr. Cooksley's report, the Board agrees that Prowler Industries, Inc., and Leatherby Insurance Company were the responsible employer and carrier.

ORDER

The Referee's order, dated January 13, 1977, is affirmed.

SAIF CLAIM NO. NC 233252 JANUARY 20, 1978

ROY DAHL, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, at the time a 48-year-old municipal maintenance employee, suffered a low back injury on February 20, 1970 while loading a culvert tile onto a truck bed. A laminectomy with L5-S1 discectomy was performed on March 28, 1970 and he returned to work on May 11, 1970.

On September 17, 1970 Dr. Hockey's closing examination revealed minimal tenderness over the surgical scar and limited forward flexion. At that time claimant was complaining of "considerable and continuous back pain" and some right leg pain. Dr. Hockey found his condition stationary. The Determination Order, entered October 15, 1970, granted claimant 48° for 15% unscheduled low back disability.

A Stipulation of August 10, 1971 granted claimant an additional 18° for a total of 66°.

The Fund, on December 17, 1976, voluntarily reopened claimant's claim for time loss benefits effective November 15, 1976 based upon Dr. Hockey's letter indicating that claimant's condition had worsened. On December 2, 1976, claimant underwent further surgery with L4-L5 discectomy.

Claimant was released for work by Dr. Hockey on May 5, 1977. The doctor's August 12, 1977 closing report found subjective complaints relating to the claimant's low back. The right ankle jerk was absent and there was some sensory deficit in the right L5 dermatome. Claimant had excellent range of back motion and no motor deficit. His condition was found to be stationary. Dr. Hockey's August 30, 1977 report found claimant's range of back motion was "fairly good" when viewed with past surgical assaults.

On October 18, 1977 the Fund requested a determination of claimant's claim. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted additional temporary total disability benefits from November 15, 1976 through May 4, 1977 and an additional 14° for a total award of 80° for 25% unscheduled disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability benefits from November 15, 1976 through May 4, 1977, less time worked.

Claimant is granted 14° of a maximum of 320° for unscheduled low back disability. This is in addition to all previous awards received by claimant.

WCB CASE NO. 77-879

JANUARY 20, 1978

O. RAY HARRIS, CLAIMANT
Zafiratos & Roman, 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 payment of 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 June 24, 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 Fund.

WCB CASE NO. 76-6769

JANUARY 20, 1978

WILLEMINE H. LINENDOLL, CLAIMANT
Dye & Olson, Claimant's Atty.
Lindsay, Nahstoll, Hart, Neil
& Weigler, 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 her claim not compensable.

At the hearing, the claimant contended (1) her claim was prematurely closed, (2) she needed further medical treatment and additional temporary total disability, (3) she was entitled to penalties and attorney fees on account of delay or failure in payment of temporary total disability, and (4) asked for a determination of the extent of her unscheduled disability.

Claimant, a 44-year-old bookkeeper, suffered an injury to her back on April 18, 1975 when she slipped on a wet floor at her place of employment. She was caught by a co-worker before she struck the floor. She filed a claim which was accepted. Claimant had had a lumbosacral fusion in 1968 and also a back injury on July 28, 1972 for which she was awarded 32°. She also slipped and fell on or about October 10, 1974.

Claimant continued to work as a bookkeeper until October 3, 1975 when, she testified, she quit work because of her back problems. She had been taking work home for a period of time prior to her quitting.

Claimant, since her last injury, has been treated by many physicians and surgeons. They all concur the claimant has a post-operative lumbosacral spine.

Dr. Schulte, who treated claimant from 1973 through 1976, reported he expected claimant could continue to have low back pains and was overly dependent on pain medication.

Claimant was evaluated at the Back Evaluation Clinic in 1973; they concurred with the diagnosis of claimant's other doctors and released the claimant to return to her bookkeeping job. They stressed that she was to avoid heavy lifting.

Dr. Schulte's office notes reflect that from January 1974 through February 1976 claimant had back pain and leg swelling. He noted she had "good and bad" days. Dr. Schulte also commented on claimant's over dependency on pain medication. He made no reference in his notes that claimant had reinjured her back in April of 1975 even though he saw claimant twice after the date of her alleged injury. Dr. Schulte reported that in October 1975 claimant developed chest pains; she also had problems with her marriage and with her daughter.

Claimant filled out an application for disability benefits on October 23, 1975 and stated that chest pains caused her to quit work on October 3.

X-rays of claimant's spine did reveal a screw loose from her prior back surgery. A myelogram revealed no nerve root irritation.

Dr. Spady, on March 9, 1976, reported claimant was unable to work, her symptoms were the same as before only worse on the

right side but he felt conservative treatment would assist her. On April 20, 1976, Dr. Spady reported further treatment would be supportive only. He was unable to relate claimant's present problems to the alleged April 18, 1975 incident but thought the basic underlying problem dated back to her early injury and back surgery. He felt claimant would have recurrent episodes of pain with almost any trivial incident involving her back.

Dr. Raaf, on September 8, 1976, found claimant to be medically stationary; he suggested an additional 5% unscheduled disability award for her low back injury on April 18, 1975.

Dr. Spady, who had stated on September 24, 1976 that claimant was medically stationary, on December 13, 1976, found no increased impairment of function in claimant's back. In October 1976, Dr. Spady had suggested claimant go to the Pain Clinic in Portland.

A Determination Order, dated October 22, 1976, granted claimant an award for only temporary total disability from April 18, 1975 through September 24, 1976.

The Referee, after hearing all the evidence, concluded that no injury had occurred on April 18, 1975. He did not decide any other issues. He found claimant was not a credible witness.

The Board, after de novo review, finds that the claim had been accepted and the issue of compensability was not before the Referee. The Board finds, based on the medical reports, that the claim was not prematurely closed and any further medical treatment claimant may need can be provided under ORS 656.245.

The Board finds, based on all the medical evidence, especially Dr. Spady's reports, that claimant did not prove by a preponderance of the evidence she suffered any permanent partial disability.

The Determination Order of October 22, 1976 ordered compensation paid from April 18, 1975 through September 24, 1976 and the Board finds that this order was not fully complied with. The Board would, therefore, order temporary total disability compensation to be paid from October 3, 1975 through January 4, 1976, allowing the carrier to offset the amount it overpaid the claimant in October of 1976.

The Board finds no grounds for the assessment of penalties.

ORDER

The Referee's order, dated August 11, 1977, is reversed.

Claimant is granted compensation for temporary total disability from October 3, 1975 through January 4, 1976 but the carrier shall be given credit for its overpayment made in October 1976.

Claimant attorney is granted as a reasonable attorney's fee for his services before the Board 25% of the compensation granted claimant by this order, payable out of such compensation as paid, not to exceed \$500.

The Determination Order, dated October 22, 1976, is affirmed.

WCB CASE NO. 77-1105

JANUARY 20, 1978

JACOB PATTERSON, CLAIMANT
Dye & Olson, Claimant's Atty.
Cheney & Kelley, 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 to be permanently and totally disabled and granted the employer credit against this award based upon payments of previous awards of permanent partial disability.

Claimant suffered a compensable injury on September 5, 1975 when he stepped on an ear of corn; his feet went out from under him and he fell backwards injuring his back. Claimant received chiropractic manipulations initially; later he was seen by several physicians.

After claimant failed to improve through conservative treatment, Dr. Fax, on October 2, 1975, performed a partial hemilaminectomy at L4-5 and L5-S1 with disc removal at L4-5. Claimant's recovery was slow, however, by December 23, 1975 Dr. Fax noted claimant had less pain in his right leg and that the tenderness over his anterior tibia on the right had disappeared. Claimant was still having some swelling in his right leg but he was having less of the sciatic-type pain than he had had formerly.

Claimant is quite obese; he is 5'9" tall and weighs 262 pounds. Dr. Fax had reported on December 23, 1975 that he thought claimant was disabled but might be able to do some very light work by the spring of 1976 if he continued to make further improvement.

Claimant continued to have pain throughout most of 1976. He lost approximately 15 pounds, however, this weight loss was not permanent. When Dr. Fax examined claimant on September 21, 1976 claimant's complaints were approximately the same as they had been on March 29, 1976 at which time Dr. Fax had indicated in his chart notes that claimant had a very significant residual disability and that any type of work claimant would be able to do in the future would have to be of a very light nature and mostly sedentary.

A Determination Order dated November 30, 1976 awarded claimant 160° for 50% unscheduled disability to his low back.

The Referee found that claimant has an eighth grade education and that his work background consists mostly of farm work and operating heavy equipment. Dr. Fax did not think it reasonable to expect that claimant could return to either of these types of work. Dr. Fax advised claimant to apply for Social Security disability in the early part of 1976.

The Referee concluded, after considering claimant's obvious limited education and limited intellectual resources together with his work background, that claimant would have to use his back in order to make a living. The medical evidence indicates that claimant has very little adaptability in his make-up and while he might be able to do some light or sedentary work, his age and his limitations preclude any serious efforts to retrain him.

The Referee found that claimant's physical impairments were well supported by the medical reports. The Referee also found that although claimant had made no serious efforts to find work he explained this on the basis that his doctors hadn't released him. Claimant apparently is unable to do anything and has been spending most of his time just sitting around. He tries to do some exercises but does very little.

The Referee, considering the medical testimony as well as the testimony of the employment counselor, concluded that claimant had established that he was sufficiently motivated to find employment but was unable to do anything and could not be trained for light work of any significance, therefore, claimant was permanently and totally disabled from performing any suitable and gainful occupation on a regular basis.

The Board, on de novo review, concurs with the findings and conclusions contained in the Referee's order which it affirms.

ORDER

The order of the Referee, dated June 23, 1977, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for prevailing at Board review the sum of \$400, payable by the employer and its carrier.

JANUARY 20, 1978

BILL SEIBERT, CLAIMANT
Daniels & Corrigan, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-appeal by the SAIF

Reviewed by Board Members Moore and Phillips.

Claimant requests review by the Board of the Referee's order which granted claimant an award of 320° for 100% unscheduled low back disability. Claimant contends he is permanently and totally disabled. The Fund contends the Referee's award is excessive.

Claimant, a 39 year old millwright, sustained a compensable low back injury on May 1, 1974. Claimant has not worked since the injury of that date. Claimant was treated conservatively by numerous doctors. Their diagnosis was lumbar strain. In January 1975, Dr. Gripekoven found claimant stationary with a mild to moderate disability. Dr. Gripekoven felt claimant could not return to his millwright job and, because of his educational limitations, he felt rehabilitation would be difficult.

On May 5, 1975, Dr. Fitchett found only subjective symptoms and complaints. The claimant demonstrated voluntary guarding and voluntary restricted back motion.

Claimant sought vocational rehabilitation and was placed in a program for draftsmen. Claimant lasted one term and quit due to low back pain which radiated down his legs to his feet.

On October 14, 1975 Dr. Fitchett reported claimant had a myelogram which indicated mild asymmetry consistent with scarring. Claimant was found to be medically stationary. Dr. Fitchett felt claimant should be restricted from frequent bending, stooping, twisting and lifting of heavy weights.

A Determination Order, dated June 30, 1976, granted claimant an award of 80° for 25% unscheduled low back disability.

On February 15, 1977 claimant was examined by Dr. Holm at the Disability Prevention Center, who diagnosed chronic L4-5 strain and S1 radiculopathy bilateral and moderate anxiety reaction. Dr. Holm felt claimant, physically, could perform light sedentary-type occupations.

On April 5, 1977 David Hitt, a rehabilitation counselor, advised claimant that due to his impairment and the lack of sufficient benefit from treatment at the Center his case was to be closed.

A Determination Order of May 9, 1977 granted claimant an additional award of 16° for 5% unscheduled low back disability.

Claimant has a 12th grade education. Claimant had had a laminectomy in 1958 and in 1963 a rock had hit him in the back necessitating further surgery, a fusion.

The Referee found, based on all of the evidence, that the claimant had not met his burden of proving that he was permanently and totally disabled. Claimant would be able to do light-sedentary work if he would seek such work and make an effort to be retrained. The Referee was convinced that the claimant tended to exaggerate the amount of his pain. However, the Referee concluded that the claimant, even though not credible, did suffer a substantial reduction in his earning capacity, therefore, he awarded claimant the maximum award of 320° for 100% unscheduled disability.

The Board, after de novo review, finds the claimant is not a credible witness and tends to greatly exaggerate his problems. He likewise is not well motivated to return to work. The medical evidence, notably Dr. Holm's report of January 15, 1975, does not support the award given by the Referee. Therefore, the Board concludes that an award of 192° for 60% unscheduled disability would adequately compensate claimant for his loss of wage earning capacity.

ORDER

The Referee's order, dated July 6, 1977, is modified.

The claimant is awarded 192° for 60% unscheduled (low back) disability. This award is in lieu of the award made by the Referee's order, which in all other respects is affirmed.

WCB CASE NO. 76-6411

JANUARY 20, 1978

LINDA M. STOCKTON, CLAIMANT
Sidney J. Nicholson, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Newhouse, Foss, Whitty & Roess,
Defense Atty.
Request for Review by EBI Co.

Reviewed by Board Members Wilson and Moore.

The Employee Benefits Insurance Company seeks Board review of the Referee's order which affirmed the denial of North Pacific Insurance Company and remanded claimant's claim to it for acceptance and payment of compensation for her bilateral foot condition.

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 \$100, payable by the carrier.

WCB CASE NO. 76-4995

JANUARY 20, 1978

DOUGLAS L. TOWNSEND, CLAIMANT
Bloom, Chaivoe, Ruben, Marandas &
Berg, Claimant's Atty.
SAIF, Legal Services, 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 remanded claimant's claim to the Fund effective October 1, 1976 for payment of compensation for temporary total disability from that date to January 3, 1977, the date the claim was reopened for vocational rehabilitation.

The issues before the Referee were (1) the Disability Prevention Division had abused its discretion by not referring claimant to the Division of Vocational Rehabilitation for a program of retraining because claimant claimed to have a vocational handicap; (2) the Fund had not adequately presented claimant's situation to the Disability Prevention Division and, therefore, he was entitled to penalties and attorney's fees from both the Fund and the Board, and (3) the closure affected by the Determination Order of August 30, 1976 was premature and claimant was entitled to compensation for temporary total disability from May 16, 1976 until January 3, 1977 when he was referred to the Disability Prevention Division for a retraining program.

Claimant suffered a compensable injury on August 8, 1974, diagnosed as a thoracic strain and a muscle strain of the back. He received conservative treatment only and his claim was closed by a Determination Order, dated November 20, 1974, which granted claimant compensation for temporary total disability from August 8, 1974 to September 9, 1974.

Claimant requested that his claim be reopened for further medical care and treatment and time loss on July 23, 1975 and in August the claim was reopened for additional conservative treatment.

On January 29, 1976 claimant was examined by the physicians of the Orthopaedic Consultants who diagnosed "Mild mid-dorsal back strain with myofasciatis [sic] dorsal". At the same time claimant was given a psychological examination by Dr. Hickman who felt the prognosis for restoration and rehabilitation was very good as far as psychological factors were concerned and there was no doubt that claimant would be able to return to full time gainful employment as soon as a suitable vocation objective could be established and as soon as arrangements could be made for him to move forward in his rehabilitation program. He felt claimant could be vocationally rehabilitated without surgery unless the medical reports indicated a clear indication for it and he strongly recommended that claimant be brought to Portland for his two-week rehabilitation readiness program starting approximately in the middle of March 1976.

On March 16, 1976, Dr. MacCloskey, claimant's treating physician, agreed with the diagnosis of the Orthopaedic Consultants and felt that Dr. Hickman's report was excellent and wholeheartedly suggested that claimant go into rehabilitation early in the program and, if necessary, a Division of Vocational Rehabilitation sponsored program.

During 1976 claimant was referred to the Disability Prevention Division and at one time was being seen by a service coordinator in Bend. After claimant had completed his examination at Dr. Hickman's psychological center, a 10-day retraining program was developed in which the service coordinator and the representative from DVR concurred. However, the Disability Prevention Division did not believe claimant had a vocational handicap in view of his education, intelligence and aptitudes and, therefore, refused to make a referral. The claim was again closed by a Determination Order, dated August 30, 1976, which granted claimant additional compensation for temporary total disability from August 11, 1975 through May 16, 1976, less time worked.

After the second closure, claimant's condition worsened psychologically and Dr. Hickman requested the claim be reopened. After receiving additional reports from Dr. Hickman, the Disability Prevention Division authorized a retraining program for claimant commencing January 3, 1977.

The Referee stated that under certain circumstances a workman who had been refused vocational rehabilitation was entitled to administrative review (OAR 436-61-060) but that the Referee could reverse or modify the decision only if a substantial right of the party had been prejudiced because the agency's decision violated:

- (1) a statute or rule,
- (2) exceeded the statutory authority of the agency,
- (3) was made upon unlawful procedure, or
- (4) was arbitrary and capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Referee, based on the evidence before him, concluded that the action of the Disability Prevention Division did not fit within any of the listed reasons allowing modification or reversal; he concluded that it was an honest difference of opinion and properly within the province of those persons making the decision.

The Referee found that inasmuch as claimant had not been declared to have a vocational handicap the closure of his claim on August 30, 1976 was not premature under the circumstances at that time.

The Referee found that the difficulty in determining whether claimant had a vocational handicap was partly due to the fact that he lived in a remote area of the state which had limited employment opportunities and also, although claimant's physicians indicated that he should not do heavy work, there was no restriction against performing lighter moderate labor. He found that claimant did not lose his employment because of his physical disability but because he could not remain awake on the night shift of the job to which he had been transferred subsequent to the industrial injury.

The Referee found that after the claim had been closed on August 30, claimant's psychological condition had worsened to the extent that he required psychotherapy. Based upon this finding, the Referee concluded that claimant's claim should be reopened effective October 1, 1976 on a medical/psychological basis and remain until January 3, 1977 when claimant's claim was reopened for vocational rehabilitation. The psychological reports which warranted the reopening were not received until December 1976 and the claim was reopened on January 3, 1977, therefore, the Referee concluded that claimant's action was not a denial and he did not assess penalties or award attorneys fees. The Referee further concluded that there was no statutory authority for him to levy any penalties or attorneys fees against the Board under the circumstances of the case before him but claimant's attorney was entitled to a fee for the compensation for temporary total disability which claimant was receiving.

The Board, after de novo review, finds that, based on the evidence, the decision made by the Disability Prevention Division was not warranted and must be construed as a decision which would justify its reversal by the Referee.

The Board further finds that the Fund failed to promptly and properly process claimant's claim for aggravation based on Dr. Hickman's report of November 29, 1976 and, therefore, penalties should be assessed and an attorney's fee awarded claimant's attorney payable by the Fund rather than out of the compensation awarded claimant.

Inasmuch as claimant is now in an authorized program of vocational rehabilitation, his claim cannot be closed and he is entitled to receive compensation for temporary total disability until this program is either completed or terminated for other reasons.

ORDER

The order of the Referee, dated July 12, 1977, is modified by deleting therefrom the second paragraph on page 4 thereof and substituting in lieu thereof the following:

"Claimant is awarded additional compensation equal to 25% of the compensation due and payable to him between October 1, 1976 and January 3, 1977 pursuant to the provisions of ORS 656.262(8).

"Claimant's attorney is awarded as a reasonable attorney's fee for his services before the Referee the sum of \$750, payable by the State Accident Insurance Fund."

Claimant's attorney is awarded as a reasonable attorney's fee for his services before the Board a sum equal to 25% of the additional compensation awarded claimant by this order, payable out of said compensation as paid, not to exceed \$500.

WCB CASE NO. 76-6300

JANUARY 20, 1978

RICHARD TRAMP, CLAIMANT
Roger Leo, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Agreement and Stipulation

IT IS HEREBY AGREED AND STIPULATED by the parties that the claimant submitted a claim to his employer for a compensable back condition; that the employer, by and through its insurance carrier, Employers Insurance of Wausau, issued a denial on October 19, 1976; that the claimant subsequently requested a hearing and a hearing was held on April 12, 1977; that on May 17, 1977 the Referee issued an Opinion and Order finding that the claimant had failed to prove by a preponderance of the evidence that he had sustained a compensable injury, that is, an injury arising out of and in the course of his employment; that the claimant thereafter timely filed an appeal of the Referee's Opinion and Order to the Worker's Compensation Board.

IT IS FURTHER AGREED AND STIPULATED by the parties that the Referee's Opinion and Order of May 17, 1977, a copy of which is attached, makes readily apparent that a bona fide dispute as to compensability exists between the parties; that in accordance with the provisions of ORS 656.289(4) the parties wish to completely and finally settle this bona fide dispute; that in order to completely and finally settle this bona fide dispute the employer

has agreed to pay, by and through its insurance carrier, and the claimant has agreed to accept, the total sum of \$2,250.00; that payment of this amount is made only to completely and finally settle a doubtful and disputed claim and is in no way an admission of liability.

