VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

Robert VanNatta, Editor

VOLUME 24

—Reports of Workmen's Compensation Cases—

FEBRUARY 1978—JUNE 1978

Published by Fred VanNatta

VAN NATTA'S WORKMEN'S COMPENSATION REPORTER

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

PRICE FIFTY DOLLARS

CLAIM NO. D53-69922 FEBRUARY 23, 1978

RICHARD BARRETT, CLAIMANT
Philip A. Mongrain, Claimant's Atty.
Allan H. Coons, Defense Atty.
Own Motion Matter Referred for Hearing

On December 6, 1977 the Board received a request from claimant, by and through his attorney, to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a compensable injury suffered on October 1, 1959 while claimant was employed by Mt. Canary Lumber Company, whose workmen's compensation carrier was Employers Insurance of Wausau.

The injury was to claimant's right knee and surgical repair of a torn lateral meniscus was performed on November 5, 1959. The claimant alleges that since the injury his right knee continued to worsen until he was forced to undergo a total right knee replacement in February 1977. The history of claimant's right knee problem is set forth in claimant's affidavit attached to his request for own motion relief.

Responding to claimant's request for own motion relief, Wausau advised the Board that it was their position that workmen's compensation insurance was not mandatory under the law in existence at the time of claimant's injury and employers who chose not to be covered could, by appropriate contract, agree to provide industrially injured workmen benefits equal to those provided by the State Industrial Accident Commission and such contracts were not subject to the jurisdiction of the Commission. It offered copies of microfilm of an "Agreement" signed by claimant on November 16, 1959 and also a "Release and Settlement of All Claims" executed by the claimant on May 17, 1960. It is the position of Wausau that SIAC never had jurisdiction in the first place, therefore, the Board could not now have continuing jurisdiction and the request for own motion relief must be dismissed.

On the same date the Board also received claimant's request to reopen his claim for a compensable injury suffered on July 21, 1966 while in the employ of Georgia-Pacific Corp. The affidavit furnished in support of this request stated that claimant twisted his left knee while working for Jones Veneer & Plywood, apparently the predecessor of Georgia-Pacific Corp. Surgery was performed on the left knee on October 17, 1966 and claimant returned to work in November of that year.

Claimant alleges to have had continuing problems with his left knee for which he has been treated intermittently by Dr. McHolick and in 1976 an arthrogram was performed which revealed advanced degenerative changes in his left knee.

In response to this claim Georgia-Pacific informed the Board it had no knowledge of claimant's 1959 injury to his right knee, however, based upon the information furnished it by claimant's attorney, it appeared that the injury to the right knee and the resultant total right knee replacement placed an increased load or strain on the left knee and that claimant's left knee problems are now directly attributable to the effects of the prior right knee injury. Georgia-Pacific takes the position that the own motion relief requested for the 1966 injury is improper and claimant, if he is entitled to proceed at all, should be allowed to proceed only against the employer with whom he was employed at the time of the 1959 right knee injury.

Claimant's attorney has requested that both requests for own motion relief be heard in tandem. The Board approves of this request and, because it does not have sufficient evidence at this time upon which to make a determination with respect to either request for own motion relief, refers both matters to the Hearings Division with instructions to set the matters down for hearing and, if necessary, join both carriers. Upon conclusion of the hearing of both matters, the Referee shall cause a transcript of both proceedings to be submitted to the Board together with his recommendation concerning the two requests for own motion relief.

WCB CASE NO. 77-1598 FEBRUARY 23, 1978

RICHARD CARLSON, CLAIMANT
Roger B. Todd, Claimant's Atty.
Robert F. Walberg, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks review by the Board of the Referee's order which dismissed his case. The issue before the Referee was for the imposition of a penalty and award of attorney's fee because of unreasonable delay or resistance in the payment of compensation.

On December 7, 1976 the Board had entered its order awarding claimant 40.5° for 30% loss of his right foot; upon appeal the circuit court by its judgment order entered January 20, 1977 increased the award to 60.75° for 45% loss of the right foot and further provided that claimant's attorney should be paid a sum equal to 20% of the additional compensation awarded as a reasonable attorney's fee, said fee to be paid out of the compensation awarded payable as paid. At the present time an appeal by the employer is pending in the Court of Appeals.

The increase awarded by the circuit court amounts to $1,417.50, 20% of this amount is $283.50. The employer paid the claimant in three installments and sometime prior to March 8, 1977 claimant had received the total amount to which he was entitled, namely 80% of the increased compensation. No payments had been paid to claimant's attorney. Because of this, the claimant's attorney requested a hearing, contending that the failure to pay him his compensation which was payable out of the compensation was, in effect, failure to pay compensation.

Claimant had written several letters to the employer concerning the payment of his fees from the compensation awarded claimant. He also discussed the matter with two different attorneys each representing the employer, each told claimant's attorney he would instruct the employer to pay the attorney fee. On March 18, 1977 claimant received a check for $283.50 in full payment of his fee.

The Referee concluded that the claimant had received his full compensation by approximately March 1 and his attorney had received his full attorney's fee shortly thereafter and actually before the full award had to be paid.