IT IS FURTHER AGREED AND STIPULATED by the parties that out of and from the above-stated lump sum of \$2,250.00 the claimant's attorney is entitled to receive the sum of \$562.50 as and for a reasonable attorneys fee.

The case is dismissed.

WCB CASE NO. 77-1237

JANUARY 23, 1978

CAROL ANN LOUGHRAN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Atty.
G. Howard Cliff, 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 defendant's denial of her claim.

Claimant, a 19-year-old cook, alleges she suffered a compensable injury to her low back on December 10, 1977, a Friday, when she was required to do more heavy lifting than usual. She testified she dumped a deep fat fryer weighing about 25 pounds twice and also had to carry meat and fish weighing about 35 pounds.

Claimant had the weekend off and stated she suffered no injury during that period, although she assisted her fiance in cutting a 5-foot Christmas tree and helped carry it back to their truck. Claimant first noticed back pain about 5-6 hours after the tree cutting incident on Sunday.

Claimant returned to work on December 13, 1976 and spoke with two supervisors. There is a dispute as to what was said. Claimant contends she mentioned cutting the Christmas tree, but denies she stated that this caused her back pain. The two supervisors testified claimant had told them she injured her back cutting the tree and her employer was "in the clear". Two other co-workers testified claimant also had told them she hurt her back helping her fiance cut the Christmas tree.

Dr. Harpole examined claimant on December 14, 1976 and found low back pain and lumbosacral spine spasms.

On January 10, 1977 x-rays revealed claimant has a con-

genital mild scoliosis which makes her unusually susceptible to back strain.

Claimant did not file a claim until January 21, 1977; it was denied on February 8, 1977 by the employer.

Dr. Rarey, a chiropractor, treated claimant on 2 consecutive days in late December and from the history he took, he thought the back strain was caused by yard work over the weekend.

Dr. Harpole's notes indicate claimant told him she had been moving heavy furniture over the weekend. This she denied.

The Referee found the claimant's claim not to be compensable and affirmed the employer's denial. He concluded claimant had filed her claim only after finding her back injury was more serious than she thought. The Referee found it hard to believe claimant told others of hurting her back while cutting the Christmas tree but, at the hearing, testified it was only a trivial matter and could not have caused her back problem. The Referee concluded that the claimant had not met her burden of proof to establish the compensability of her claim and he affirmed the employer's denial.

The Board, after de novo review, finds, based on all the evidence presented at the hearing, that claimant failed to meet her burden of proof that her claim was compensable. Therefore, the Board affirms the Referee's order.

ORDER

The Referee's order, dated June 2, 1977, is affirmed.

WCB CASE NO. 77-2280

JANUARY 24, 1978

CAROLYN BRIGHT, CLAIMANT
Flaxel, Todd & Nylander, 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 April 7, 1977 Determination Order granting her 32° for 10% unscheduled left shoulder disability. Claimant contends that this award is 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 August 18, 1977, is affirmed.

WCB CASE NO. 77-2347

JANUARY 24, 1978

FAY V. CARVER, 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 April 11, 1977 Determination Order granting claimant no increase in permanent disability above the 20% already awarded.

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 22, 1977, is affirmed.

WCB CASE NO. 77-185

JANUARY 24, 1978

ORVILLE F. DAHRENS, CLAIMANT
Ronald K. Pomeroy, 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 claimant's claim to it for acceptance and payment of 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 July 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 Fund.

WCB CASE NO. 76-5420

JANUARY 24, 1978

JANIE HALL, CLAIMANT
Bert Gustafson, 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 96° for 30% unscheduled neck and left shoulder 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 July 26, 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 Fund.

WCB CASE NO. 76-5239

JANUARY 24, 1978

LEIGH A. HUGHES, CLAIMANT
Marvin S. Nepom, 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 September 23, 1976 Determination Order granting him 32° for 10% unscheduled neck and back disability. Claimant contends that at the time of the first Determination Order, entered February 26, 1975, he was not medically stationary and therefore, that order should be set aside. He also feels that the award granted by the Referee is inadequate to compensate him for his 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 June 30, 1977, is affirmed.

WCB CASE NO. 76-7175

JANUARY 24, 1978

LeROY KAMMERER, CLAIMANT
Robert Morgan, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
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. 77-1575

JANUARY 24, 1978

EARL LARRISON, CLAIMANT
Souther, Spaulding, Kinsey, Williamson
& Schwabe, 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 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 July 21, 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 Fund.

RALPH MADRIL, CLAIMANT
Dye & Olson, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Roger R. Warren, Defense Atty.
Request for Review by Claimant
Cross-appeal by Emp. Ins. of Wausau
Cross-appeal by EBI Companies

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which found claimant's condition was an aggravation and remanded the claim to Employers Insurance of Wausau for acceptance and payment of compensation. Claimant contends, as does Employers Insurance of Wausau on cross-appeal, that his condition is actually related to a new injury and Employee Benefits Insurance should be responsible therefor; also, penalties and attorney fees should be assessed. EBI contends, on cross-appeal, that the Referee's order should have provided for full reimbursement to it for all payments of compensation previously made by it.

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 4, 1977, is affirmed.

LILLIAN G. POWELL, CLAIMANT
Phipps, Dunn & Mobley, Claimant's Atty.
Merlin Miller, 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 her a total award equal to 112° for 35% unscheduled low back disability. Claimant contends this award is 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 July 14, 1977, is affirmed.

DAVID RICHARDS, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Atty.
Jack Mattison, 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 award equal to 48° for 15% unscheduled low back disability. Claimant contends this award is 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. However, it should be noted that in paragraph two of page two, the words "2 years" should be corrected to read "2 terms".

ORDER

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

MYRNA ANDERSON, CLAIMANT
Don G. Swink, Claimant's Atty.
Roger Warren, 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 her an additional 19.2° for 10% low back disability and 33° for 30% loss of function of the left leg. Claimant contends that this award is inadequate.

Claimant suffered an injury to her low back on February 8, 1967 while lifting a surgery patient. She filed a claim which was initially denied. Claimant requested a hearing and, as a result of the hearing, a hearing officer, on November 15, 1967, remanded the claim to the carrier to be accepted for payment of compensation as provided by law. Prior to this, claimant had undergone a lumbar laminectomy.

Claimant's claim was first closed by a Determination Order entered April 7, 1969 which awarded claimant 19.2° of a maximum of 192° for unscheduled disability. Claimant was dissatisfied with the adequacy of this order and requested a hearing. After the hearing, the hearing officer, on August 26, 1969, increased claimant's award to 48.0° for 25% of the maximum for

unscheduled disability.

Claimant returned to work. In January 1971 claimant had increased pain in her low back and left leg and was seen by Dr. Hiestand who diagnosed recurrent herniated disc related to the 1967 injury. Dr. Hiestand performed a laminectomy on February 9, 1971 and recommended that the claim be reopened.

On May 4, 1971 a stipulation was entered into by the parties whereby claimant's "application for aggravation" was accepted by the carrier.

Following the second surgery, claimant returned to work but her condition worsened and on May 16, 1974 she underwent further surgery performed by Dr. Smith and Dr. Langston. On March 5, 1976 Dr. Langston did a final evaluation for claim closure and on June 1, 1976 a Second Determination Order awarded claimant an additional 19.2° for her unscheduled low back disability. Claimant was dissatisfied with the amount of this award and requested a hearing. After that hearing, the Referee awarded an additional 19.2° for the unscheduled disability and 33° loss use of the left leg by an order dated March 9, 1977.

The Board, on de novo review, concurs with the conclusion reached by the Referee insofar as it relates to the extent of claimant's disability. However, the Board does not agree with the Referee's opinion that this is actually an aggravation claim. Claimant's claim was initially closed on April 7, 1969 and her aggravation rights would have expired on April 6, 1974 but on May 4, 1971, within the 5-year period, the claim was reopened by an approved stipulation, therefore, claimant was entitled to have her claim closed pursuant to ORS 656.268 when her condition again became medically stationary.

Her claim was closed pursuant to ORS 656.268 by a Determination Order dated June 1, 1976. The proper procedure for closure of claimant's claim at that time was pursuant to the provisions of ORS 656.268 inasmuch as the provisions of ORS 656.273, relating to the filing of a claim for aggravation, had been tolled by the reopening on May 4, 1971.

Claimant could not have filed a claim for aggravation after April 6, 1974 had the statute not been tolled and once the claim was closed after the reopening within the 5-year period claimant's only remedy was to request a hearing on the adequacy of the award made by the Determination Order withi

the award made by the Determination Order within one year after the entry thereof.

ORDER

The order of the Referee, dated March 9, 1977, is affirmed.

DEWEY KENNEDY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, a road department laborer, suffered a compensable injury on September 19, 1968 when a co-worker accidentally dropped a "scoop bucket" on his head. Dr. Schwan found pain, tenderness and restriction of motion in both the cervical and lumbar spinal area with muscle splinting. There were no fractures although an anomalous 6th lumbar vertebrae was seen. Dr. Smith saw claimant on June 2, 1969 and believed that he was medically stationary although physical complaints were still present.

On June 18, 1969 the claim was closed with an award of 16° for 5% unscheduled disability. Time loss benefits were commenced on July 8, 1971 as a result of claimant's increase in symptoms.

After consulting several doctors, claimant was seen by Dr. Shlim on August 30, 1972. Dr. Shlim indicated that further treatment would not help claimant's condition. The claim was again closed on September 14, 1972 with an additional award of 16° for 5% unscheduled disability.

Dr. Donald Smith, on January 26, 1973, requested that claimant's claim be reopened as his problems were continuing. Dr. Mason performed a myelogram, finding a small defect at L4-5 bilaterally, but essentially finding the procedure negative. It was generally agreed among claimant's doctors at that time that his subjective complaints were excessive for the objective findings.

Dr. Seres, of the Pain Clinic, saw claimant and indicated that claimant was not interested in helping himself solve the distress he was suffering and recommended claim closure to motivate claimant. The Third Determination Order, dated April 10, 1974, granted claimant no additional award for permanent disability.

Claimant underwent a second myelogram in February 1976 and, on April 28, 1976, an exploratory laminectomy and fusion were performed. Claimant progressed well and was released for light work on October 11, 1976. Claimant returned to work as a carpenter, but in January 1977 he was taken off work temporarily by Dr. Rankin who felt claimant was pushing himself too hard. He was released again in March 1977, although with caution.

Dr. Rankin's closing examination of September 22, 1977 revealed that the fusion was solid, abdominal musculature was excellent, motion in the low back was reduced as was expected, and no major neurological abnormality was present. After a full

work day, claimant usually had soreness and aching in his back and riding in his pickup truck aggravated his symptoms.

Dr. Schwan indicated that claimant was presently self employed remodeling and doing cabinet carpentry.

On October 5, 1977 the Fund requested a determination of claimant's claim. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted compensation for temporary total disability from January 26, 1976 through October 10, 1976, less time worked, and from January 10, 1977 through March 27, 1977 and compensation for temporary partial disability from October 11, 1976 through January 9, 1977 and from March 28, 1977 through September 22, 1977. It also recommends that claimant be awarded an additional 48°, giving claimant a total award of 80° for 25% unscheduled disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 26, 1976 through October 10, 1976, less time worked, and from January 10, 1977 through March 27, 1977, and compensation for temporary partial disability from October 11, 1976 through January 9, 1977 and from March 28, 1977 through September 22, 1977.

Claimant is granted an award equal to 48°. This is in addition to any previous awards claimant has received for this injury of September 19, 1968.

SAIF CLAIM NO. BC 201515 JANUARY 26, 1978

LARRY A. KENNISON, CLAIMANT
SAIF Legal Services, Defense Atty.
Own Motion Determination

Claimant, on August 22, 1969 suffered a compensable injury to his right hand from a broken band saw blade. On that day, Dr. Reid sutured the extensor pollicis brevis tendon to the right thumb and the right hand and forearm were immobilized with the right thumb in hyperextended position.

Claimant returned to work on October 16, 1969, but was laid off after a little more than a week. On December 4, 1969 he grabbed a calf which jerked away from him reinjuring his right thumb. He saw Dr. Reid on December 6, at which time he could not completely hyperextend the right thumb and he complained of some pain when he attempted to touch his right thumb to the right fifth finger.

On February 5, 1970 Dr. Cooper, a medical examiner for the Fund, considered claimant medically stationary and recommended closure. He noted that the interphalangeal joint of the thumb flexed 50° from the neutral position as compared to 65° in the uninjured thumb.

The March 24, 1970 Determination Order granted claimant compensation equal to 7° for partial loss of the right thumb.

Claimant requested that his claim be re-evaluated by the carrier on February 15, 1977. Dr. Harwood's examination of March 7, 1977 revealed no worsening of claimant's impairment and he did not find any need for further treatment. Again, on September 15, 1977, claimant requested that the Fund forward his claim to the Department for re-evaluation.

On September 19, 1977 the Fund requested a determination of claimant's claim. The Evaluation Division of the Workers' Compensation Department recommended, based on Dr. Harwood's report, that claimant be granted no additional compensation.

The Board concurs with this conclusion.

ORDER

The Determination Order, dated March 24, 1970, is hereby reaffirmed.

WCB CASE NO. 77-103 JANUARY 26, 1978

H. C. MARTIN, CLAIMANT
Robert J. Morgan, 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 to be permanently and totally disabled.

Claimant, a 43-year-old welder, suffered a compensable injury to his back on August 14, 1967 when he lifted and pushed some type of a heavy wheel.

Dr. Daack, on August 15, 1967, diagnosed an acute lumbar myositis and an acute lumbosacral strain. Dr. Rask, an orthopedic surgeon, believed claimant had a lumbosacral sprain with severe sciatica. Dr. Rask advised claimant to wear a back support and conservatively treated him for the next two years.

Dr. Hickman, in May 1969, reported that emotional factors were interfering with claimant's rehabilitation, but felt claimant had an average intelligence and the prognosis for rehabilitation was fair to good.

The Physical Rehabilitation Center found claimant's physical condition to be stationary on June 12, 1969.

Claimant attempted to go back to work as a welder in August of 1969, but experienced low back pain and Dr. Rask felt he was not stationary at that time.

On January 29, 1970 claimant was examined by the members of the Back Evaluation Clinic who found lumbosacral instability with sprain of muscles and ligaments of the lumbosacral joints, superimposed upon a congenital variation which consists of incompletely sacralized last lumbar vertebra on both sides. Claimant was referred to Dr. Rask for a myelogram and probable surgery.

Dr. Rask, on April 30, 1970, performed a two level fusion L5-6, L6-S1 and a laminectomy L5-L6 on the right with decompression of the L5 nerve root on the right. Claimant continued under Dr. Rask's treatment.

Claimant was again seen by the Back Evaluation Clinic on December 9, 1971 and they diagnosed chronic low back strain, pseudoarthrosis following fusion L5 and L6 and possibly pseudoarthrosis L5 and S1. The x-rays revealed some motion in the area of claimant's fusions and suggested consideration of a re-fusion. They did not feel claimant was able to return to his former occupation.

Dr. Hickman, who examined claimant in February of 1972, reported that the prognosis for rehabilitation and restoration was poor, based on the amount of time claimant had been off work and his depressive state.

Dr. Logan, who had examined claimant in February 1972, reported on November 22, 1972 that claimant was not a good candidate for more surgery and suggested his claim be closed. He noted claimant had a two level nonunion of a spinal fusion. Claimant was continuing his use of pain medication.

Dr. Hickman, in January 1974, said that it was highly doubtful claimant would ever again return to full time gainful employment. He noted claimant's emotional status had deteriorated to the point it seemed unlikely he would be able to hold any kind of job even if it were offered to him.

Dr. Toon, of the Disability Prevention Division, found claimant stationary on February 1, 1974, stating claimant could not return to his former occupation, but was capable of doing some work. He rated the loss of function to claimant's back as mildly moderate.

A Determination Order, dated February 27, 1974, granted claimant compensation for temporary total disability and 112° for 35% unscheduled back disability.

Dr. Quan saw claimant on May 7, 1974 and diagnosed an inadequate personality disorder, chronic and mild, and a depressive neurosis, chronic and mild. He felt that these two conditions would not prevent claimant from working and said they resulted in only 5% impairment of the whole man.

A compromise settlement was approved on June 26, 1974 which increased claimant's award to 176°.

Dr. Grewe began to treat claimant in early 1974. He performed a myelogram and thereafter performed a lumbar laminectomy on October 25, 1974 to correct a nonunion of the transverse process fusion L4-5 sacrum (or L5-L6 sacrum).

Dr. Blachy, a psychiatrist, in May 1975, thought claimant was a poor candidate for rehabilitation. Claimant's problems were: (1) minimal regular work habits, (2) psychological musculoskeletal disorder, (3) passive-aggressive personality, (4) borderline intellectual resources and (5) his status after his lumbar laminectomy.

Dr. Logan stated on November 26, 1975 that claimant was permanently and totally disabled. Dr. Grewe concurred with this opinion on March 21, 1977.

Claimant was examined on March 31, 1976 by the Orthopaedic Consultants who suggested the Pain Clinic as had Dr. Grewe in February of 1976. They felt the claimant was not medically stationary, but capable of some form of work.

Dr. Grewe reported on August 24, 1976 that claimant was stationary and claimant had refused to go to the Pain Clinic.

A Second Determination Order, dated December 23, 1976, granted claimant only compensation for temporary total disability.

The Referee found claimant to be permanently and totally disabled, based on the reports of Drs. Logan and Grewe. He concluded the claimant had established a prima facie case that he was in the odd-lot category and the employer had failed to show there was some kind of suitable work regularly and continuously available for the claimant; therefore, the Referee concluded the claimant was permanently and totally disabled.

The Board, after de novo review, affirms the Referee's order. Claimant has made his prima facie case of being within the odd-lot category, based on all the medical evidence and the employer has failed to rebut that case by showing there is some kind of gainful employment regularly and continuously available to the claimant. In fact, the employer in this case has done nothing to assist

claimant in returning to the labor market, either through retraining or job placement.

ORDER

The Referee's order, dated April 26, 1977, is affirmed.

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

WCB CASE NO. 76-3125

JANUARY 26, 1978

LEO J. NEILAN, JR., CLAIMANT
Galton, Popick & Scott, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On January 12, 1978 the Board received a Request for Reconsideration of the Board's Order on Review entered in the above entitled matter on January 5, 1978 on the ground that the request for Board review had been initiated by the State Accident Insurance Fund and that the compensation awarded claimant had not been disallowed nor reduced, therefore, claimant's attorney was entitled to a reasonable attorney's fee payable by the Fund for his services performed at the Board level.

The Order on Review reversed that portion of the Referee's order that directed the Fund to pay claimant an amount equal to 10% of the sum determined by the Referee to be due to Travelers Insurance Company from the Fund. The Board, after due consideration, concludes that this amount constitutes a diminution of compensation awarded claimant by the Referee's order, therefore, the provisions of ORS 656.382(2) are not applicable.

ORDER

The claimant's Request for Reconsideration of the Board's Order on Review entered in the above entitled matter on January 5, 1978 is hereby denied.

THOMAS PAGE, CLAIMANT
Roger Gould, Claimant's Atty.
SAIF, Legal Services, 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 affirmed the Determination Order, dated July 26, 1977, awarding claimant 7.5° for 5% loss of the left leg.

Claimant, a 23-year-old tree planter, suffered a left knee injury December 22, 1975. An arthroscopy and arthrotomy were performed by Dr. Anthony A. Smith on February 18, 1976 with excision of a torn lateral meniscus. Claimant returned to work with some limitation due to pain and swelling.

Dr. Smith, after an examination of claimant on December 2, 1976, stated that claimant now suffers from a residual disability, categorized as mild. The only issue before the Board is what award of compensation should be granted to claimant based on the uncontradicted opinion of claimant's physician that claimant's disability is "mild".

After de novo review, the Board finds, based on claimant's testimony and the medical evidence, that the disabling residual effect on claimant's knee has affected claimant's personal efficiency and his activities. The Board regards an award of 5% permanent partial disability to be indicative of very "minimal" disability. Certainly "minimal" is not "mild".

The Board concludes that claimant is entitled to 22.5° for 15% loss of his left leg.

ORDER

The order of the Referee, dated July 26, 1977, is modified.

Claimant is granted 22.5° of a maximum of 150° for loss of the left leg. This award is in lieu of the award made by the Referee's order which in all other respects is affirmed.

Claimant's attorney is granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation as paid, not to exceed \$2,300.

ROBERT PALMER, 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 Phillips.

Claimant seeks Board review of the Referee's order which granted him an award equal to 112° for 35% unscheduled low back disability. Claimant contends he is permanently and totally disabled.

Claimant was a 60-year-old park ranger when he suffered a compensable injury to his low back on June 6, 1975; a door he was carrying was caught by a gust of wind causing claimant to twist suddenly.

Dr. Luce, on June 18, 1975, diagnosed acute lumbosacral strain, superimposed upon degenerative disc disorder at L3, L4 and L5 and admitted claimant to a hospital for pelvic traction. A myelogram of August 6, 1975 disclosed spondylosis L4-5 and L5-S1 with a narrowing of the canal and possible disc herniation at that level as well.

On August 11, 1975 Dr. Luce performed a decompressive laminectomy L-5 total, subtotal at L4 and a foraminotomy of L4, L5 and S1 nerve roots bilateral.

Claimant was discharged from the hospital on August 24, 1975. Dr. Luce reported on February 26, 1976 that the claimant was medically stationary and the maximum benefit of the treatment had been reached. Dr. Luce stated the objective evidence of impairment in the lumbar area was moderately severe, but subjectively it was considered mildly moderate. He released the claimant for work with the qualification that all heavy lifting, prolonged bending, stooping and twisting be avoided.

A Determination Order, dated April 29, 1976, as amended, awarded claimant 64° for 20% unscheduled back disability.

Dr. Luce, upon the Fund's request, examined claimant on August 5, 1976; his impressions were the same as those contained in his February 26 report. He commented, however, that claimant had attempted to return to work, but the limitations imposed on him precluded his reemployment.

Claimant had contacted the Division of Vocational Rehabilitation, but was informed he was too old (61) for their program. Claimant has an eighth grade education and has a GED. Most of the

claimant's work experience has been in outdoor - heavy labor types but he has done some lighter-type work. He has not had any training in trades. Dr. Luce noted that permanent total disability should be considered.

Claimant had had prior to this injury a subtotal laminectomy C6, hemilaminectomy C7, foraminotomies, bilateral C6-7 and a lateral foraminotomy on the right side C6-7. He had been released for work on January 2, 1973 with no apparent residuals. Claimant has not returned to work since this June 1975 injury.

Claimant currently takes no medication and is not under medical care but he has constant pain in his low back and hips down into his legs and feet. He does experience some numbness in his legs. Claimant has difficulty in standing, lifting and bending. He testified he could do 2-3 hours of work daily but not on a steady basis, however, he could do lighter type jobs for a longer period.

The Referee found the medical evidence did not indicate claimant was permanently and totally disabled. Dr. Luce found objective evidence of impairment in the lumbar area to be moderately severe, but released claimant back to work with some qualifications. The Referee concluded, based on the medical evidence, that the claimant could do some light work, but could not return to his old job where full activities were necessary. He found claimant's loss of future earning capacity entitled claimant to a greater award than that granted by the Determination Order and he increased claimant's award from 64° to 112° for 35% of the maximum for unscheduled disability.

The Board, after de novo review, finds that Dr. Luce's reports indicate that the claimant has a moderately severe impairment to his back as a result of his June 1975 injury.

The Board concludes, based on the medical evidence and claimant's testimony, that claimant is entitled to an award equal to 160° for 50% unscheduled disability to his low back.

ORDER

The Referee's order, dated February 28, 1977, is modified.

Claimant is awarded compensation equal to 160° for 50% unscheduled low back disability. This award is in lieu of the award made by the Referee's order which in all other respects is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order payable out of said compensation as paid, not to exceed \$2,300.

ROBERT VanCleave, CLAIMANT
Bloom, Chaivoe, Ruben, Marandas & Berg,
Claimant's Atty.
A. Thomas Cavanaugh, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which refused his claim for additional temporary total disability and granted him an award of compensation equal to 80° for 25% unscheduled disability for his back injury.

Claimant contends his claim was prematurely closed because he was (1) not medically stationary, (2) was in a vocational rehabilitation program, and (3) is entitled to an award at least equal to 180° for 50% unscheduled disability to his back.

Claimant, a 46-year-old long haul truck driver, sustained a compensable injury to his low back and left hand on February 25, 1971 when the truck he was driving was involved in a collision accident. Claimant was subsequently given conservative treatment by Dr. Goodwin who released claimant to return to work on May 10, 1971.

Claimant was found medically stationary on December 27, 1971 by Dr. Goodwin.

A Determination Order, dated February 1, 1972, awarded claimant compensation equal to 16° for 5% unscheduled disability to his back and 1° for partial loss of the left index finger.

Claimant continued to have trouble with his back and in December 1974 was examined by Dr. Rinehart, who treated him for post-traumatic muscle spasm. Dr. Rinehart thought this condition was a result of claimant's 1971 injury.

The Orthopaedic Consultants examined claimant on March 11, 1975 and diagnosed a mid-dorsal sprain with intermittent right postural fasciitis in the dorsal area. They recommended claimant continue for 2-3 months with Dr. Rinehart. They felt claimant was not stationary.

Dr. Rinehart continued to treat claimant and reported on October 17, 1975 claimant would be required to change jobs and was being referred to Vocational Rehabilitation for retraining in a more sedentary occupation.

Dr. Cottrell diagnosed in October 1975 a deformity of the dorsal spine and degenerative disc disease at the lumbosacral level. He felt claimant could do moderate work, but he should change his occupation from truck driving.

Dr. Specht, in November 1975, reported no physical findings to account for claimant's symptoms for nearly five years; claimant could return to his former occupation with the qualification that he not lift more than 35 pounds. Dr. Specht believed claimant did not have any permanent disability as a result of his accident.

The Orthopaedic Consultants reexamined claimant on May 17, 1976 and diagnosed mid-dorsal sprain, right, with degenerative osteoarthritis asymptomatic at that time, sprain over the right scapular area, inferior medial border of the rhomboid area and old ankle injury. They said that claimant was stationary and claimant could return to his truck driving if he didn't have to do any lifting. They rated his loss of function of his back as mild.

A Determination Order, dated July 9, 1976, granted claimant temporary total disability from December 22, 1974 through May 13, 1976 and an award of compensation equal to 16° for 5% unscheduled disability to his upper back and right shoulder as a result of his 1971 injury.

Claimant, in August 1976, entered a vocational rehabilitation program and obtained a license to sell real estate and also a GED.

Claimant is now 52 years old and has worked all but 3 years of his working life driving a truck. He has been employed on a commission basis with a real estate company since February 1976 but has not yet earned any income. Claimant's current complaints are pain in the upper middle spine which has spread down his spine into his right shoulder and affects the right hand and arm, a problem with his equilibrium and headaches. All his symptoms are increased by long periods of driving, bending, twisting and sitting.

The Referee found no evidence in the record to support the reopening of claimant's claim. Three orthopedic surgeons had found claimant medically stationary and not in need of any further treatment. The Referee, applying the law in effect at the time of claimant's injury, found claimant was not entitled to temporary total disability while he was in a program of vocational rehabilitation.

The Referee concluded, based on claimant's loss of earning capacity resulting from his inability to return to his former employment or any employment requiring heavy lifting, that claimant was entitled to an award of 80° for 25% unscheduled disability to his back.

The Board, after de novo review, finds, based on all of the evidence, that the claimant suffered a greater loss of earning capacity than that for which he was awarded by the Referee. Claimant is barred from returning to his former occupation or to any occupation requiring heavy lifting.

The Board concludes, based upon the medical evidence, that claimant's loss of wage earning capacity is more adequately compensated for by an award of 128° for 40% unscheduled disability.

ORDER

The Referee's order, dated April 25, 1977, is modified.

Claimant is awarded 128° for 40% unscheduled back disability. This is in lieu of the award made by the Referee's order, which in all other respects is affirmed.

Claimant's attorney is granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed \$2,300.

WCB CASE NO. 77-1196

JANUARY 26, 1978

JERRY R. WOLFE, CLAIMANT
Doblie, Bischoff & Murray, 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 claimant's claim to it for acceptance and payment of 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 July 29, 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.

JANUARY 26, 1978

FRANK YOUNG, CLAIMANT

Doblie, Bischoff & Murray, Claimant's Atty.

Souther, Spaulding, Kinsey, Williamson &

Schwabe, Defense Atty.

Request for Review by Claimant

Reviewed by Board Members Wilson, Moore and Phillips.

Claimant seeks Board review of the Referee's order which granted him 288° for 90% unscheduled low back disability. Claimant contends that he is permanently and totally disabled.

On September 15, 1975 claimant suffered a compensable injury when the brakes on his truck failed causing him to hit a rock which in turn caused the truck to go into the side of a ditch. As a result of this accident, claimant commenced having increased pain and discomfort in his low back which radiated down his right leg; this pain was intermittent and severely aggravated by standing and walking. Claimant has not worked since the date of his injury.

Claimant's primary treating physician was Dr. Woolpert, an orthopedic surgeon, who treated claimant conservatively and, on October 10, hospitalized claimant for bed rest, traction and therapy. Claimant's condition did not improve and Dr. Woolpert referred him to Dr. Anderson who performed a myelogram which did not indicate a need for surgery. Claimant was given a back brace which he continues to wear almost constantly and he has continued to receive treatment from Dr. Woolpert.

Claimant was enrolled in the Disability Prevention Center between September 28 and October 7 and during this enrollment demonstrated a very hostile and uncooperative attitude according to Dr. Vizzard, a clinical psychologist at the Center. Claimant was also examined at the Center by Dr. Holm, an orthopedic physician, who felt that claimant's vocational handicap was severe and because of his multiple impairments claimant was unable to tolerate the exercise and physical therapy and the occupational therapy schedule. He noted that claimant had qualified for total disability under Social Security sometime prior to his admission to the Center.

The vocational team, after considering claimant's numerous physical problems, psychological make-up, attitude, and age, concluded that retraining or referral to Vocational Rehabilitation for training was not reasonable nor feasible and the Center had no further specific treatment to offer.

In a report, dated October 12, 1976, Melinda Reed, a certified occupational therapy assistant at the Disability Prevention Center, stated that claimant was uncooperative, had a poor attitude and was a "manipulator". She testified that she did not feel claim-

ant was "manipulating" with regard to his physical complaints but that he seemed to come to the Center with a very closed mind and tended to tell people just what he would do and what he would not do; that was her basis for calling him a manipulator.

Claimant was also examined by Dr. Quan, a psychiatrist, whose impression was that claimant had a personality disorder, chronic but passive aggression as aggressive features, anxiety, neurosis, chronic-mild, all apparently related to the injury. Dr. Quan thought the major dysfunction was the personality disorder and some degree of anxiety was brought on by the accident, however, the anxiety, by and of itself, would not preclude claimant from returning to work and if claimant had no physical difficulties there would be no problem with any anxiety.

A service coordinator in Roseburg reported on November 23, 1976 that claimant did not seem to be motivated and that she had closed her file on him. She also testified at the hearing, stating that, initially, claimant was quite cooperative and she felt that some progress had been made, however, claimant was still under the medical treatment of Dr. Woolpert and could not do very much. After he was released she stated she had never contacted claimant or talked with him before she closed her file on him.

Claimant testified that he had made no attempt to return to work because there was simply nothing that he could do; he felt that he was in such pain that he could not possibly go back to operating heavy equipment. Claimant has operated heavy equipment since 1945 and he was able to continue that type of work until his initial industrial injury suffered in 1968 and which required two laminectomies.

Claimant has a 10th grade education and subsequent to the 1968 industrial injury, which required the surgeries, claimant, in 1973, had a total left hip replacement. The Referee observed claimant moving around the hearing room without any unusual amount of discomfort and also sitting, while testifying, for a prolonged period of time.

The Referee found claimant was not permanently and totally disabled. The claimant was 57 years old, reaching retirement age and felt that he could not return to work because of the injury to his back. Although his treating physician seems to agree with claimant, the Referee felt that claimant's real problem was that he did not want to work with pain; that he had worked all of his life at hard labor and felt it was not worth tolerating continued pain in order to return to the labor market.

The Referee concluded that claimant apparently has no intention to return to a gainful useful occupation. However, the Referee found claimant to be extremely disabled; he unquestionably cannot return to any job which he had been able to perform prior to his injury and therefore would have to be retrained to do a sedentary type job. For this reason, claimant's earning capacity has

been greatly affected by his industrial injury necessitating him to take a job at low pay. Additionally, claimant has many physical handicaps which have previously been referred to and these prior surgeries, when considered with his present industrial injury, have certainly taken their toll on claimant; nevertheless, the Referee concluded that claimant would have to show more desire, motivation, and cooperation to justify an award for permanent total disability as a result of his industrial injury. The case was originally closed by Determination Order dated November 12, 1976 whereby claimant was awarded 240° for 75% unscheduled low back disability. The Referee felt the evidence justified an increase in this award and therefore granted claimant 288° for 90% unscheduled low back disability.

The majority of the Board, on de novo review, finds that claimant is permanently and totally disabled. The Referee apparently assumed that claimant had to demonstrate a proper motivation before he was entitled to an award for permanent and total disability. There are two types of permanent total disability: (1) that arising entirely from medical or physical incapacity; and (2) that arising from physical conditions less than total incapacity plus non-medical conditions, which together result in permanent total disability. In the case before the Referee, the medical records demonstrate that claimant's physical incapacity is such as to render him permanently and totally disabled, therefore, motivation is irrelevant. Testimony, which was undisputed, persuasively indicates that claimant's injury has left him incapable of performing any services for which there exists a reasonable stable market. Claimant is now precluded from engaging in any activities which require lifting, sitting, walking, bending, or manual dexterity.

While it may be true that claimant appeared to be uncooperative while at the Disability Prevention Center, the Board finds that perhaps there was justification in his attitude when considering the types of retraining programs which were offered to him.

Dr. Woolpert testified that claimant's motivation with respect to returning to work was average; furthermore, that he found claimant cooperative in respect to the methods of treatment which he had outlined for him and that his medical findings ruled out the potential possibility of malingering. Dr. Vizzard, who first indicated the uncooperative attitude of claimant, later stated that claimant was a relatively rigid person who, because of this rigidity, had generated few positive resources in his life. Since he did not particularly like dealing with others, but chose to take a reticent and somewhat distant approach in dealing with them, claimant has focused to a great extent on deriving pleasure from his work. Now that claimant can no longer do the work which he enjoyed, it has caused complications. Dr. Vizzard concluded that claimant had been both frustrated and frightened.

Dr. Quan did not indicate that claimant was uncooperative or lacked proper motivation although he did indicate that claimant worried at times about not being able to go back to work.

If the medical evidence relating to claimant's physical incapacity by itself does not justify an award for permanent total disability, the evidence regarding the non-medical conditions would be sufficient to justify such an award. The claimant's age, training, aptitude, adaptability to non-physical labor, mental capacity and emotional condition, combined with his physical incapacities, would be sufficient to render him unable to regularly perform a suitable and gainful occupation.

ORDER

The order of the Referee, dated July 27, 1977, is modified.

Claimant is considered to be permanently and totally disabled as of the date of this order. This award is in lieu of the award made by the Referee's order which in all other respects is affirmed.

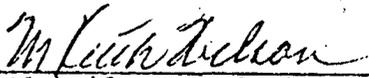
Claimant's attorney is hereby granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation, payable out of said compensation as paid, not to exceed \$2,000.

Chairman M. Keith Wilson dissents as follows:

The Opinion and Order of the Referee, a copy of which is attached hereto, should be affirmed and adopted by the Board.

The claimant is being permitted by the majority of the Board to dictate to the system which of the treatment modalities provided by our law he will accept and which he will refuse. This choice is deliberate and is one which the claimant in any given case has the right to make, but having foreclosed any opportunity for improvement in his physical and vocational condition, he should not be rewarded by a grant of permanent total disability.

There can be no question but that Mr. Young has serious disabilities, but society is entitled to his full cooperation toward reducing his physical and vocational limitations. This cooperation has not been extended by this claimant; the elaborate, expensive and comprehensive system of rehabilitation in Oregon has been frustrated by deliberate refusal to even give the system a fair trial, and an award of permanent and total disability is being made without the benefit of knowledge as to whether our program of physical and vocational rehabilitation would be of benefit to Mr. Young. He has determined that our program has nothing to offer him toward improvement of his situation. I disagree with him, at least until it has been given a fair chance. If Mr. Young is unwilling to participate, then in my view it is improper to determine him to be permanently and totally disabled.


M. Keith Wilson, Chairman

MARVIN EPLEY, CLAIMANT
Green & Griswold, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury while working at a service station on March 29, 1971. This claim was closed by a Determination Order, dated July 14, 1971, which granted claimant 16° for 5% unscheduled disability.

An Own Motion Order, dated June 13, 1977, remanded the claim to the carrier.

On January 28, 1977 claimant had undergone a laminectomy at the lumbosacral level and had been released to light work by Dr. Schwartz on March 23, 1977. On June 15, 1977 he was released for regular work.

Presently, claimant needs no further treatment, although after working long days he does require some medication for relief of pain. He is anticipating a move to another job where his job duties will be less demanding.

The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted temporary total disability benefits from January 28, 1977 through March 23, 1977 and temporary partial disability benefits from March 24, 1977 through June 15, 1977. It also recommends that claimant be awarded an additional 64° which would give claimant a total award of 80° for 25% unscheduled disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from January 28, 1977 through March 23, 1977 and for temporary partial disability from March 24, 1977 through June 15, 1977, less time worked.

Claimant is granted an award of 64° for 20% unscheduled low back disability. This is in addition to the award granted by the July 14, 1971 Determination Order.

Claimant's attorney is granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, payable out of such compensation as paid, not to exceed \$2,000.

CLAIM NO. C604/23655/HOD JANUARY 30, 1978

LINDA HART, CLAIMANT
Malagon, Starr & Vinson, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Order

On January 19, 1978 the Board received from the employer and its carrier, by and through their attorney, a motion requesting a rehearing by the Board of the above entitled matter. The Board assumes this motion is to be construed as a motion to reconsider its Order on Review entered in the above entitled matter on January 4, 1978.

The Board, after giving full consideration to the facts set forth in the affidavit of the attorney and the memorandum of law submitted in support thereof, concludes that neither furnishes a sufficient basis for reconsidering its Order on Review.

ORDER

The motion received from the employer and its carrier by the Board on January 19, 1978 is hereby denied.

WCB CASE NO. 76-853 JANUARY 30, 1978

FRANK HUDSON, CLAIMANT
Burton J. Fallgren, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests Board review of a Referee's order which affirmed the employer's denial of claimant's aggravation claim.

Claimant is a 65-year-old workman with a long history of back problems dating back to 1939. California hospital records and V.A. hospital summaries indicate claimant had had a laminectomy in 1939, multiple admissions for low back and leg pain, and a fusion in 1952. Claimant has received a service connected disability award.

On March 25, 1972, claimant strained his low back while getting out of his truck in the course of his employment. After extensive conservative treatment, Dr. McGough performed a laminectomy on October 3, 1972, at which time the previous fusion was repaired because it was not solid.

By November 1973, Dr. McGough found claimant to be stable in terms of his disability and felt claimant could do some sedentary type of work, however, he questioned claimant's motivation and suggested claimant might wish to retire.

The Back Consultation Clinic found claimant's condition stationary and found loss of function due to this injury to be mildly moderate.

A Determination Order, issued on June 4, 1974, granted claimant 160° for 50% unscheduled disability. It was paid in a lump sum as requested by claimant.

In October 1975 claimant returned to Dr. McGough requesting that his claim be reopened for aggravation. Dr. McGough didn't feel that any surgical treatment was indicated nor was there any evidence that claimant's condition had worsened.

Claimant's claim for aggravation was denied January 7, 1976.

During April 1976 claimant consulted Dr. Bell, who hospitalized claimant for traction; this provided only temporary relief.

Dr. Wilson, in May 1976, stated claimant had some residual back and right leg pain but he did not feel there had been an aggravation of claimant's injury of March 25, 1972.

The Orthopaedic Consultants' report of July 5, 1977 indicated claimant's condition was stationary and his disability relatable to the industrial accident was "moderate". Claimant had previously received an award for 50% unscheduled disability. The Referee found claimant had not sustained his burden of proving his condition was worse now than on June 4, 1974.

The Board, after de novo review, finds that the medical records do not justify reopening this claim for aggravation. All of the medical treatment claimant has received since closure of his claim in 1974 has been palliative and is covered by ORS 656.245.

ORDER

The order of the Referee, dated August 5, 1977, is affirmed.

SAIF CLAIM NO. WC 60747 JANUARY 30, 1978

VIVIAN STENSON MCGEE, CLAIMANT
Malagon, Starr & Vinson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On December 21, 1977 an Own Motion Determination was entered in the above entitled matter whereby, based upon the recommendation of the Evaluation Division of the Workers' Compensation Department, claimant was granted 96° of a maximum of 192° for 30% unscheduled disability.