The Referee was of the opinion that the provisions of ORS 656.313 which requires payment of compensation pending review to insure that an injured workman is not deprived of the compensation benefits when they are most useful to him had been met. Claimant had received his 80% on or about the first of March. He viewed the failure to withhold and pay the 20% for attorney's fees from February 1 to March to be more the result of an administrative mixup or inadvertence than intentional conduct and that there was never a refusal to pay compensation.

The Referee concluded there was no evidence of intentional conduct and therefore there was not an unreasonable delay or resistance in the payment of compensation inasmuch as the

total award of compensation was paid prior to the time required by ORS 656.216(1).

The Board, on de novo review, disagrees with the Referee's interpretation of attorney's fees which are payable out of compensation awarded claimant. ORS 656.313 states that the filing by an employer or the Fund of a request for review or court appeal shall not stay payment of compensation to a claimant. When the claimant's attorney fee is based on a certain percentage of the compensation awarded claimant and payable out of said compensation as paid, it is compensation and must be timely paid to the attorney at the same time claimant is paid. The fact that the claimant's attorney ultimately was paid his attorney's fee in one lump sum a short time prior to the date the total compensation was due does not excuse the employer.

In this case claimant received his first check on February 1, but his attorney did not receive any check until March 18, 1977. The Board concludes this is an unreasonable delay in the payment of compensation which subjects the employer to a penalty and requires it to pay claimant's attorney's fee.

The Board further concludes that the employer should be assessed a sum equal to 15% of the $283.50 which was belatedly paid in a lump sum to the attorney for claimant, and should also pay claimant's attorney a reasonable attorney's fee for his services before the Referee at hearing.

ORDER

The order of the Referee dated September 9, 1977 is reversed.

Georgia-Pacific is directed to pay to claimant's attorney, Roger B. Todd, a sum equal to 15% of $283.50, 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 $100 payable by the employer.

WCB CASE NO. 77-345 FEBRUARY 23, 1978

CLAIRE GATCHALL, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
Rhoten, Rhoten & Speerstra,
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 awarded him 256° for 80% unscheduled disability, the award to be in lieu of the Determination Order dated January 7, 1977, but not to include a previous award for 45% unscheduled disability resulting from a 1965 injury. Claimant contends he is permanently and totally disabled.

Claimant suffered a compensable injury on December 26, 1975 which resulted in severe back pain. Claimant's family physician, Dr. Kuehn, saw claimant on January 8, 1976 and has continued to treat him intermittently for this back condition. Claimant was also examined by Dr. Steele, an orthopedic surgeon, who placed claimant in a physical therapy program for his back problem.

Claimant had suffered a previous injury on March 5, 1975 when he hit his head on the tire of a Volkswagen which was up on a hoist. Dr. Kuehn referred him to Dr. Serbu who had treated claimant for a back injury in 1965. On April 30, 1975 Dr. Serbu reported that claimant had suffered a mildly arthritic condition in his neck when he struck his head on the tire and the X-rays showed some narrowing of both C5-6 and C6-7. This March 1975 injury was accepted as a non-disabling injury. Claimant continued to work and also continued to receive treatments for his neck problem up until the December 1975 injury. Since that injury claimant has not returned to work.

Claimant filed an aggravation claim on May 20, 1977 relating to his March 1975 neck injury; the claim was denied on June 29, 1977.

As a result of the 1965 injury claimant had had a laminectomy. He has also been seen and examined by numerous medical specialists. However, his primary treatment has been from Dr. Kuehn. Dr. Kuehn in his deposition referred to claimant's neck problem as well as to his mid-back problem and also to his earlier low back problem. He also stated that claimant had a

hiatal hernia. Apparently claimant also has dizzy spells occasioned by looking up or rapidly rotating his head. Dr. Kuehn did not think the low back problem was a contributing factor to claimant's present difficulty, he thought most of claimant's problems came from the mid-back area.

Dr. Steele, on March 8, 1977 stated that claimant could not return to his former employment as an automobile mechanic and he would have permanent physical impairment which would limit him in any significant bending, twisting, or lifting more than 10 pounds. It was Dr. Steele's opinion that the only type of work available for claimant would be light work which would allow frequent change of position and with claimant's background and education, both of which are limited, it would be difficult for claimant to find such work.

Claimant was seen by a Vocational Rehabilitation counselor who concluded that because claimant for the past 19 years had been an automobile mechanic and he now was unable to lift more than 10 pounds nor to drive safely due to the inability to move his head from side to side without suffering spells of vertigo and, additionally, had some marginal GATB scores outside of the verbal area with focused interests in a very competitive labor market he would be unable to return to any competitive employment.

Claimant is 61 years old, is 5' 10" tall and weighs between 200 and 205 pounds, his normal weight for the past 30 years. He has a high school education and he did some farm work before World War II during which he served two years plus as a truck driver and a mechanic. The evidence indicates that claimant cannot sit or stand for prolonged periods of time without his back commencing to hurt and forcing him to lie down.