Subsequent to the entry of this order, the Board discovered that claimant's claim for the February 17, 1967 injury had been reopened on December 16, 1971 which was within the 5-year period for filing a claim for aggravation and which reopening had the affect of tolling the aforesaid 5-year period until claimant's claim was ultimately closed pursuant to ORS 656.268. A Determination Order was issued on July 7, 1972. Claimant had one year from the date of that order to request a hearing on the adequacy of the award made by it.

Claimant, within one year, did request a hearing and, as a result of said hearing, the Referee ordered claimant's claim reopened. Therefore, upon a finding that the claimant's condition is medically stationary, the claimant is entitled to have her claim closed pursuant to ORS 656.268 rather than ORS 656.278.

The Board concludes that its Own Motion Determination entered in the above entitled matter on December 21, 1977 should be rescinded and the Evaluation Division of the Workers' Compensation Department instructed to enter a Determination Order in conformity with its recommendation to the Board, dated December 12, 1977.

IT IS SO ORDERED.

WCB CASE NO. 76-5310 JANUARY 30, 1978

WILLIAM PICKER, CLAIMANT
Milo Pope, 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 found the claimant to be permanently and totally disabled.

Claimant, at age 51, sustained a compensable injury to

his low back on May 16, 1974 while lifting a truck transmission. The original diagnosis was acute lumbar strain. Claimant was treated conservatively for this condition by Dr. Johnson who reported that claimant experienced backache and pain extending down the right hip into his leg, causing him to drag his right foot and numbness in his right leg if he attempted to operate a vehicle for any length of time.

A myelogram and an EMG examination resulted in normal findings.

Dr. Lester, an orthopedic surgeon, in March 1975, doubted that claimant could return to his prior heavy farm work, but said claimant was in no need of surgical treatment.

Dr. Pasquesi, after examining claimant on March 31, 1975, diagnosed chronic lumbosacral strain, chronic left sacroiliac strain and probably an unoperated disc with chronic moderate to severe pain and loss of muscle power. He found claimant medically stationary but suggested retraining for some type of work not requiring constant stooping, bending of his back, crawling and climbing or lifting more than 50 pounds. He felt claimant's total impairment was 14% of the whole man. Dr. Johnson had found claimant medically stationary on May 14, 1975.

Claimant was referred to the Vocational Rehabilitation Division, but his file was closed because his physical condition was getting worse. Dr. Johnson, in July 1975, agreed that claimant's symptoms would worsen with the passage of time. He indicated claimant's need for a different type of employment and believed that claimant's lack of a high school education might bar him from other occupations. He thought claimant was motivated to return to work, if the work would not aggravate his back.

On July 29, 1975 Dr. Halferty, at the Disability Prevention Division, examined claimant and reported his complaints were of low back and right leg problems, were aggravated by walking, riding or driving in a vehicle.

Dr. Perkins, a psychologist, found claimant had a 6th grade education, had average intelligence on non-verbal materials and high dull normal intelligence on verbal materials. Dr. Perkins opined claimant was a poor candidate for retraining if he had to avoid physical labor due to his age, poor aptitudes, and skills, although he appeared to be motivated to return to work.

Claimant had worked on a ranch for the last 20 years; he had worked for this employer for 13-14 years at the time of this injury.

A Determination Order, dated November 19, 1975, awarded claimant 224° for 70% unscheduled disability resulting from his low back injury.

Dr. Johnson, in August 1976, stated he felt claimant's condition would not improve and claimant was permanently disabled for work.

The Orthopaedic Consultants examined claimant on January 10, 1977 and diagnosed osteoarthritis of the lumbar spine, with chronic lumbosacral strain. They felt claimant was stationary and was not able to return to his former employment without stringent limitations, but that he could return to some other occupation not requiring excessive lifting, bending and stooping. They rated the total loss of function due to this injury as moderate.

Claimant's employer has offered to find employment for him on the ranch either on a part time or full time basis. The employer has contacted the claimant on at least two occasions, but the claimant never attempted to go back to work for this employer or to contact his employer.

The Referee found that the claimant had established a prima facie case of "odd-lot" status and that the employer had failed to meet his burden of proof to show that some kind of suitable work was regularly and continuously available to the workman. Therefore, he concluded that the claimant was permanently and totally disabled.

The Board, after de novo review, finds that although claimant had made a prima facie case that he fell within the "odd-lot" category, thereafter the employer met his burden of showing that some kind of suitable work was regularly and continuously available to the claimant.

The employer offered to find or to make a job which was suitable for claimant on a regular and gainful basis. However, the claimant made no attempt to work at this job offered by this employer. Claimant is obligated to at least try to do the job and to determine if he can do it or if the job was too much for him.

The Board concludes that the claimant had been adequately compensated for his loss of wage earning capacity by the Determination Order which had given claimant 70% of the maximum for his un-scheduled disability.

ORDER

The Referee's order, dated June 13, 1977, is reversed.

The Determination Order, dated November 15, 1975, is affirmed.

SAIF CLAIM NO. FC 171222 JANUARY 30, 1978

FRANK REID, CLAIMANT
Allen G. Owen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Order

On January 12, 1978 an Own Motion Order was entered in the above entitled matter. The order neglected to award claimant's attorney a reasonable attorney fee for his services in obtaining own motion relief and, therefore, should be amended accordingly.

On page 2 of the Own Motion Order, immediately following the first paragraph, the following paragraph should be inserted:

"Claimant's attorney is awarded as a reasonable attorney's fee for his services in obtaining the reopening of claimant's claim a sum equal to 25% of the compensation which claimant shall receive as a result of this order, including both compensation for temporary total disability and permanent partial disability, if any, payable out of said compensation as paid, not to exceed \$2,000."

In all other respects the Own Motion Order, dated January 12, 1978, should be reaffirmed and ratified.

IT IS SO ORDERED.

SAIF CLAIM NO. ZA 358022 JANUARY 30, 1978

LOREN E. REITLER, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On June 5, 1953 claimant sustained fractures of the right humerus and right femur in a logging accident. The right femoral fracture was complicated by osteomyelitis.

Claimant has been granted several awards, i.e., 20% loss function of the right arm, 60% loss function of the right leg and 40% loss function of an arm for unscheduled disability to the back.

Dr. Embick, on September 20, 1976, reported that claimant's osteomyelitis had recurred and he hospitalized him for treatment on September 24, 1976. A stipulation, dated June 3, 1977, accepted the claim and time loss benefits were commenced from the

date claimant was hospitalized. He was released for work on November 24, 1976.

Dr. Embick's examination of November 11, 1977 found claimant's permanent disability unchanged.

On January 12, 1978, the Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommended that claimant be granted temporary total disability compensation from September 24, 1976 through November 24, 1976. They felt he already had been adequately compensated for his permanent disability.

The Board concurs with this recommendation.

ORDER

Claimant is granted temporary total disability benefits from September 24, 1976 through November 24, 1976, less time worked.

Claimant's attorney is granted as a reasonable attorney's fee a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed \$500.

WCB CASE NO. 77-807-SI JANUARY 30, 1978

In the Matter of the Petition of
BOISE CASCADE CORPORATION
For Reimbursement From the
Second Injury Reserve Fund in the
Case of RAY F. ROSE
Souther, Spaulding, Kinsey, Williamson &
Schwabe, Employers Atty.
Norman Kelley, Defense Atty.
Order on Review

Reviewed by Board Members Wilson, Moore and Phillips.

On December 22, 1977 Referee Terry L. Johnson recommended that the Board affirm the Determination Order, dated June 28, 1977, which had denied a request by the employer, Boise Cascade Corporation, for second injury relief.

No exceptions or arguments against the Referee's findings of facts, conclusions of law and recommended order were filed within 30 days from the service of said order and the Board, after de novo review of the transcript of the proceedings, adopts as its own the findings, conclusions and recommended order of Referee Johnson, dated December 22, 1977.

ORDER

The Determination Order, dated June 28, 1977, is affirmed.

WCB CASE NO. 77-69

JANUARY 30, 1978

In the Matter of the Compensation
of the Beneficiaries of
VERNON WILLIAMS, DECEASED
Galton, Popick & Scott, Claimant's Atty.
Cheney & Kelley, Defense Atty.
Request for Review by the Beneficiaries

Reviewed by Board Members Moore and Phillips.

The beneficiaries of the deceased workman, hereinafter called claimant, seek Board review of the Referee's order which approved the denial of claimant's claim and also refused to grant claimant any other benefits. Claimant contends the claim is compensable and claimant is entitled to payment of funeral bills and penalties and attorney fees.

The decedent, at age 58, had been employed on January 29, 1976 as a security guard in a bank, stationed at a vault door from 10:00 a.m. to 6:00 p.m. He had been a conscientious and reliable worker. On January 29th, he had left home at his normal time and had appeared to be normal. However, during the day he had complained to one of the co-workers of a sore neck and shoulder and of not feeling well and feeling "choked up". He had not eaten a full lunch nor a piece of cake that was offered to him by a bank employee. The bank employee had sat with the decedent until 5:00 p.m. and had noted he had been less talkative than normal and appeared a little flushed and a little tired when she left at 5:00 p.m.

Around noon, the decedent and the bank employee had discovered a sizeable amount of cash unsecured outside of the bank vault and they had decided to secure the money. The bank employee noted the decedent had become upset over this incident.

The decedent had gone home at his usual time and had prepared dinner, cleared the dinner dishes off the table and had done some cleaning up in the kitchen. All of these activities were normal for the decedent.

The decedent had told his wife he did not feel well, he had a stiff neck, his jaw and teeth hurt, and he had difficulty swallowing. The decedent had prepared to retire at about 9:00 p.m. and had made two trips up and down the stairs in his home. His wife retired at about 10:00 p.m. and, noting that the decedent could not be awakened, had called for assistance. The decedent had died sometime before 10:00 p.m.

The decedent had been examined by Dr. Garvey in 1973 and the examination revealed hypertension, however, claimant had not complained to his wife of any symptomatology which might have been associated with this condition nor had he returned for continuing medical care and treatment. Dr. McNulty reported on December 28, 1976 that although no autopsy had been performed it was likely, though not definite, that the decedent had had significant coronary artery disease and a likely possibility was a terminal myocardial infarction. He listed three etiologic factors for coronary artery disease, two of which the decedent was known to have had, i.e., hypertension and smoking. The third factor, stress, is a less proven risk factor for heart disease. Furthermore, Dr. McNulty stated he had no evidence that decedent had undergone any undue or any unusual stress related to his work. He stated that there was evidence that the decedent had had heart disease in 1973 and he thought, therefore, as it related to the development of the coronary artery disease, decedent's employment was not a precipitating factor. He felt there were too many variables to state that a job had caused decedent's death.

To prove legal causation the claimant must show that the decedent had exerted himself in carrying out his job. In the instant case, the decedent had performed a sedentary type of work, described by fellow employees as not physically taxing. The decedent had been required to sit on a stool at a desk and to press buttons to open and close the doors to the restricted area. It was argued that the incident of the misplaced cash box created severe emotional distress, however, the evidence indicates that the decedent had been used to dealing with large sums of money and replacing it in its proper custody when found outside such custody.

The Referee found that claimant had failed to establish legal causation.

To establish medical causation the claimant must prove that the normal physical or emotional exertion was a material contributing factor which produced the decedent's death and through this claimant must furnish medical evidence of a probable causal relationship between the decedent's death and his employment. There was a difference of opinion with respect to medical causation. Dr. Griswold felt that there was probable causal relationship between the decedent's job and his death. Dr. McNulty was of the opinion that the decedent had had a significant coronary artery disease, he was also of the opinion that the decedent had died of a myocardial infarction and that, in the face of a chronic coronary artery disease, a sudden stress or work situation could precipitate such infarction; however, he stated it was not evident from the record available to him that the decedent had undergone any undue or unusual stress related to his work. Dr. Sutherland, at the request of the employer, testified that the decedent's activities on the last day of work had been usual and had not been at all strenuous for him. He did not feel that there was any information to suggest that the decedent had had a particularly severe emotional stress on that day.

All of the three doctors are eminent cardiologists, however, the Referee chose to be persuaded by the testimony of Dr. McAnulty and Dr. Sutherland and concluded that claimant had failed also to establish medical causation. The Referee concluded that the preponderance of the medical and lay evidence was that the decedent's heart attack had not been related to his work and the funeral and cemetery bills, therefore, were not covered, nor were death benefits, pursuant to ORS 656.204.

Claimant had filed a form 801 on January 28, 1976 which the carrier received on or about January 30, 1976 and sent it on to the employer to be completed. The employer found the form in its files about a year later. Thus there was a delay of about a year during which time there was neither an acceptance or denial of the claim nor any payment of compensation. The claimant was unsure how the form had been received although claimant had signed it at the same time as the retainer agreement with counsel was signed. The actual date that the employer denied the claim was January 12, 1977. Claimant testified that she called her counsel within a week after the death of the decedent and that she left the entire matter up to him to take care of.

The Referee concluded that, although it was obvious that the carrier was wrong and the employer was careless, there was no explanation for non-action on the part of the claimant or her counsel and he did not interpret the statute as allowing assessment of penalties or an award of attorney fees under such facts.

The Board, on de novo review, agrees with the Referee's findings and conclusion insofar as they relate to the denial of claimant's claim including the payment of funeral and cemetery bills; however, the Board finds that claimant is entitled to time loss benefits, penalties and attorney fees, based upon the delay of almost one year between the filing of the form 801 by claimant and the denial of the claim. The employer has the obligation to process the claim and it is obvious here it was negligent in carrying out this obligation. The Board concludes that payment for time loss should be made from January 29, 1976, the date of death, to January 12, 1977, the date of the employer's denial, plus an additional 5% of this sum. Claimant's attorney should be paid as a reasonable attorney fee the sum of \$500, pursuant to ORS 656.382.

ORDER

The Referee's order, dated April 21, 1977, is modified.

The claimant is granted an award for temporary total disability from January 26, 1976 through January 12, 1977.

Claimant is also granted an additional sum equal to 5% of the compensation for temporary total disability, pursuant to ORS 656.262(8).

Claimant's attorney is granted as a reasonable attorney

fee for his services before the Referee the sum of \$500 payable by the employer.

Claimant's attorney is granted as a reasonable attorney fee at Board review the sum of \$100, payable by the employer.

The Referee's order, in all other respects, is affirmed.

CLAIM NO. 000131

JANUARY 31, 1978

HARVEY BODDA, CLAIMANT
Order Referring Own Motion
Request for Hearing

On December 12, 1977 the Board received a request from claimant to reopen his claim for an industrial injury suffered on May 3, 1966 while employed by Hoyt Brothers, Inc., whose Workers' Compensation coverage was furnished by Reserve Insurance Company. Claimant's claim was accepted and the initial closure was made on September 30, 1968 by a Determination Order which awarded claimant compensation for 50% loss of the left foot. Claimant's aggravation rights expired on October 1, 1973.

In support of his request for own motion relief, claimant furnished to the Board chart notes of Dr. William J. Gallagher, an orthopedic surgeon, and also a medical record dated July 15, 1977. It appears from the medical record that claimant was initially seen by Dr. Boals and has also been treated by Dr. VanOlst.

On January 6, 1978 the Reserve Insurance Company was advised by the Board that claimant had requested that his 1966 claim be reopened; claimant had stated to the Board that his request to the carrier to reopen the claim had been denied. The letter also informed the carrier that the Board was unable to locate claimant's file. On January 10, 1978 the carrier responded, stating that the original claim number assigned by the Board was 000131 and the file for such claim should indicate that it has been reopened twice for aggravation. The response further indicated that claimant has filed additional Workers' Compensation claims for industrial injuries sustained while employed by Stuckart Lumber Company and while employed by Cedar Lumber Company; both companies are located in the vicinity of Mill City and Lyons. Reserve Insurance records indicated claimant's most recent injury occurred in May 1976 when a container was dropped on the same foot which was injured on May 3, 1966.

The Board does not have, at this time, sufficient evidence to justify a determination of the merits of claimant's request to reopen his claim for the injury of May 3, 1966. Therefore, this matter is referred to the Hearings Division with instructions to set the matter down for hearing, join all necessary parties and, thereafter, hold a hearing and take evidence on the merits of claim-

ant's request for own motion relief. Upon completion of the hearing, the Referee shall cause a transcript of the proceeding to be prepared and submitted to the Board together with his recommendations relating to claimant's request to reopen his claim for his May 3, 1966 injury.

WCB CASE NO. 77-1936

JANUARY 31, 1978

LAURA DUCAT, CLAIMANT

Malagon, Starr & Vinson, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Order

On December 5, 1977 the employer, John Patterson, dba Summers Lane Tavern, filed a request for an Order of Remand of the above entitled matter for the presentation of additional evidence before the Referee, an Order abating any payment to claimant until a further order is entered, or, in the alternative, a Board review of the Referee's Opinion and Order entered in the above entitled matter on November 9, 1977.

On the 7th of December, the Board received a Motion of Dismissal of the employer's request for remand and a memorandum in support of said motion to dismiss.

The Board, after giving full consideration to the facts set forth in the affidavit of John Patterson which was submitted in support of the request, and to claimant's motion to dismiss, concludes that there is no justification for remanding the above entitled matter to the Referee for the introduction of testimony; there is no showing that this evidence was not available at the time of the hearing.

The Board cannot abate any payments to claimant; ORS 656.313 provides that payment of compensation to claimant shall not be stayed by the filing of a request for review.

The Board has accepted the request made by the employer as a request for Board review of the Referee's order entered on November 9, 1977.

ORDER

The employer's request for an Order of Remand remanding the above entitled matter to the Referee for the introduction of testimony and evidence is hereby denied as is the employer's request that the Board abate any payment to claimant until a further order is entered herein.

Claimant's request received on December 7, 1977 is hereby construed to be a request for Board review of the Referee's Opinion and Order entered in the above entitled matter on November 9, 1977.

WCB CASE NO. 76-6467

JANUARY 31, 1978

EARL HUTCHESON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
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, dated June 1, 1977, which affirmed the employer's denial of his claim for an occupational disease.

Claimant had been employed by the employer for approximately 12 years on October 10, 1976 when he was admitted to the Bay Area Hospital in Coos Bay. The admitting diagnosis was organic lung disease, with etiology due to a multitude of factors which included chronic bronchitis, secondary to smoking, a possible acute bronchitis, related to infection, and a possible coin lesion of the right mid-lung field. The admitting physician was Dr. Oelke. Claimant was discharged six days later with the same diagnosis except that the chronic bronchitis was stated to be secondary to smoking "and to his occupation".

Claimant filed a claim on October 25, 1976 for an occupational lung disease by exposure to dust and smoke at work. The claim was denied by the employer on November 2, 1976. Claimant contends that the denial was unreasonable, therefore, he is entitled to penalties and attorney fees. On November 2, 1976 the employer had Dr. Oelke's letter, dated October 28, 1976, which simply gave the date of hospitalization and indicated that claimant was totally disabled at that time. The letter contained the original diagnosis but did not have the additional statement contained in the discharge diagnosis.

The Referee found that upon claimant's admission to the hospital he had given a history which denied any particular exposure on his job to any particular chemicals except for some dust. The Referee found that claimant smoked two packs of cigarettes a day and claimant had also denied any history of pneumonia or tuberculosis. On the date of his admission to the hospital, claimant discontinued smoking and was treated for bronchitis and sinusitis with marked improvement in his condition.

On October 26, 1976 Dr. Quinn examined claimant; his report indicated claimant smoked only one pack of cigarettes a day.

and that he had stated he worked in a plywood mill where he was exposed to much dust and smoke. Based upon this history, Dr. Quinn felt that claimant's chronic obstructive airway disease was probably related to the air pollution to which he was exposed to in his work, and as well as to his personal air pollution problem with smoking and that all these should be discontinued.

In January 1977 Dr. Oelke advised claimant's attorney that the chronic obstructive pulmonary disease which he felt claimant had was related both to the past history of cigarette smoking and his work environment which, according to claimant, was quite dusty. Dr. Oelke stated that it was difficult to say which caused the greatest degree of claimant's problems, cigarette smoking or his work environment; however, he felt very strongly that claimant should not return to work or to any environment which would contain numerous irritants as they could only continue to exacerbate the claimant's problem.

Dr. Tuhy examined claimant on December 28, 1976. His reports were rather guarded but he did state it was quite likely that claimant's lung condition was not caused by his work activities, however, there well might have been an exacerbation of his pre-existing chronic obstructive lung disease with chronic bronchitis by various non-specific lung irritants present in the mill. Later, after reviewing the medical reports, Dr. Tuhy was of the opinion that the sudden exacerbation suffered on October 10 was due primarily to an attack of acute sinusitis although at the time the longstanding chronic obstructive pulmonary disease was also diagnosed.

Dr. Berryman prepared a consultation opinion for Dr. Quinn which indicated that both the chronic obstructive pulmonary disease and the chronic sinus drainage were probably related to smoking cigarettes and also to the dusty environment in which claimant worked.

The employer offered, over the objection of claimant, several reports concerning the testing of pollutants existing in the type of operation in which claimant was engaged. The Referee received these reports and gave credence to such reports only as they related to general findings in similar operations.

Claimant and some of his co-workers testified that in the daily operation of the dryer facility they were exposed from time to time to a certain degree of smoke, dust and steam.

The Referee, after considering all of the findings of the physicians involved and the reports upon which such findings were based, concluded that the work conditions were not the underlying cause of claimant's disease, that the primary cause of claimant's lung condition would appear to be his long history of cigarette smoking. He found no medical opinion which stated with any certainty that claimant's condition arose out of and in the scope of his employment and from conditions to which he was exposed only at the employment.

The Referee concluded that claimant had not carried his

burden of proof to show medical causation of his chronic obstructive pulmonary disease nor of the sinusitis or the bronchial conditions, arising out of and in the scope of his employment. Upon the Referee's affirmance of the employer's denial, the other questions of reasonableness, attorney's fees and penalties became moot.

The Board, on de novo review, finds nothing in the medical evidence which would indicate that claimant's condition was not either caused by or exacerbated by his occupation at the plywood mill. To the contrary, although there is medical evidence that claimant's smoking also may have contributed to this condition, it is uncontradicted that claimant will be unable to return to his work at the plywood mill or to any other work which would expose claimant to a dusty, smoky or steamy environment. Dr. Oelke, Dr. Quinn, and Dr. Berryman all agree that the dusty environment in which claimant works contributed to his chronic obstructive pulmonary disease; even Dr. Tuhy was reluctant to relate claimant's condition causally to cigarette smoking alone.

Therefore, the Board concludes that claimant has suffered a compensable occupational disease and that his claim should be remanded to the carrier for acceptance as such.

Insofar as the assessment of penalties is concerned, the Board finds that the circumstances were such that the employer's denial cannot be construed as unreasonable. All of the doctors indicated that claimant's history of heavy cigarette smoking might have had some affect upon his present condition; however, because the claim was improperly rejected by the employer, claimant's attorney is entitled to a reasonable attorney's fee payable by the employer pursuant to the provisions of ORS 656.386.

ORDER

The order of the Referee, dated June 1, 1977, is reversed.

Claimant's claim for a compensable injury filed on October 5, 1976 is hereby remanded to the employer and its carrier to be accepted and for the payment of compensation, as provided by law, commencing on October 10, 1976 and until the claim is closed pursuant to the provisions of ORS 656.268.

Claimant's attorney is awarded as a reasonable attorney's fee for his services before the Referee the sum of \$1,000, payable by the employer and its carrier.

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

JANUARY 31, 1978

ALLAN KYTOLA, CLAIMANT
Allan Coons, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson,
& Schwabe, Defense Atty.
Order of Dismissal

On January 21, 1977 the Board issued an Order to Show Cause in the above entitled matter advising that claimant respond with a good reason why his request for review should not be dismissed. One year has expired since the issuance of that order and claimant has failed to show good cause; therefore, claimant's request for review is hereby dismissed.

IT IS SO ORDERED.

WCB CASE NO. 133CB2905226 JANUARY 31, 1978

MELVIN E. LUDWIG, CLAIMANT
Willard Schwenn, Claimant's Atty.
Merlin L. Miller, Defense Atty.
Bonafide Dispute Stipulation and Settlement

COME NOW the parties, Melvin E. Ludwig, Claimant, in person and through his attorney, Willard Schwenn, and the employer, Tektronix, Inc., and its carrier, Travelers Insurance Company, acting by and through their attorney, Merlin L. Miller, and recite, stipulate and petition as follows:

Claimant originally sustained a lower back strain injury on or about January 27, 1970 while employed by the same employer. A claim was presented, the injury was accepted as compensable and benefits were thereafter paid for that injury, including a permanent partial disability award of 30% (96 degrees) FOR UNSCHEDULED LOW for unscheduled low back disability. The initial determination order was issued May 28, 1970.

During 1977, the claimant orally requested that his claim be reopened on account of aggravation of his low back condition. Mr. Ludwig felt that his condition involved a compensable worsening of his original low back injury. The claimant was referred to the Worker's Compensation Board for consideration under its Own Motion jurisdiction as the 5 year aggravation period had expired. The carrier declined to voluntarily reopen the claim for the reason that the medical evidence indicated his current condition was due in large part to a peripheral neuropathy of diabetic origin. Part of the condition was also attributed to bilateral compressive neuropathy L5 of bony origin and epidural adhesions. The employer and carrier also deny any responsibility for these later conditions.

The parties recognize and represent there is a bona fide dispute as to the compensability of claimant's aggravation claim and because there is such a dispute, they have agreed to compromise and settle said claim pursuant to ORS 656.289(4) for an amount equal to 20% (64 degrees) of the maximum allowable for unscheduled disability, which sum would amount to \$4480.00, plus \$53.00 for a medical bill. The \$4480.00 includes retro reserve benefits. Out of said sum shall be paid claimant's attorneys fee in the amount of \$250.00.

All parties understand and agree that if these payments are approved by the Board and payments thereunder, said payments are in full, final and complete settlement of claimant's aggravation claim. It is expressly agreed and understood by all parties that this is a settlement of a doubtful and disputed aggravation claim and is not an admission of liability on the part of the employer and carrier by whom liability is expressly denied, and that the aggravation claim is denied and remains denied in each and every respect.

WHEREFORE the parties hereby stipulate to and join in this Petition for approval of the foregoing aggravation claim

WHEREFORE the parties hereby stipulate to and join in this Petition for approval of the foregoing aggravation claim settlement and for authority to pay the sums set forth above pursuant to ORS 656.289(4) in full and final settlement between the parties, and for an order approving this compromise and dismissing this Own Motion aggravation claim with prejudice.

IT IS APPROVED, and it is so ordered, and the Own Motion aggravation claim is dismissed with prejudice.

SAIF CLAIM NO. FC 321906 JANUARY 31, 1978

ROGER OLSON, CLAIMANT
Frank J. Susak, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On November 13, 1977 an Own Motion Determination was entered in the above entitled matter which, upon the recommendation of the Evaluation Division of the Workers' Compensation Department, granted claimant compensation for temporary total disability from July 10, 1975 through August 7, 1977, less time worked, and 32° for 10% unscheduled disability to the back and right shoulder and 9.6° for 5% loss function of the right arm.

Claimant's claim was reopened on August 1, 1975 and compensation for temporary total disability was paid, commencing July 10, 1975, the date claimant was hospitalized for a cervical

myelogram and back surgery. There was no evidence in the record whether or not claimant's claim had been closed after July 10, 1975, therefore, when the State Accident Insurance Fund requested a determination of claimant's claim on August 5, 1977, the Evaluation Division of the Workers' Compensation Department apparently assumed that the claim now should be closed pursuant to ORS 656.278 and made their recommendation to the Board.

The Board is now advised that claimant's claim was not closed pursuant to ORS 656.268 since the reopening of the claim on December 10, 1975, which was within 5 years from the date claimant's claim was initially closed on December 20, 1971. Therefore, the Board concludes that its Own Motion Determination, dated November 30, 1977, should be rescinded and the Evaluation Division of the Workers' Compensation Department directed to issue a Determination Order, pursuant to ORS 656.268, and in conformity with the recommendation made by it to the Board.

IT IS SO ORDERED.

WCB CASE NO. 76-3619

JANUARY 31, 1978

FRANK ROHAY, CLAIMANT

Peterson, Susak & Peterson, 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 an award of 160° for 50% unscheduled disability, awarded claimant 75° for 50% loss of his left leg, and 96° for 50% loss of his left arm. Claimant contends that he is permanently and totally disabled.

Claimant, who at the time of his injury on March 21, 1972 was a 52-year-old carpenter, fell a short distance, injuring his low back. Dr. Wade initially diagnosed an acute lumbar strain, possibly a kissing spine syndrome. In 1972, two lumbar laminectomies were performed and on March 1, 1973 a multiple level rhizotomy was performed at L4-5 and S1. It was Dr. Wade's opinion that claimant was permanently and totally disabled insofar as his low back was concerned; he had approximately 20% of normal range of motion in his low back and any increased activities exacerbated claimant's pain.

Claimant was unable to bend or stand for prolonged periods of time and could not be employed in any position which required excessive lifting.

Claimant, while employed as a carpenter-sawyer, had suffered a low back injury on November 12, 1970 for which he had been

awarded 80° by an Opinion and Order entered on July 8, 1974. After conservative treatment for this injury, claimant had been able to return to lighter work as a carpenter and worked until his injury of March 21, 1972.

Claimant's 1972 claim was closed by a Determination Order, dated January 21, 1974, and upon which claimant requested a hearing. After a hearing, Referee Rode, by an Opinion and Order entered August 21, 1975, awarded claimant 37.5° for 25% loss of the left leg but affirmed the Determination Order's award of 160° for 50% unscheduled low back disability.

On September 16, 1975 Dr. Hill performed a lumbar laminectomy at L4 and L5 with a foraminotomy and discectomy at L4-5. An examination on April 16, 1976 by Dr. Reimer, a neurologist, indicated that claimant was having a "collapsing" form of muscle weakness in both the remainder of the musculature of his left arm as well as the muscles of his left leg. The claim having been reopened for the surgery, was then closed by a Second Determination Order dated July 13, 1976 which awarded claimant 48° for 25% loss of his left arm.

Dr. Hill, on January 19, 1977, advised that claimant still had complaints of low back and leg pain and tardy ulnar palsy in the left hand with atrophy and weakness of the left side. He did not think claimant would be able to return to any active employment because of discomfort in sitting, standing and walking.

The Referee found that there were three areas of claimant's body involved in the claim before him and that the extent of disability of the back and left leg had been determined by Referee Rode in his Opinion and Order of August 21, 1975, therefore, the awards granted by that order should not be disturbed unless there was evidence of a worsening of claimant's back or leg condition, or both, since the date of the hearing, May 7, 1975.

The Referee concluded that although there might be some slight increased impairment of claimant's back it has not affected his earning capacity to a greater extent than that for which he had been previously awarded. He concluded that there had been an increase in the impairment of claimant's left leg and because that was in the scheduled area claimant would be entitled to an increased award for the increased loss of function of his left leg. He also concluded, based upon the evidence before him, that claimant's prior award for his left arm should be increased, finding that claimant has no grip or control while holding things and has a numbness which sometimes runs to his shoulder.

The Referee thereupon granted the awards recited in the opening paragraph of this order.

The Board, on de novo review, finds claimant to be permanently and totally disabled. Claimant had several surgeries prior

to his initial claim closure which awarded him 50% of the maximum for unscheduled disability; claimant has also had subsequent serious back surgeries and yet little, if any, attention has been given to the effect of these surgeries on claimant's ability to work at a regular and gainful employment. There is substantial evidence that claimant's condition has continued to deteriorate since the first closure of his claim and yet since that closure he has been awarded compensation only for scheduled members of his body.

Dr. Hardeman, an orthopedist, was of the opinion that claimant could only do light work if at a piecemeal basis only and not full time. Dr. Hill was of the opinion that claimant would never be able to return to any active employment. Claimant testified at the hearing that he is unable at the present time to perform any type of work because of the pain and disability to his back, leg and arm. This testimony was confirmed by the uncontradicted testimony of four of the witnesses and the Fund offered no rebuttal testimony. The evidence indicates that claimant has not worked since this injury on March 21, 1972.

The Board concludes that claimant, who is now 57, and has lost 75% of his back, 50% of his left leg and 50% of his left arm, has little, if anything, left to offer in the labor market.

ORDER

The order of the Referee, dated July 13, 1977, is modified.

Claimant is considered to be permanently and totally disabled from the date of this order forward. This is in lieu of the awards made or affirmed by the Referee's order which, in all other respects, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in connection with this Board review a sum equal to 25% of the increased compensation awarded claimant by this order, payable out of said compensation as paid, not to exceed \$2,300.

SAIF CLAIM NO. ODC 1551 JANUARY 31, 1978

AIRLETTA SANDERS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On January 6, 1977 (sic) the Board entered its Own Motion Determination in the above entitled matter. It has come to the Board's attention that there are several incorrect dates in this Determination which should be corrected as follows:

In the fifth line of the fourth paragraph on page one the "1975" should be "1977".

On the last line on page one "1975" should be "1977".

On page two of said order, the date of entry of the order should be "January 6, 1978" not "January 6, 1977".

In all other respects the order should be ratified and re-affirmed.

IT IS SO ORDERED.

WCB CASE NO. 72-225

JANUARY 31, 1978

WALTER SORENSON, CLAIMANT
Colin Lamb, Claimant's Atty.
Breathower & Gilman, Defense Atty.
Own Motion Order

On March 11, 1977, claimant requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278, and reopen his claim for an industrial injury suffered on April 8, 1971; the request was accompanied by a copy of a medical report from Dr. Johnson.

After being advised by the Board of the request, the carrier responded on April 1, 1977, stating it opposed any modification of claimant's original award, but requesting the Board to decide whether a causal relationship between claimant's industrial injury of April 8, 1971 and claimant's hospitalization in February, 1977 was established.

The Board, at that time, did not have sufficient evidence upon which to make a determination on the merits of either of these issues, therefore, they referred the matter to the Hearings Division with instructions to hold a hearing to take evidence on said issues. The Referee was directed, upon conclusion of the hearing, to prepare a transcript of proceedings to be submitted to the Board together with his recommendations on these issues.

After a hearing August 5, 1977, the Referee caused the transcript of the proceeding to be prepared and submitted to the Board together with his recommendation.

The Board, after due consideration of the transcript of the proceedings and the recommendation submitted by the Referee, concurs in such recommendation. A copy of the Referee's recommendation is attached hereto and, by this reference, made a part hereof.

ORDER

Claimant's claim for aggravation with respect to his compensable injury of April 8, 1971, is hereby remanded to the employer, Midwest Coast Agricultural Co-op, and its carrier, Scott Wetzel Services, Inc., to be accepted and for the payment of compensation, as provided by law, commencing February 16, 1977 and until the claim is closed pursuant to the provisions of ORS 656.278, less any time worked.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in obtaining own motion relief for claimant a sum equal to 25% of such compensation as claimant may receive as a result of this order, including compensation for temporary total disability and for permanent partial disability, if any, payable out of such compensation as paid, not to exceed \$2,000.

SAIF CLAIM NO. FC 239022 JANUARY 31, 1978

MURL E. WEIRICH, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, at the time a 47-year-old nursery employee, suffered a compensable injury on March 30, 1970 when he fell backwards from a truck after doing some maintenance on it. On September 25, 1970 a laminectomy was performed by Dr. Lisac who indicated in his closing report of February 25, 1971 that the result was good and claimant had only minimal residual permanent partial disability. The initial Determination Order, dated April 19, 1971, granted claimant time loss benefits and 48° for 15% unscheduled disability.

Claimant, in May 1971, felt his condition was worsening and he was again treated by Dr. Lisac. The doctor, in his November 4, 1971 report, found little change from claimant's condition at the time of the first closure. A Second Determination Order, dated November 17, 1971, awarded claimant an additional 16° for 5% disability.

The claim was again opened for treatment in November 1972. On March 5, 1973 a facet rhizotomy for pain relief was performed at L4-5-S1, bilaterally. Dr. Wade's closing report, after a September 14, 1973 examination, revealed that claimant's permanent disability exceeded that for which he had already been granted. On October 4, 1973, a Third Determination Order granted claimant an additional 16° for 5% unscheduled disability and 15° for 10% radicular left leg disability due to the same injury.

In June 1977, the claimant informed the Fund that his condition was getting worse but that he had been advised by his treating physician that he would just have to live with it. The Fund sent claimant to the Orthopaedic Consultants who examined him on July 14, 1977 and found that his condition was medically stationary and that there was no significant difference in his condition.

On August 22, 1977 the Fund requested a determination of the extent of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted no additional compensation, either for temporary total disability or permanent partial disability.

The Board concurs with this recommendation.

ORDER

The Determination Order, dated October 4, 1973, which had the effect of giving claimant a total of 80° for 25% unscheduled disability and 15° for 10% loss function of the left leg, is hereby affirmed.

WCB CASE NO. 77-5708

FEBRUARY 7, 1978

VERLAN BURKE, CLAIMANT
Lachman & Henninger, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Order of Dismissal

On January 20, 1977 the Workers' Compensation Board received from claimant a request for review of the Referee's order entered in the above entitled case on December 19, 1977.

The postmark on the envelope is January 19, 1978, which is more than 30 days from the date of the mailing of the Referee's order. The mailing of a request of Board review within this 30 day period is set forth in ORS 656.289(3) and is jurisdictional. If the appeal is not taken within this time fixed by statute the Referee's order becomes final by law.

ORDER

The request by claimant for review is dismissed.

WCB CASE NO. 77-1930

FEBRUARY 7, 1978

WILLIAM CARTER, CLAIMANT
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 March 9, 1977 Determination Order awarding 7.5° for 5% loss of the left leg.

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 8, 1977, is affirmed.

WCB CASE NO. 77-760

FEBRUARY 7, 1978

WCB CASE NO. 77-1402

WCB CASE NO. 77-3334

AGNES FOSTER, CLAIMANT
Brown, Burt & Swanson, Claimant's Atty.
Keith D. Skelton, Defense 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. 76-5019

FEBRUARY 7, 1978

KEITH D. LAMBERT, CLAIMANT
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 him 22.5° for 15% loss function of the right leg.

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 June 22, 1977, is affirmed.

WCB CASE NO. 76-5394

FEBRUARY 7, 1978

ANTONIO MIRELES, CLAIMANT
Bodie, Minturn, VanVoorhees, Larson
& Dixon, 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 affirmed the Determination Orders of January 14, 1975, September 29, 1976 and November 4, 1976 (including an Interim Order dated November 6, 1975) granting a total award of 20.25° for 15% loss of the left 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 July 27, 1977, is affirmed.

FEBRUARY 7, 1978

JOSEPH RAY NELL, CLAIMANT
Bailey, Welch, Bruun & Green,
Claimant's Atty.
A. Thomas Cavanaugh, Defense Atty.
Order

On January 6, 1978 the Board received from claimant, by and through his attorney, a motion that the Board issue an order remanding the above entitled matter to the Referee for the purpose of taking additional testimony with regard to the medical condition of claimant. The motion was supported by a medical report from Dr. Berselli dated December 13, 1977.

Dr. Berselli's report merely states that claimant underwent a total spinal myelogram on July 11, 1977, that the myelogram was normal but claimant continued to complain of severe neck pain. Dr. Berselli expressed his opinion that claimant could not work at any sort of occupation because of the pain and he felt claimant was entitled to receive compensation for temporary total disability from July 11, 1977 until the present time.

The Board concludes that this letter might support a claim for aggravation but it does not support claimant's motion to remand the matter to the Referee for the purpose of taking additional testimony with regard to the medical condition of claimant.

ORDER

Claimant's motion for an order remanding his claim to the Referee for the purpose of taking additional testimony is hereby denied.

FEBRUARY 7, 1978

PETE N. OWEN, 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 Phillips.

Claimant seeks Board review of the Referee's order which affirmed the July 9, 1976 Determination Order granting him 28.8° for 15% loss of the right arm.

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 15, 1977, is affirmed.

WCB CASE NO. 76-6585

FEBRUARY 7, 1978

WILBUR E. SLOVER, CLAIMANT
Frohnmayr & Deatherage, 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 his claim for an alleged back injury.

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 12, 1977, is affirmed.

WCB CASE NO. 77-3666

FEBRUARY 8, 1978

THOMAS BERRY, CLAIMANT
Gary K. Jensen, 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 claimant's claim to it for acceptance and 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 September 19, 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 Fund.

WCB CASE NO. 77-3600

FEBRUARY 8, 1978

MILTON T. CORLEY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Newhouse, Foss, Whitty & Foess,
Defense Atty.
Request for Review by the Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the Referee's order which found claimant to be permanently and totally disabled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee.

ORDER

The order of the Referee, dated September 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 \$500, payable by the carrier.

WCB CASE NO. 77-2755

FEBRUARY 8, 1978

JOSEPH J. GADACH, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant
Cross-request by the Employer

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which granted him a total award of 192° for 60% unscheduled low back disability. Claimant contends that he is permanently and totally disabled while the employer, on cross-appeal, contends that the 80° granted by the April 12, 1977 Determination Order was adequate 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 22, 1977, is affirmed.

WCB CASE NO. 77-974

FEBRUARY 8, 1978

GARY MERRIFIELD, CLAIMANT
Doblie, Bischoff & Murray, 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 a total award equal to 80° for 25% unscheduled low back disability. Claimant contends that he is entitled to an award of at least 144° for 45% 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 September 1, 1977 is affirmed.

WCB CASE NO. 77-3358

FEBRUARY 8, 1978

ARLO M. MILLER, CLAIMANT
Gary Jensen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Beneficiaries

Reviewed by Board Members Moore and Phillips.

The beneficiaries of Arlo Miller seek Board review of the Referee's order which dismissed the request for hearing.

The Board, after de novo review, affirms and adopts the Order of Dismissal 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 22, 1977, is affirmed.

CLAIM NO. H-20741

FEBRUARY 8, 1978

HUEY MORTON, CLAIMANT
Lindstedt & Buono, Claimant's Atty.
G. Howard Cliff, Defense Atty.
Order Awarding Attorney's Fees

On December 21, 1977 the Board issued its Own Motion Order in the above entitled matter which inadvertently neglected to award claimant's attorney a reasonable attorney's fee. The employer, through its carrier, had initiated the request for own motion jurisdiction and, inasmuch as it did not prevail, it must be required to pay claimant's attorney a reasonable attorney's fee pursuant to the provisions of ORS 656.382(2).

The Own Motion Order entered in the above entitled matter on December 31, 1977 is amended by inserting after the last paragraph on page 1 thereof the following paragraph:

"Claimant's attorney is awarded as a reasonable attorney's fee for his services in behalf of claimant the sum of \$1,000, payable by the employer, Northwest Foundry and Furnace Company, by and through its carrier, Industrial Indemnity."

In all other respects the Own Motion Order entered in the above entitled matter on December 21, 1977 is ratified and reaffirmed.

CLAIM NO. H-20741

FEBRUARY 8, 1978

HUEY MORTON, CLAIMANT
Lindstedt & Buono, Claimant's Atty.
G. Howard Cliff, Defense Atty.
Order

On January 20, 1978 the employer and its carrier moved the Board to reconsider its Own Motion Order issued in the above entitled matter on December 21, 1977.

The Board, after giving full consideration to the matter, concludes that there is no justification for making any change in its order; therefore, the motion made by the employer and its carrier to reconsider said order should be denied.

IT IS SO ORDERED.

FEBRUARY 8, 1978

ANTONIO SECO, CLAIMANT
Richardson, Murphy & Nelson, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of 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 July 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 \$150, payable by the carrier.

FEBRUARY 9, 1978

GEORGE E. ANDES, CLAIMANT
McClain & Brown, Claimant's Atty.
Cosgrave & Kester, 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 January 13, 1976 Determination Order granting him 32° for 10% low 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 August 31, 1977, is affirmed.

FEBRUARY 9, 1978

M. A. DERHALLI, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson,
& Schwabe, 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 a dermatitis condition.

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 14, 1977, is affirmed.

FEBRUARY 9, 1978

MARY EVANS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, 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 "de facto" denials of her claim for aggravation. Claimant contends that her claim should be reopened for further time loss and medical treatment and that she is entitled to penalties and attorney fees.

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 7, 1977, is affirmed.

FEBRUARY 9, 1978

In the Matter of the Compensation
of The Beneficiaries of
O. V. FLOWERS, DECEASED
Keith D. Skelton, Claimant's Atty.
Jack L. Mattison, Defense Atty.
Request for Review by Beneficiaries

Reviewed by Board Members Wilson and Moore.

The beneficiaries of O.V. Flowers seek Board review of the Referee's order which denied their request for benefits under ORS 656.204.

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 June 10, 1977, is affirmed.

FEBRUARY 9, 1978

NELSON GOHLKE, CLAIMANT
James D. Vick, Claimant's Atty.
Merten & Saltveit, 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 remanded claimant's aggravation claim to it for acceptance and payment of compensation until closure 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 June 21, 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.

EARL R. McCULLOUGH, CLAIMANT
Pippin & Bocci, Claimant's Atty.
Breathouwer & Gilman, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which approved the employer's "de facto" denial to reopen claimant's claim but awarded claimant 37.5° for 25% partial loss of the left leg.

Initially, claimant requested a hearing on the adequacy of the Determination Order entered November 17, 1976 which granted claimant 7.5° for loss of the left leg. Later the Board received a request to reopen his claim, such request should have been made to the carrier, however, the claim was forwarded to the carrier and considered to be filed pursuant to ORS 656.273(4) as an aggravation claim. On May 11, 1977, nearly three months after the request for the hearing on the Determination Order, the Board received claimant's request for hearing on the employer's failure to reopen his claim. The parties at the hearing agreed that the failure of the employer's carrier to take any action amounted to a "de facto" denial.

Claimant is a 31-year-old former professional football player. His athletic record is excellent both in football and in track where he starred at USC prior to entering the ranks of professional football. However, his athletic activities evidently precluded him from taking full courses while in college and he lacks 40 hours of qualifying for a degree.

Claimant contends that his left leg is his dominant leg inasmuch as he "took off on it" while performing the high jump and it was also his "push off" leg while running the hurdles. This is undisputed insofar as it relates to his athletic activities, however, claimant is no longer engaged in athletic activities and has not been since the summer of 1976.

Claimant was first injured on September 13, 1975 while playing for the Portland Thunder, a professional football team. He sustained a severe muscle strain to the anterior quadriceps muscle on the left and received daily physical therapy from the team trainer. The strain gradually healed and claimant returned to playing pro football until early in October when he was reinjured, thereafter he was unable to return to pro football as an active player. He was first seen by Dr. Rush on October 30, 1975.

Apparently claimant filed a claim about the time the Portland Thunder folded for financial reasons. Claimant then returned

to his home in Southern California where he saw Dr. Hughes who advised claimant, in December 1975, that claimant was totally disabled with a torn muscle on the left thigh. Dr. Hughes, in February 1976, indicated there was a herniation of the muscle through the fascial sheath and he referred claimant to Dr. Fixler, an orthopedic physician.

The Referee found that the history taken by Dr. Fixler presented a different, although not contradictory, view concerning the facts of claimant's accident. Dr. Fixler diagnosed rupture of the rectus femorus muscle, origin left anterior inferior iliac spine and told claimant to have daily physical therapy and do rehabilitation exercises to build up the remaining muscles in his lower left leg. At that time, the prospects were fairly good for claimant's return to professional sports.

Dr. Fixler saw claimant on June 16, 1976 and reported that his left leg condition was now stabilized to the point that the patient was ready to return to regular work duties without restrictions. He stated he would recheck him in approximately three months and that it might require three to six months for a permanent and stationary level to be reached. Dr. Fixler also stated that claimant presently has a low back ache due to recurrent lower lumbar spine strain and claimant is presently disabled as a result of this non-industrial condition.

Claimant testified that he tried out for the Los Angeles Rams during the summer of 1976. The doctor had told him he could resume playing, although he had told the doctor he did not feel his leg had healed. He testified that the pain in his low back came about because he was favoring his leg. The Rams released claimant during August 1976. After that claimant returned to Dr. Fixler who stated claimant had been unable to resume his professional football career because of pain and weakness in his left thigh. He felt that claimant's left leg condition now had reached a permanent and stationary level, that the rectus femorus muscle was bunched in the left anterior mid thigh, obviously torn from his proximal attachment. He did not believe any further treatment was indicated and claimant should be considered permanently disabled for professional football or for other strenuous professional sports and also for very heavy work.

Dr. Cohen examined claimant in San Pedro, California in September 1976 at the request of the carrier. His diagnosis was residuals post tear of the quadriceps muscle of the left leg and he found claimant was considerably disabled from engaging in professional football. He thought claimant could do almost any other type of activity as long as it did not require maximum exertion. He did not feel any further treatment was indicated and he agreed with Dr. Fixler on his findings.

On November 17, 1976 the claim was closed by a Determination Order which awarded claimant 7.5% for 5% loss of the left leg and compensation for temporary total disability through September 1976.

Claimant was not satisfied with the opinions of Dr. Cohen and Dr. Fixler and sought advice from Dr. Moskowitz, a family practice doctor, who is still treating claimant. Dr. Moskowitz reported that the muscular ligamentation injury to the left leg has caused both emotional and physical problems which are not stationary.

The Referee found the preponderance of the evidence was that claimant, despite his contrary feeling, was not suffering from a work-related back injury; the preponderance of the medical evidence was that claimant does not have to favor his left leg in ordinary pursuits of life and, therefore, there is no reason for any strain being placed upon the back. The Referee found no evidence that claimant could not, from a physical standpoint, do jobs in the ordinary field of business and industry, although there might be some strenuous activities which he would have to avoid. He found claimant to be well educated, intelligent and only a year and a half away from a college degree. He felt that claimant could undoubtedly qualify for many types of jobs but claimant refuses to look for such jobs and therefore is now on welfare.

The Referee approved the "de facto" denial of the employer to reopen claimant's claim but increased the award of 7.5° made by the Determination Order to 37.5°.

The Board, on de novo review, finds no evidence which would justify claimant's request to reopen his claim. Obviously claimant is contending that by favoring his left leg he had placed a strain on his back which had resulted in the claimant's low back problem to which Dr. Fixler referred in his June 1976 report but attributed to a non-industrial cause.

The Board will not, however, treat the failure by the employer's carrier to take any action with respect to claimant's request to reopen his claim as a "de facto" denial; the Board finds that such inactivity was in direct violation of the statutory requirement imposed upon a carrier by ORS 656.262(5) that written notice of acceptance or denial of the claim shall be furnished to the claimant by the direct responsibility employer within 60 days after the employer has notice or knowledge of the claim. The carrier's failure to comply with this requirement subjects it to payment of an attorney's fee to claimant's attorney pursuant to ORS 656.382. Under the circumstances, the Board does not feel the assessment of penalties is merited.

The Board concurs in the increased award granted claimant for partial loss of his left leg.

ORDER

The order of the Referee, dated August 22, 1977, is modified.

The denial of claimant's request to reopen his claim is a proper denial.

Claimant's attorney is awarded as a reasonable attorney's fee for his services before the Referee a sum of \$650, payable by the employer and its carrier. This is in lieu of the attorney's fees granted by the Referee's order which, in all other respects, is affirmed.

WCB CASE NO. 76-7042

FEBRUARY 9, 1978

JOHN MURLEY, CLAIMANT
Don G. Swink, 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 found claimant to be 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 June 24, 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 Fund.

WCB CASE NO. 77-3823

FEBRUARY 9, 1978

JIM PHILLIPS, CLAIMANT
Maurice V. Engelgau, 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 May 5, 1977 Determination Order awarding claimant 15° for 10% loss function of the right leg.

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 14, 1977, is affirmed.

WCB CASE NO. 77-1533

FEBRUARY 10, 1978

ROY ANDERSON, CLAIMANT
Harold W. Adams, 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 carrier's denial of claimant's claim of medical expenses.

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 2, 1977, is affirmed.

WCB CASE NO. 76-7079

FEBRUARY 10, 1978

KEVIN S. CONDRA, CLAIMANT
Merten & Saltveit, 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 granted claimant temporary total disability from December 15, 1975 to December 31, 1975 and reopened claimant's claim for time loss benefits commencing April 21, 1977 until closure is authorized. The order also required the Fund to pay claimant's travel expenses to and from the doctor and assessed penalties and attorney fees. The Fund contends that claimant's symptoms are not related to the claim originally accepted by it.

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, 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. ZA 928712 FEBRUARY 10, 1978

KENNETH E. MASON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on June 5, 1962 to his left leg. His claim was closed and his aggravation rights have expired. An Own Motion Determination, dated June 2, 1977, had granted claimant compensation for temporary total disability and compensation for 15% loss of the left leg.

On June 6, 1977 Dr. Stevens indicated that claimant was progressively more disabled and recommended that the claim again be reopened for an arthrography. The Fund continued to pay time loss benefits and, on July 6, 1977, the arthrotomy with medial meniscectomy was performed. Claimant was medically stationary on November 10, 1977; he had significant arthritic changes and it was necessary for him to use a cane full time. The doctor felt that claimant, although 63 years old, was still too young for a joint replacement or osteotomy.

The Evaluation Division of the Workers' Compensation Department recommends, at this time, that claimant be granted compensation for temporary total disability from June 6, 1977 through November 10, 1977 and compensation for 40% scheduled left leg disability, such awards to be in lieu of all previous awards.

The Board concurs with this recommendation.

ORDER

Claimant is granted temporary total disability benefits from June 6, 1977 through November 10, 1977, less time worked.

Claimant is also granted compensation for 40% loss of function of the left leg. This is to be in lieu of and not in addition to any previous awards received by claimant for left leg disability.

FEBRUARY 10, 1978

GERALD MAYES, CLAIMANT
Robert H. Grant, 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 to be 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 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 \$350, payable by the carrier.

FEBRUARY 10, 1978

ROBERT E. McBRIDE, CLAIMANT
D. S. Denning, Jr., 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 remanded claimant's claim to the Fund for acceptance and payment of benefits from the date of the injury until termination pursuant to statute and ordered the Fund to pay claimant's attorney a sum of \$800.

The claimant alleged that he suffered a compensable injury on August 18, 1976 while he and a co-worker were unloading his employer's truck in a town in Pennsylvania. Claimant did not report the accident to the employer until November 22, 1976 and he signed the Form 801 on December 7, 1976.

Claimant testified that he and his co-worker were unloading the truck and a case of food fell off the top of the stack onto the four-wheeled flat dolly which was approximately 3' X 6'

in size and hit claimant on the back of his head and neck. His co-worker apparently had seniority over claimant and offered to send him home but claimant declined and said he would try to tough it out. The two workers continued their trip and arrived in Ontario, Oregon approximately four days after the alleged incident. Claimant testified that he started having leg pains but he did not connect them to the blow he had suffered on his head; he thought they might have resulted from an old knee injury. Later claimant developed back pain which, according to claimant, got progressively worse and he was seen by Dr. Thrasher on November 11, 1976. Dr. Thrasher's first report, dated January 3, 1977, indicates claimant related a history of a severe blow to his back and neck and also a history of heavy use of the back.

A laminectomy at L4-5 was performed after conservative treatment failed to alleviate claimant's problems.

The employer's safety director testified that on August 16, 1976 a "lumper" was hired to unload the truck and paid \$45.00. He stated if "lumbers" are hired the drivers earn less money than if they unload the trucks themselves because they get an extra amount for unloading. The employer, therefore, felt that claimant could not have been injured in the unloading; they contend that claimant did not, in fact, unload the truck. Claimant contended that he knew nothing of a trip report indicating payment to a "lumper" nor anything about a receipt which was signed by such causal employee.

There was testimony given in behalf of the Fund that when claimant was interviewed on December 13, 1976 by one of the Fund's district managers, claimant allegedly told him he was not aware as to how he had injured himself. Claimant denies such statements and there were no written or taped statements introduced to support the Fund's testimony.

Dr. Thrasher, who was an orthopedic surgeon, on May 11, 1977, expressed his opinion that claimant's medical condition involving the back was caused by the physical accident reported by claimant to have occurred on August 18, 1976; he had made an earlier opinion on December 28, 1976 that, "Now it appears that this doubtless was the initiating cause of his low back symptoms which have developed . . .". The Referee found that it was interesting that claimant himself was of the opinion that the blow to his head and shoulders would not have injured his low back and found that this statement contained in the doctor's notes of December 28 (quoted above) conformed to claimant's testimony concerning his delay in reporting the injury to his employer and his original belief that his complaints were related to an old knee injury.

The Referee found claimant's testimony quite credible; he felt that he had given a very logical explanation for his delay in reporting the injury. The Referee was perturbed because claimant's co-worker was not called as a witness by either claimant or the employer. He felt that his appearance would have been critical and that the failure to produce him as a witness must be held against

the employer because the claimant had met his burden of proof by his testimony and by the medical reports.

The Referee gave little weight to the trip reports and "lumper" and overtime receipts which were offered because the author of such reports was not made known. He felt that claimant had given a credible history of the event in Pennsylvania which was strongly supported by the report of his treating physician, Dr. Thrasher. He concluded that the claimant had carried his burden to prove a compensable injury occurred on the date in question and he remanded the claim to the Fund.

The Board, on de novo review, finds that claimant's testimony at the hearing was so contradictory that it cannot be said that such evidence preponderates in favor of finding compensability. The history related to Dr. Thrasher by claimant is only as credible as the credibility of the claimant which the Board finds to be less than satisfactory. Although it is true that the Referee's evaluation of credibility is entitled to substantial weight, it is not binding upon a reviewing body. The Board reviews de novo and must resolve each case as its independent judgment dictates.

The Referee seems to feel that the failure of the employer to call the co-worker as a witness was detrimental to the employer's case. It would appear that it would have been to claimant's advantage to call this co-worker as a witness unless, when called as a witness, the co-worker would have testified to a different set of facts than those testified to by the claimant.

There is a substantial question, based on the evidence in the record, as to whether claimant actually unloaded the truck. The employer produced the "lumper" receipts; claimant denied that there had been any "lumpers" on that trip. The Referee seemed to feel that because claimant denied the existence of such receipts which the employer had produced it was necessary for the employer also to produce claimant's co-worker who had signed said receipts. This is simply not so. Claimant has the burden of proving his claim that he has suffered a compensable injury; his testimony that there were no "lumpers" is unsubstantiated; however, the employer produced the "lumper" receipts. If these receipts had not been signed by claimant's co-worker, claimant certainly should have made every effort to produce him to so testify.

The Board concludes, based upon all of the evidence, that claimant has failed to prove by a preponderance of the evidence that he suffered an injury on August 18, 1976. Therefore, the denial of claimant's claim by the Fund on January 3, 1977 was proper and should be upheld.

ORDER

The order of the Referee, dated June 28, 1977, is reversed.

The denial on January 3, 1977 by the State Accident Insurance Fund of claimant's claim for an alleged industrial injury suffered on August 18, 1976 is approved.

WCB CASE NO. 76-580
WCB CASE NO. 76-5396

FEBRUARY 10, 1978

ROBERT E. MCFARREN, CLAIMANT
Keith E. Tichenor, Claimant's Atty.
Allen W. Lyons, Defense Atty.
Stipulated Order

The two above-numbered cases having come before the Workers' Compensation Board and Hearing Referees upon the requests for hearing in each of the respective cases filed by the claimant, and each of the two cases having subsequently been appealed to the Court of Appeals of the State of Oregon where they are now pending on review, and it further appearing that the matters and issues raised in each of the two cases and upon their appeal to the Court of Appeals have been fully compromised and settled by stipulation of the parties, which stipulation appears below, now, therefore,

IT IS HEREBY ORDERED as follows:

I.

With respect to WCB No. 76-580, SAIF No. EODC4880, CA No. 9807, which case involves the employer City of Portland, the parties agree and stipulate as follows:

(a) That claimant's case will be reopened for the payment of additional time loss between May 28, 1976, and January 4, 1977, in the sum of \$4,391.81.

(b) That claimant's claim will remain in an open status and will be resubmitted to the Closing and Evaluation Division of the Workers' Compensation Board for evaluation of claimant's permanent partial disability and any additional award of temporary total disability beyond January 4, 1977, to which the claimant may be entitled, and which the State Accident Insurance Fund and employer City of Portland shall pay if so ordered by the Worker's Compensation Board.

(c) That the claimant, once the case is again closed by the Closing and Evaluation Division of the Worker's Compensation Board with a rating for permanent partial disability and temporary total disability, shall have and does hereby reserve his right to appeal such order by requesting a hearing thereon at the appropriate time.

(d) That out of the benefits of temporary total disability in the sum of \$4,391.81, the employer City of Portland and carrier State Accident Insurance Fund shall pay as an attorney fee to the law firm of Pozzi, Wilson, Atchison, Kahn & O'Leary the sum of \$800.00 and that the remaining balance of \$3,591.81 shall be paid to the claimant in lump sum.

(e) That the claimant will dismiss his appeal of this case now pending before the Court of Appeals of the State of Oregon under CA No. 9807.

(f) That the employer City of Portland and carrier State Accident Insurance Fund hereby stipulate and agree that claimant's case against Washington County under WCB No. 76-5396, SAIF No. DODD 1201, CA No. 9425, which case, as recited below, is to be dismissed, will not at any time in the future or under any circumstances be raised as a defense to the claimant's right to compensation in any form in WCB No. 76-580, SAIF No. EODC 4880, CA No. 9807, nor any contention made that disability which the claimant may suffer as a compensable condition from his employment with the City of Portland is in fact the result of his employment with Washington County.

II.

With respect to WCB No. 76-5396, SAIF No. DODD 1201, CA No. 9425, which involves the employer Washington County, the parties agree and stipulate as follows:

(a) That the claimant will dismiss the appeal of his case now pending in the Court of Appeals of the State of Oregon under CA No. 9425.

(b) That the carrier State Accident Insurance Fund will not at any time in the future contend that the claimant's condition of contact dermatitis, heretofore found to be a compensable result of his employment with the City of Portland, was caused or contributed to by his employment with Washington County.

It is so stipulated.

In the Matter of the Complying Status of
Jason B. Schrock, Marilyn Schrock,
Ernest Daniel Hertzler, Ruth Hertzler,
Paul I. Zehr, Mary Zehr, dba
SMITH'S WAREHOUSE, EMPLOYER
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Smith's Warehouse

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which approved the Proposed and Final order of August 23, 1976, approved the Fund's acceptance thereof, and indicated claimant's claim should be processed according to statute and all costs to the Fund would be reimbursed by the non-complying employer.

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. However, the Board would like to correct an error which occurred twice on page 2 of the Referee's order. The reference to a check received by the Fund on July 1, 1976 was actually issued and signed by the new owners of the company, not by George Smith, the previous owner.

ORDER

The order of the Referee, dated August 19, 1977, is affirmed.

CHRIS W. BARKER, CLAIMANT
Galton, Popick & Scott, 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 remanded claimant's claim to it for acceptance and payment of compensation to which claimant is entitled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, as amended on June 29, 1977, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated June 28, 1977, as amended the following day, 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 \$450, payable by the carrier.

CLAIM NO. 751-C-511,444 FEBRUARY 14, 1978

JAMES BLETH, CLAIMANT
Berger, Samuels, Roehr & Sweek,
Claimant's Atty.
Gearin, Landis & Aebi, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his left knee on November 1, 1966. A medial meniscectomy was performed on November 3, 1966 and claimant was released to work with no limitations on December 12, 1966. The claim was closed on November 13, 1967 with no award for permanent disability.

Claimant underwent a lateral meniscectomy in 1968. After a hearing, it was determined that this surgery was required by a new injury and upon closure of this new claim, claimant was granted 15° for 10% disability of the left leg.

Claimant underwent surgery for "exploration of the popliteal space and excision of Baker's cyst of the left knee" on November 26, 1975. The following month, he requested that the Board exercise its own motion jurisdiction and reopen his claim for the injury suffered July 23, 1968. The Board had insufficient evidence to determine whether the 1968 injury or the 1966 injury had been aggravated and it referred the claim to the Hearings Division to hold a hearing on this issue.

The Referee, on August 19, 1976, found that the aggravation involved the medial aspect of the knee joint, therefore, he recommended that claimant's condition at that time should be the responsibility of Home Insurance Company, which had been furnishing the employer's Workers' Compensation coverage at the time of the November 1, 1966 industrial injury. The Board adopted the Referee's recommendation on September 20, 1976 and remanded the claim for aggravation to Home Insurance Company.

After a closing evaluation on April 22, 1977, Dr. Bump indicated that claimant was having continuing problems with his left knee. He found a full range of motion but some crepitus and weakness about the quadriceps. Claimant was advised to use a knee brace. The doctor noted that claimant had been working since

January 12, 1976. In the doctor's opinion there was no additional permanent disability after the most recent surgery.

On November 15, 1977 the carrier requested a determination of claimant's claim. The Evaluation Division of the Workers' Compensation Department recommended, even though Dr. Bump found no additional permanent disability, that claimant should be granted additional compensation for his disability of the left leg. This was based on the fact that there has been definite disability as a result of claimant's medial joint problems. Claimant, up to this time, has received 10% for his left leg disability; Evaluation recommended an additional 5% and recommended that claimant be granted time loss benefits commencing November 26, 1975, per the Board order of March 11, 1976, through January 11, 1976.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability from November 26, 1975 through January 11, 1976, less time worked.

Claimant is granted 5.5° of a maximum of 110° for scheduled left leg disability. This is in addition to the previous award for 10% left leg disability granted as a result of the July 23, 1968 injury.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed \$2,000.

WCB CASE NO. 77-1936

FEBRUARY 14, 1978

LAURA DUCAT, CLAIMANT

Malagon, Starr & Vinson, Claimant's Atty.

SAIF, Legal Services, Defense Atty.

Amended Order

On January 31, 1978 an order was issued in the above entitled matter which incorrectly referred to claimant's request received on December 7, 1977 in the first paragraph of page 2 of said order. The first paragraph on page 2 should be corrected to read as follows:

"The request received from the employer, John Patterson, dba Summers Lane Tavern, on December 5, 1977 is hereby construed to be a request for Board review of the Referee's Opinion and Order entered in the above entitled matter on November 9, 1977."

In all other respects the order entered on January 31, 1977 is ratified and reaffirmed.

SAIF CLAIM NO. A 465385 FEBRUARY 14, 1978

LEMUEL PERRIGAN, CLAIMANT
Lyman C. Johnson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On January 19, 1978 the Board entered its Own Motion Determination in the above entitled matter which erroneously stated that claimant was granted compensation for temporary total disability from November 22, 1977 through December 6, 1977, less time worked; the compensation granted claimant for temporary total disability was from November 22, 1976 through December 6, 1977, less time worked. The order should be amended accordingly.

IT IS SO ORDERED.

WCB CASE NO. 76-1530 FEBRUARY 14, 1978
WCB CASE NO. 76-1673

KENNETH TAYLOR, CLAIMANT
Galton, Popick & Scott, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employers Insurance
of Wausau
Cross-request by Claimant

Reviewed by Board Members Wilson and Phillips.

Employers Insurance of Wausau (Wausau) and the claimant both requested Board review of the Referee's order which set aside the denial on June 8, 1977 by Wausau of claimant's claim; it directed Wausau to accept said claim and to pay claimant all benefits provided by law until said claim was closed pursuant to ORS 656.268, and to pay claimant as a penalty a sum equal to 25% of the compensation due claimant from January 16, 1976, the date claimant ceased working, and until April 14, 1976, the date claimant first received compensation for temporary total disability, and further directed Wausau to pay claimant's attorney the sum of \$1,250 as a reasonable attorney's fee.

It is undisputed that claimant suffered a compensable injury on November 10, 1971 while employed by Leonetti Furniture Company whose Workers' Compensation coverage was, at that time, furnished by Wausau. Claimant's injury was diagnosed as a chronic lum-

bosacral strain for which he was hospitalized and given conservative treatment. Claimant continued to have intermittent back pain and in October of 1975 noticed increasing low back problems while at work, usually caused by bending or lifting. On December 10, 1975 Dr. Lockwood treated claimant for low back pain on the left side radiating to his hip.

In 1973 the State Accident Insurance Fund (Fund) had replaced Wausau as the employer's Workers' Compensation carrier. On January 16, 1976 claimant worked one hour on his shift and then advised his foreman that he had to see a doctor because of back problems. His family physician referred him to Dr. Berselli who, after examination, advised claimant to discontinue working and to have total bed rest. Claimant advised his foreman that he would be unable to continue work. Claimant has not worked since that date.

In the early part of February 1976, after claimant had been discharged from the hospital, he filed a claim at the Fund's Milwaukie office and was advised to file a claim with Wausau. After calling the Fund's office in Salem, claimant returned his Form 801 (claim) to Wausau; the claim was thrown away by one of the employees of Wausau.

Claimant, after requesting both Wausau and the Fund to reopen his claim, retained an attorney and, through him, filed a request for hearing on Wausau's refusal to reopen on March 24, 1976. On the same date a request for hearing on the Fund's refusal to accept the claim was filed.

On April 14, 1976 Wausau issued its draft to claimant for temporary total disability compensation from January 17, 1976 through April 9, 1976. On May 14, 1976 the Board issued an order, pursuant to ORS 656.307, designating Wausau as the paying agent.

On June 4, 1976 the Fund issued its letter of denial on the basis that claimant had suffered an aggravation of his 1971 injury and therefore, his claim was against Wausau not the Fund. On June 8, 1976, Wausau issued its denial on the basis that claimant had sustained either a new industrial injury or occupational disease and that said condition was the responsibility of the Fund.

Claimant now contends that the Referee erred by failing to find that he has sustained both an aggravation which would be the responsibility of Wausau and an occupational disease or new injury which would be the responsibility of the Fund, citing Blair v. SAIF, 21 Or App 229.

Dr. Berselli, who was claimant's treating physician, testified that it was medically probable that claimant's work activities over a period of time caused the lumbosacral strain which he diagnosed. He also testified that it was probable claimant's work activities for the previous two days during the third week of October 1975 contributed in a significant way to claimant's symptoms

experienced at that time. Dr. Berselli testified that he would expect claimant's work to cause repeated exacerbation, that he thought the 1971 industrial injury did contribute to claimant's present condition because it was the opening episode in a chronic back strain problem and claimant, at that time, may well have suffered just enough damage to the ligaments and muscles of the back that it rendered him more susceptible to injuries and stresses.

Dr. Pasquesi examined claimant on June 10, 1976 and in his report stated that with respect to the relationship of claimant's November 10, 1971 injury to his present injury claimant recited a history which indicated ". . . that he recovered completely from the 11-10-71 injury". Claimant told him "He has had numerous other injuries at home and on the job which usually recovers in a few days until the accident of approximately October of 1975 which he does not recall as having occurred on the job or at home". Dr. Pasquesi expressed his opinion that claimant ". . . has had a succession of accidents and the accident of 11-10-71 was only one and possibly the first of a long series of injuries, all of which recovered except the last one".

The Referee found that claimant had suffered an aggravation of his November 10, 1971 injury and he remanded the claim to Wausau to accept and also assessed penalties against Wausau for its failure to either accept or deny the claim within 60 days and for its failure to commence payment of compensation for temporary total disability within 14 days after receiving notice of claimant's injury. He assessed no penalty against the Fund, although it was claimant's contention that both carriers should be assessed penalties and should be liable for payment of a reasonable attorney fee to claimant's attorney.

The Board, on de novo review, is most persuaded by the opinion expressed by Dr. Berselli that claimant's work exacerbated an underlying problem and his work over proceeding days contributed significantly to the symptoms he experienced in October 1975 and again in January 1976. Such opinion would support a finding that claimant had suffered an occupational disease. Dr. Berselli further testified that claimant's problem in November 1971 was a mild strain which was resolved quickly and the medical report from Dr. Pasquesi indicates that claimant suffered an occupational disease rather than any specific injury. After the 1971 injury, claimant had been able to work continuously; after January 16, 1976, claimant was unable to work.

The Board does not agree with the claimant's contention that he has suffered both an aggravation and an occupational disease; claimant's condition had its onset with the incident of November 10, 1971 and because of claimant's insistence on continuing to work his condition ultimately developed into an occupational disease and under the last exposure rule which, in the opinion of the Board, is applicable in this case, the responsibility for claimant's present condition is that of the Fund.

Claimant contends that regardless of whether liability is determined to rest exclusively upon Wausau or upon the Fund or as against both, both carriers have violated the elementary statutory requirements concerning payment of compensation within 14 days after notice or knowledge of a claim and acceptance or denial of the claim within 60 days after the employer had notice or knowledge thereof.

The Board finds that although the Fund is liable for claimant's present condition, nevertheless the decision of the Oregon Supreme Court in Jones v. Emanuel Hospital, 280 Or 147, requires that both carriers pay claimant "interim compensation" and both carriers are subject to the assessment of penalties and award of payment of an attorney's fee.

The Board, therefore, concludes that the Fund should pay claimant compensation for temporary total disability from January 16, 1976, the date of claimant's injury, until June 4, 1976, the date claimant's claim was denied by it and also pay claimant a sum equal to 25% of the compensation for temporary total disability for such period of time, plus attorney's fees, pursuant to ORS 656.262(8). The Board further concludes that although Wausau has already paid claimant compensation from the date of claimant's injury, it failed to commence such payments within 14 days after it had knowledge of claimant's claim and also it failed to either accept or deny claimant's claim within 60 days, therefore, it must pay claimant additional compensation equal to 25% of the compensation for temporary total disability belatedly paid claimant on April 14, 1976 for the period from January 16, 1976 through April 14, 1976.

The Board finally concludes that the attorney's fee of \$1,250 which the Referee directed Wausau to pay claimant's attorney is a reasonable attorney's fee but that the payment of said fee should be evenly divided between the two carriers.

ORDER

The order of the Referee, dated June 2, 1977, is reversed.

The claimant's claim for an occupational disease is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing January 16, 1976 and until closed pursuant to the provisions of ORS 656.268.

The Fund shall pay to claimant an additional sum equal to 25% of the compensation for temporary total disability due claimant from January 16, 1976 until June 4, 1976, the date the claim was denied by the Fund.

Employers Insurance of Wausau shall, in addition to the compensation for temporary total disability it has already paid claimant, pay claimant a sum equal to 25% of the compensation paid claimant from January 16, 1976 to April 14, 1976.

The State Accident Insurance Fund shall pay claimant's attorney the sum of \$625 and Employers Insurance of Wausaus shall pay claimant's attorney the sum of \$625 as a reasonable attorney's fee for his services in behalf of claimant before the Referee.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum of \$300, payable by the State Accident Insurance Fund.

CLAIM NO. D53-122943

FEBRUARY 14, 1978

KATHRYN M. WIER, CLAIMANT
Own Motion Determination

Claimant, at age 47, slipped and fell while working as a retail sales worker on April 5, 1968, hurting both knees and the right wrist. Subsequently, four Determination Orders were issued with total awards equal to compensation for 75% loss of the right leg, 25% loss of the left leg and 5% loss of the right forearm.

The right leg condition is not involved in this Own Motion Determination. The claimant, in the opinion of the Evaluation Division of the Workers' Compensation Department, has been adequately compensated for her disability in the right forearm.

Claimant, as a result of the 1968 injury, had a total removal of the left patella and an osteotomy in the high tibial area. After these surgeries, claimant was awarded 38° for 25% loss of the left leg by Determination Order, entered on December 4, 1975.

Claimant requested on May 3, 1977 (after the 5-year aggravation period had expired) that her claim be re-opened and the carrier voluntarily reopened for further medical care.

Dr. Weinman, on May 26, 1977, replaced the medial side of the left knee joint with a "Marmor type" prosthesis. His closing report of November 8, 1977 found the knee less painful, it was swelling less and not causing falls. He found good motion and noted that her limp was caused by her stiffened right leg and not the left. Dr. Weinman's opinion was that claimant's loss of function to the left leg was probably equal to 25%.

On December 2, 1977 the carrier requested a determination of claimant's disability. The Evaluation Division of the Department disagreed with Dr. Weinman's estimate of the left leg. Based on the sum total of the three major surgeries, the added stress on the left leg as a result of the severely disabled right leg, and the restrictions placed on the left leg to maintain the prosthetic joint in good condition, it found claimant's left leg disability

to be equal to 35% of the maximum. Her condition was medically stationary. It recommended that claimant be granted an additional award of 15° for 10% loss of the left leg and compensation for temporary total disability from May 23, 1977 through November 8, 1977.

The Board concurs with this recommendation.

ORDER

Claimant is granted temporary total disability from May 23, 1977 through November 8, 1977, less time worked.

Claimant is also granted compensation equal to 15° for 10% scheduled left leg disability. This award is in addition to all previous awards claimant has received for her April 5, 1968 injury.

WCB CASE NO. 76-4573

FEBRUARY 14, 1978

WALTER P. WILLIAMS, CLAIMANT
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 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 July 14, 1977, is affirmed.

SAIF CLAIM NO. WA 425480

FEBRUARY 15, 1978

WILLIAM E. CLARK, CLAIMANT
A. C. Roll, Claimant
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a low back injury on July 15, 1954 while loading lumber for Danabo Lumber Mill. A combined procedure was performed by Dr. Stainsby and Dr. Molter in April 1955. Dr. Molter, on July 5, 1956, indicated that there was a small amount of motion at the fusion site, L5-S1 but claimant was "getting along";

he felt that claimant had 40% loss function of the lumbar spine. An order, dated July 17, 1956, granted claimant compensation for 40% loss function of an arm for unscheduled disability. Subsequently, claimant's claim was destroyed.

Claimant's claim was reopened by the State Industrial Accident Commission's own motion for payment of temporary total disability benefits from December 10, 1956 and was again closed on March 25, 1957 with such compensation terminating on January 14, 1957.

Dr. Degge, on May 27, 1976, reported that claimant's symptoms were progressively getting worse and recommended that his claim be reopened for a myelogram and consideration of an exploration of the old fusion. The Fund accepted responsibility for claimant's lumbosacral pseudarthrosis on November 10, 1976 and reopened as of November 1, 1976.

A myelogram was performed on November 5, 1976 and on November 8 a laminectomy, L4-5, a posterolateral 2-level fusion and a bilateral L4-5 and L5-S1 were done. Claimant was released for work on May 16, 1977. Dr. Degge reported on December 12, 1977 that claimant has lost no time from work since that date and his permanent residuals were mildly moderate.

On December 29, 1977 the Fund requested a determination of claimant's disability. The Evaluation Division of the Board recommended that claimant be granted temporary total disability benefits from November 1, 1976 through May 15, 1977 only; no additional award for permanent partial disability was recommended.

The Board concurs.

ORDER

Claimant is hereby granted temporary total disability benefits from November 1, 1976 through May 15, 1977, less time worked.

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

EARL DOUGHERTY, CLAIMANT
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 affirmed the February 10, 1977 Determination Order granting 32° for 10% unscheduled right shoulder disability.

Claimant sustained a compensable injury to his right shoulder on July 28, 1975 when the ladder on which he was working slipped and he lost his grip, falling to the floor. He saw Dr. Liu two days later who found no fracture or injury but felt claimant had a possible strain of the muscles around the shoulder.

Claimant's condition did not respond to conservative treatment and surgery was performed by Dr. Case on December 4, 1975. On June 17, 1976 Dr. Case indicated claimant could return to light work but could not return to his regular job. In his September 13, 1976 report Dr. Case indicated that claimant's condition had improved but he was still restricted; he could not lift weights over 30 pounds above shoulder height, and he probably could not carry items weighing over 20 pounds up a ladder.

Dr. Holm, at the Disability Prevention Center, stated in September 1976 that claimant should not change jobs although he would have to modify his work habits to some degree. Dr. Case's closing evaluation found claimant's condition medically stationary with some permanent disability resulting from the industrial injury. The February 10, 1977 Determination Order awarded claimant 32°.

The Referee found that claimant, who is again working for his same employer, has not suffered any loss of income. He noted that Dr. Case testified that claimant's condition had improved substantially, especially after claimant had been at the Disability Prevention Center. Dr. Case stated that since claimant left the Disability Prevention Center he had nearly as much internal rotation of the right shoulder as of the left. Except for this claimant had a full range of motion.

Based upon the medical evidence and the testimony of Dr.

Case, the Referee concluded that claimant had not proven that he was entitled to an increased award of compensation and he affirmed the Determination Order.

The Board, on de novo review, finds that the award made by the Determination Order was inadequate. Based on the medical reports, the Board finds that should claimant lose his present job he would suffer a greater loss of wage earning capacity than that for which he was compensated. Claimant was instructed to restrict his activities to some degree both by Dr. Case and Dr. Holm. This restriction may not preclude claimant from doing his present job, (his employer is solicitous of claimant's welfare) but it might preclude claimant from entering a large part of the labor market.

The Board concludes that claimant is entitled to an award of 48° for 15% unscheduled disability to adequately compensate him for his potential loss of wage earning capacity.

ORDER

The Referee's order of July 27, 1977 is modified.

Claimant is granted 48° for 15% unscheduled right shoulder disability. This is in lieu of the award granted by the Determination Order of February 10, 1977 and affirmed by the Referee's order, which in all other respects is affirmed.

Claimant's attorney is granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed \$2,300.

WCB CASE NO. 76-3810

FEBRUARY 15, 1978

BRECK A. JACOBS, 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 dismissed his request for hearing on the issue of his entitlement to further medical care and treatment, in addition to temporary total disability between May 11, 1976 and October 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 September 8, 1977, is affirmed.

WCB CASE NO. 77-450, 76-5558 & FEBRUARY 15, 1978.
76-4282

CHARLES P. KING, CLAIMANT
Green & Griswold, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Atty.
Request for Review by CNA Ins.

Reviewed by Board Members Wilson and Moore.

CNA Insurance Company seeks Board review of the Referee's order which remanded claimant's occupational disease claim to it for acceptance and payment of compensation.

The Board, after de novo review, affirms and adopts the Opinion and Order, dated May 26, 1977, as reinstated by order dated July 29, 1977, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated May 26, 1977, as reinstated by order dated July 29, 1977, is affirmed.

Claimant's attorney is granted as a reasonable attorney's fee for his services in connection with this Board review in the amount of \$100, payable by the carrier, CNA Insurance.

FEBRUARY 15, 1978

ANTHONY LANDRISCINA, CLAIMANT
Charles E. Hodges, Jr., Claimant's Atty.
Department of Justice, Defense Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Request for Review by SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requested the Board to review the Referee's order which directed it to accept claimant's claim for aggravation of his October 25, 1972 injury; to pay claimant compensation, as provided by law; to reimburse United Pacific/Reliance for all sums which the latter paid claimant pursuant to an order issued under the provisions of ORS 656.307, and sustained the denial issued by United Pacific/Reliance and the State Accident Insurance Fund both on behalf of RayGo-Wagner.

Claimant has suffered three compensable injuries. On October 25, 1972, while in the employ of Western Electric, whose carrier was the Fund, claimant sustained a compensable injury, the claim for which was closed with no award for permanent partial disability.

On June 4, 1973, while in the employ of RayGo-Wagner, whose carrier at that time was the Fund, claimant suffered another compensable injury. This claim was also closed with no award for permanent partial disability.

On April 17, 1975, while claimant was turning a wheel, he strained his back; at that time he was still employed by RayGo-Wagner, but the employer was then insured by United Pacific/Reliance. The only issue before the Referee and before the Board on review is whether the 1975 injury constituted a new injury or was an aggravation of the 1972 injury.

The Referee found that claimant had received extensive medical care and treatment since his 1972 injury under the care of many doctors. The Referee stated, however, that the medical reports were not being reviewed in detail because none of them unequivocally answered the question of aggravation versus new injury. He found that claimant had had no back problems before his 1972 injury but that since that injury both medical and lay testimony established that he had had continual low back problems of significant intensity which required medical care and treat-

ment. Although each of the first two claims was closed with no award for permanent disability, the Referee found that it was obvious, at least in retrospect, that claimant had sustained a substantial disability following the 1972 injury.

The Referee concluded that claimant had met his burden of proving that he had suffered an aggravation of his 1972 injury which was incurred while claimant was in the employ of Western Electric, whose carrier was the Fund.

The Board, on de novo review, finds the reports of three doctors, namely, Dr. Cottrell on August 5, 1975; Dr. Russakov on August 23, 1976, and Dr. Newman on September 9, 1976, all indicated, based upon the history related to them by the claimant, that the injury of 1975 was "most significant" in reference to claimant's disability. The evidence shows that after claimant's first and second injuries he was able to return to work and function at his job on a regular basis during the entire period of time. There is no evidence that claimant had any pain radiating into his leg until after the 1975 injury. There is evidence of residuals resulting from the 1975 injury.

Although there is evidence that claimant sought medical attention from time to time after the 1972 injury and made some complaints about pain, nevertheless, claimant was able to work with this pain and suffered no permanent disability; therefore, it must be assumed that claimant had fully recovered from his 1972 injury.

The Board has adopted the Massachusetts-Michigan rule in successive-injury cases. This rule places full liability upon the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability. If the second injury takes the form merely of a recurrence of the first, and does not contribute even slightly to the causation of the disabling condition, then the carrier at the time of the original injury remains liable for the second. In this instance, the evidence indicates that the 1975 injury was more than a mere recurrence of the 1972 injury, which was not even disabling, and did contribute, if not entirely, at least to a great extent, to the claimant's present disabling condition.

The Board concludes that the injury suffered on April 17, 1975 by the claimant while employed by RayGo-Wagner, whose coverage at that time was furnished by United Pacific/Reliance, must be considered as a new injury rather than an aggravation of the October 25, 1972 injury.

ORDER

The order of the Referee dated June 29, 1977, is reversed.

Claimant's claim for a compensable injury suffered on April 17, 1975 is remanded to the employer, RayGo-Wagner, and its carrier, United Pacific/Reliance, to be accepted for the payment of compensation, as provided by law, until the claim is closed pursuant to the provisions of ORS 656.268.

Any sums which the State Accident Insurance Fund may have paid to United Pacific/Reliance pursuant to the Referee's order shall be repaid to the Fund by United Pacific/Reliance.

The denial by the Fund of any responsibility for claimant's injury on April 17, 1975, if such denial was actually made, is approved.

Claimant's attorney is awarded as a reasonable attorney's fee for his services before the Referee at the hearing the sum of \$400, payable by the employer, RayGo-Wagner, and its carrier, United Pacific/Reliance.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum of \$100, payable by the employer, RayGo-Wagner, and its carrier, United Pacific/Reliance.

WCB CASE NO. 76-6078-B FEBRUARY 15, 1978

CHARLES LOVELL, CLAIMANT
Lyman C. Johnson, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Request for Review by EBI Co.

Employee Benefits Insurance Company seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation and affirmed the denial of the State Accident Insurance Fund.

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 12, 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, Employee Benefits Insurance.

WCB CASE NO. 77-2862

FEBRUARY 15, 1978

HAL R. MCUNE, CLAIMANT
Brian L. Welch, Claimant's Atty.
Marshall C. Cheney, Defense Atty.
Stipulation and Order of Dismissal

It is hereby stipulated by and between Hal R. McUne, claimant, and Edward Hines Lumber Co., the employer and insurer, as follows:

The claimant was employed by Edward Hines Lumber Co., and it is the claimant's contention that he sustained a compensable injury which arose out of and in the course of employment. Claimant was examined by John H. Weare, M.D. of Burns, Oregon, and J. David Bristol, M.D., William G. Kraybill, M.D., David D. Anderson, M.D., John M. Porter, M.D., and Richard A. Schaefer, M.D., all of Portland, Oregon.

CONTENTIONS OF CLAIMANT

The claimant contends that the employer should pay the medical and hospital expense incurred and should pay temporary total and permanent partial disability benefits as prescribed by statute.

CONTENTIONS OF EMPLOYER

The employer contends that as a matter of fact, no accident, injury, happenstance or other occurrence took place or occurred to the claimant, not did he sustain any physical ailment or condition at any time that he was employed by employer which is causally related to this claim.

The employer also contends that any condition or disease developed by claimant during the course of employment of claimant by employer was wholly unrelated to any activity of employment.

STIPULATION

The parties have agreed that an order may be entered in this captioned matter dismissing this claim and confirming this settlement and compromise. Such agreement has been made pursuant to the wishes of the claimant and with the consent and approval of counsel for claimant, Brian L. Welch. Claimant has been advised by his own doctors, the employer independently and based upon the

facts of this claim and the medical advice furnished to the employer by claimant. The parties represent that this settlement and compromise is fair and reasonable. The parties agree that such an order in this claim shall be that:

(1) The employer-insurer, Edward Hines Lumber Co., shall pay and cause to be paid to claimant the sum of \$6,500.00 commensurate with the dismissal of this claim, in full, complete settlement of all claims arising out of the employment of said Hal R. McUne by the said employer, including aggravation, penalties and attorneys' fees, which shall be in full and complete settlement of all benefits under the Oregon Compensation Act for and on account of said employment, and that such order is made pursuant to the provisions of the Workmen's Compensation Act of Oregon wherein there is a bona fide dispute over the compensability of such a claim and that upon approval of this settlement and entry of order of dismissal by the Workers' Compensation Board that said payment shall be caused to be made forthwith to the claimant, Hal R. McUne, Burns-Bend Route, Burns, Oregon 97720.

(2) That of and from said sum of \$6,500.00 there shall be paid by the claimant, by and through this employer, \$1,625.00 thereof to Brian L. Welch, attorney for the claimant, for and on account of services performed by him, which sum is deemed to be a reasonable amount.

APPROVED AND THE MATTER IS DISMISSED.

WCB CASE NO. 76-2758

FEBRUARY 15, 1978

WAYNE WARD, CLAIMANT
Harry R. Kraus, Claimant's Atty.
Day & Prohaska, 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 a total award of compensation equal to 80° for 25% unscheduled low 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 March 23, 1977, is affirmed.

FEBRUARY 17, 1978

ELIZABETH CARTER, CLAIMANT
Bailey, Welch, Bruun & Green,
Claimant's Atty.
Rankin, McMurry, Osburn, Gallagher
& VavRosky, 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.

FEBRUARY 17, 1978

BRIAN E. FLOYD, 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 seeks Board review of the Referee's order affirming the February 23, 1977 Determination Order which, together with a prior Determination Order, resulted in claimant receiving 45° for 30% loss of function of the left leg. Claimant contends that he is entitled to more.

Claimant suffered a knee injury while playing football in high school in 1972 but had no problems with the knee after that injury. In November 1974, after working for his employer for approximately 7 months, he noticed that his knee was gradually becoming painful while he hand-trucked cases of motor oil from the warehouse area to the display area of G.I. Joe's. Later he noticed a black and blue area on the inside of his leg several inches below the knee. He could recall no traumatic incident which could have precipitated this bruise.

Dr. Pasquesi, on February 5, 1976, examined claimant and found he had chondromalacia and felt claimant should be retrained in some type of work not requiring him to be on his feet 8 hours a day, nor requiring repetitive climbing or descending stairs, and not requiring him to walk over uneven ground. There was a possibility claimant would require further surgery.

A Determination Order, dated March 16, 1976, granted claimant 37.5° for 25% loss of the left leg.

Dr. Fagan, who had previously operated on claimant in 1975, stated in his June 9, 1976 report that claimant's knee had given way on him on May 3, 1976 and a subsequent arthroscopy was carried out on June 3, 1976 which revealed a definite tear of his lateral cartilage, good medial joint space, and evidence of mild chondromalacia in the patella. Dr. Fagan performed a left arthrotomy and a left lateral meniscectomy.

Claimant was re-examined on December 2, 1976 by Dr. Pasquesi who found that claimant still had pain in the region of the kneecap on the medial and lateral aspects of his knee and some swelling. Dr. Pasquesi found the claimant had lost 10° of flexion of his knee and he rated claimant's impairment of the left lower extremity at 5% more than it was when he rated it at 25% on February 5, 1976. He felt the claimant was stationary. Dr. Fagan concurred with these findings.

A Second Determination Order, dated February 23, 1977, awarded claimant an additional 7.5° for 5% loss of his left leg, giving claimant a total of 45° for 30% of the maximum. Claimant was found to be medically stationary as of December 2, 1976.

Claimant is 21 years old. He was, at the time of the hearing, working for his father cutting and gluing fittings on plastic pipe for swimming pool installation. He was able to sit most of the time he was doing this work. Claimant feels his knee is getting sorer; he now wears a brace. He testified he is unable to do a full squat, to run and has to be careful to keep his knee from buckling. Claimant has not received any medical treatment for his leg since September of 1976; he does use aspirin for pain.

The Referee concluded that, based on the reports of Dr. Fagan and Pasquesi, the total award of 45° adequately reflected claimant's loss of function of his left leg.

The Board, after de novo review, finds claimant is entitled to more than 30%, based on the testimony of claimant that he has suffered permanent loss of strength and endurance in his left leg and on the medical reports of Drs. Fagan and Pasquesi. The Board increases claimant's award to 60° for 40% loss of function of his left leg.

ORDER

The Referee's order, dated July 14, 1977, is modified.

Claimant, by this order, is granted 60° for 40% loss of his left leg. This is in lieu of the prior awards received by claimant for his left leg injury of November 1, 1974.

Claimant's attorney is granted as and for a reasonable attorney fee for his services at Board review a sum equal to 25% of the increase in compensation made by this order, payable out of said increased compensation as paid, not to exceed \$2,300.

WCB CASE NO. 77-2693

FEBRUARY 17, 1978

GABRIEL GOITIANDIA, CLAIMANT
Bailey, Welch, Bruun & Green, Claimant's Atty.
Cheney & 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 claimant's occupational disease claim to it for acceptance and 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 September 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 \$350, payable by the carrier.

WCB CASE NO. 77-192

FEBRUARY 17, 1978

LYLE HOBWOOD, CLAIMANT
Ackerman & DeWenter, 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 compensation for his wife's services to him in connection with his disability and recovery in the amount of \$380 per month from the hospital discharge date to the date of the hearing and \$3.10 an hour for similar services as are required in the future.

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, 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 Fund.

WCB CASE NO. 76-6973

FEBRUARY 17, 1978

HERBERT L. HONEY, 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 seeks Board review of the Referee's order which remanded the claim to the Fund for consideration of possible referral for vocational rehabilitation and ordered time loss benefits be paid from June 29, 1977, the date of the order, until such benefits can be properly terminated in accordance with the statutes and Board rules.

Claimant contends that he is entitled to temporary total disability benefits from September 9, 1976 through June 29, 1977.

Claimant, at age 33, suffered a compensable injury on September 14, 1974 when he fell from a ladder. The initial diagnosis was cerebral concussion and a possible shoulder injury.

It was felt that claimant would benefit from vocational rehabilitation services as he was not severely disabled and, except for his shoulder injury, he was in good health. In mid-1975 he was enrolled in a course of Civil-Structural Engineering at Chemeketa Community College. Claimant did very well in most of his classes but indicated, in December 1975, that he was having difficulty with his math class. A tutor was hired for him. In July 1976, after special tutoring failed to bring about any improvement, it was evident that the program would have to be changed if claimant was to benefit therefrom.

On October 5, 1976, a Determination Order granted claimant 48% for 15% unscheduled left shoulder disability, found his condition to be medically stationary as of November 19, 1975, and

awarded compensation for temporary total disability from September 14, 1974 through September 9, 1976, less time worked.

Claimant talked to his counselor, Mr. Mikkelson, and a plan was developed whereby claimant would change to a course of study in well drilling. Claimant said he tried to sign up for the summer term of 1976, but was informed that no classes in well drilling were being offered at that time. Subsequently, he registered for the fall term, but when he attempted to advise his counselor of the change, he was informed that Mr. Mikkelson no longer worked for that office.

Claimant was required to obtain his doctor's permission to take the new course, but by the time this was done it was too late to enter the fall program. Claimant was subsequently dropped from the program as the division had received no response from him to its inquiries, one by phone and one by letter. Claimant questioned why he had been dropped, but was told there was nothing he could do.

After termination from the vocational rehabilitation program, claimant attempted to find work, but he was unable to find any consistent employment because of his physical disability.

The Referee found claimant to be sincere in his efforts to get into a rehabilitation program with the idea of getting into suitable and gainful employment when the program finished. He felt that because claimant was vocationally handicapped in August 1975, he probably still was at the time of the hearing since he was unable to satisfactorily complete a course of study under a vocational rehabilitation program. He found claimant to be highly motivated and therefore, remanded the claim to the Fund for evaluation and consideration of further training.

The Board, after de novo review, concurs with the findings and conclusion of the Referee. However, the evidence indicates that claimant is entitled to temporary total disability benefits between September 9, 1976, which was the date the Determination Order terminated temporary total disability benefits and until June 29, 1977, the date of the Referee's order. There was no evidence that claimant did not have a vocational handicap at the time the Determination Order was entered; he was unable to complete a course of study which would enable him to get a job he could handle, although he made every effort to succeed in this area. Pursuant to ORS 656.268(1)(2) claimant's claim could not be closed while he had this vocational handicap, therefore, the Board finds that the Determination Order of October 5, 1976 should be set aside and claimant paid time loss benefits between September 9, 1976 and June 29, 1977.

ORDER

The order of the Referee, dated June 29, 1977, is modified only to the extent that claimant is granted compensation

for temporary total disability commencing September 9, 1976 and until June 29, 1977.

Claimant's attorney is granted as a reasonable attorney's fee for his services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said compensation as paid, not to exceed \$500.

WCB CASE NO. 77-3318

FEBRUARY 17, 1978

GARY L. MEEKS, CLAIMANT
Paul C. Paulsen, 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 approved the April 27, 1977 Determination Order granting 37.5° for 25% loss of the left leg.

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 5, 1977, is affirmed.

WCB CASE NO. 77-61

FEBRUARY 17, 1978

LOYAL I. MILLER, CLAIMANT
Gordon W. Stewart, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
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 found the claimant's claim for an occupational disease to be compensable.

Claimant, 54 years old, alleges he suffered an occupational disease arising out of and in the course of his employment as a sawyer. He had been so employed for five and one-half years. The requirements of claimant's employment were that he sit in

a small room, observe logs approaching from his right and operate various controls to send the logs in any one of three directions. There was evidence that claimant had to constantly move his head from side to side and repeatedly move his left arm forward and back, a stretching maneuver.

The mill was shut down for a four-day weekend on November 24, 1976. Claimant worked his normal shift that day and left with his wife that evening to drive to Idaho. On November 27, 1976, while claimant was returning to his home, he testified that his left arm was uncomfortable. He thought this problem was caused by the vibration of the vehicle he was driving. Claimant, upon his reaching home, went to bed, but was awakened by pain in his left shoulder and arm at 2:30 a.m. when he rolled over in bed and got a catch in his vertebra. The pain continued and he sought medical assistance the next morning from Dr. Kemper, claimant's family physician.

Dr. Kemper reported that claimant's problem began on his way home from Idaho and that it was not an on-the-job accident. The doctor's records do reflect that claimant had a history of arthritis, but he had had no prior problems with his shoulder area or any problems similar to those he experienced following his injury in bed.

Dr. Kemper referred claimant to Dr. Ray Miller, a neurologist, whose records reflect claimant had been experiencing some discomfort in his left arm and shoulder for the past 9 to 12 months. Dr. Miller reported a different history related by claimant than that given to Dr. Kemper by claimant. He told Dr. Miller he had to move his left arm to and fro four to five thousand times per day at work. Dr. Miller diagnosed degenerative cervical disc disease, C-7, T-1 on the left, with a C8 radiculopathy on the left.

On December 14, 1976, a cervical laminectomy with removal of a completely extruded disc at the L-7, T-1 level on the left side was performed on the claimant by Dr. Miller. Dr. Miller's opinion was that claimant's neck and left arm problem were secondary to his work, and a direct result of his work.

Claimant had engaged in various strenuous activities outside of his employment. These included tearing down an old barracks, which required claimant to crawl and lie on his back with his arms overhead, part-time work delivering and installing appliances and starting a worm raising business.

The Referee found that the case of Geenty v. Hyster, Inc., (75 Adv. Sh. 3561) was controlling; the facts in that case and in this one were very similar. He found no evidence that the other activities in which the claimant engaged involved more than normal use of claimant's head and neck, but that claimant's employment activities did involve unusual use of the head and neck and an unusual amount of repetitive turning and reaching. This finding, when combined with Dr. Miller's opinion, led the Referee to conclude that claimant had met his burden of proof that he has suffered

a compensable occupational disease and ordered his claim accepted.

The Board, after de novo review, finds that Dr. Miller does not, in his reports, indicate he was aware of claimant's activities off the job nor does he relate when claimant last worked in relation to the injury occurring at home in bed. The claimant told Dr. Miller he had continuing problems in the left arm and left shoulder for almost a year prior to this episode of experiencing greater pain after rolling over in bed. However, claimant later testified he had never had this type of pain before. The history claimant gave Dr. Miller fails to reflect claimant's activities during his drive from Idaho to home, nor his three-day vacation and claimant's first experience of pain on his return trip.

The Board finds that the claimant actually injured himself when he turned over in bed after he had returned home. This was a specific incident which resulted in his injury and occurred off the job. Dr. Miller's opinion as to the causal relationship between the injury and claimant's job is based on the incorrect and unsubstantiated information. The Board finds many dissimilarities between the facts in this case and the facts in the Geenty case.

The movements of the claimant's head required by his work activity are not unusual nor unduly strenuous. In Geenty, medical evidence established claimant's work activity constantly aggravated and accelerated the degenerative process; not so in this case.

The Board concludes, based on all the evidence, that the claimant does not have an occupational disease.

ORDER

The Referee's order, dated May 17, 1977, is reversed.

The denial of the employer is affirmed.

WCB CASE NO. 76-3535

FEBRUARY 17, 1978

In the Matter of the Compensation
Of The Beneficiaries of
MERRILL RAY, DECEASED
Lively & Wiswall, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Abating Amended Order on Review

On January 19, 1978 an amended order on review was entered in the above entitled matter which awarded claimant's attorney a reasonable attorney's fee for his services at the hearing before the Referee payable by the State Accident Insurance Fund.

The Board is now informed by the attorney for the Fund that he and claimant's attorney have entered into a stipulation whereby the Fund will pay claimant's attorney a larger attorney's fee than that awarded by the amended order and the claimant's attorney will not appeal from said order.

Time is of the essence inasmuch as the Board will lose jurisdiction over the above entitled matter on February 21, 1978. The Board concludes that it is in the best interest of all parties concerned to hold in abatement the amended order until the stipulation is received which will avoid further litigation of this matter.

ORDER

The amended order on review entered in the above entitled matter on January 19, 1978, which amended a portion of the order on review entered on January 6, 1978, shall be held in abeyance pending receipt by the Board of the stipulation signed by all parties relating to the attorney's fee to be paid claimant's attorney by the State Accident Insurance Fund for his services at hearing.

WCB CASE NO. 77-2939

FEBRUARY 17, 1978.

JACK D. SHUMAKER, CLAIMANT
Anderson, Fulton, Lavis & Van Thiel,
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 carrier's denial of his aggravation 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 September 8, 1977, is affirmed.

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