The Referee found the claimant does very little at the present time and has made no effort to return to work although he has indicated he has talked to some people about work but couldn't find anything he was able to do.

The Referee found that the medical evidence was insufficient to support aggravation. He found there was a possibility that some permanent disability may have existed with respect to claimant's neck as a result of the March 1975 incident but the medical testimony was not clear. He found the December 1975 injury had removed claimant from the labor market and had caused most of claimant's present problems, but he found it difficult to find that claimant was permanently and totally disabled. The Referee commented that claimant seemed quite comfortable during

the hearing despite the fact he said he was not able to sit for a very long period of time.

The Referee felt that the award for 35% for unscheduled disability was inadequate. Based on claimant's age, the fact that he is presently drawing Social Security benefits and is unable to return to work as a mechanic, the Referee concluded that claimant was entitled to an award of 256° for 80% unscheduled disability. Claimant had received 112° for 35% unscheduled disability by the Determination Order of January 7, 1977.

After de novo review, the Board finds claimant to be permanently and totally disabled. Both Dr. Steele and Dr. Kuehn stated that claimant could not return to his former employment as an automobile mechanic and with all the limitations Dr. Steele placed on claimant's physical activities that little was left in the way of work activity in which claimant could engage. Furthermore, Dr. Steele felt, based upon claimant's work background and his education, that it would be very difficult for him to find any light type work. Such testimony was bolstered by the opinion of Mr. Wyatt, a professional vocational rehabilitation counselor who also felt claimant was precluded from returning to any gainful employment.

The Board finds that the medical and lay testimony is sufficient to establish for claimant a prima facie case of "odd-lot" permanent total disability and the employer has not come forward with any evidence of a gainful and suitable occupation available to claimant on a regular basis. Therefore, claimant must be considered to be permanently and totally disabled.

ORDER

The order of the Referee dated September 12, 1977 is modified. Claimant is found to be permanently and totally disabled as of the date of this order. This award for permanent total disability is in lieu of the award granted by the Referee in his order 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 increased compensation granted to claimant by this order, payable out of said increased compensation as paid, not to exceed $2,300.

WCB CASE NO. 76-4779 FEBRUARY 23, 1978

FRANK J. HEINRICK, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.

Reviewed by Board Members Wilson and Moore.

Claimant seeks review by the Board of the Referee's order which affirmed the August 6, 1976 denial of claimant's claim by the State Accident Insurance Fund.

The issues before the Referee were (1) compensability; (2) penalties for unreasonable denial and (3) timeliness of the claim.

Claimant is 51 years old. He is a self-employed produce trucker who has been a patient of Dr. Osborne since 1960. During this time Dr. Osborne had cautioned claimant to resist his tendency to overwork. On March 3,1976 claimant suffered an onset of symptoms including a rapid heart beat and dyspnea. He was seen by Dr. Osborne at the emergency room of Portland Adventist Hospital. It was the doctor's opinion claimant had suffered fatigue and paroxysmal atrial tachycardia, hereinafter referred to as P.A.T.

On April 30, 1976 claimant filed a claim (form 801) with the Fund. The Fund investigated the claim and denied it on August 6, 1976.

Dr. Osborne on February 21, 1977 opined that claimant "did not suffer an injury, but I felt that certainly he was on the verge of total collapse from fatigue and certainly he could have, if he had not taken care of himself, suffered probable serious damage to his heart." Later Dr. Wysham examined claimant who had apparently improved under his medical management but was not able to run his produce trucking business. It appeared claimant had suffered from P.A.T. since 1960 and had become worse in the last three years.

Both Dr. Wysham and Dr. Lee, also a cardiologist, testified at the hearing. The Referee was persuaded by their testimony that the cause of P.A.T. is usually not known but is thought to be degenerative. Also symptoms such as claimant had accompanied by an attack of P.A.T. usually end when the accelerated heart rate reverts to normal and there is no permanent change or damage to the heart.

Dr. Wysham advised claimant to discontinue driving as a precaution in case an attack should occur in the future. Dr. Lee believed that the P.A.T. was episodic rather than progressive and that attacks were as likely to occur at rest as during exertion. He did not feel there had been a sufficient number of attacks to justify an opinion that the work precipitated them.

The Referee found that although the opinions of Dr. Wysham were most persuasive that the attack was precipitated by work related activity neither his report of March 14, 1977 nor his testimony indicated that he was aware of what claimant was doing on March 3, 1976 when the attack occurred. The Referee found that it was impossible to accurately determine what claimant was doing because of the inconsistencies in his testimony. He found claimant was not a credible witness and that he had failed to prove that he had suffered a compensable injury on March 3, 1976 or thereafter.

Having made such findings, the issue of penalties and timeliness of the claim became moot; nevertheless, the Referee commented that resistance by carriers in heart claims was, in most cases, all but guaranteed in view of the imperfect state of knowledge of the art of medicine in that field. Furthermore, the record failed to show more than persistent resistance to a difficult claim which fell short of an unreasonable denial requiring the imposition of penalties.

On the issue of timeliness of the claim, the Referee commented that the provision for filing a claim found in ORS 656.265 was keyed to notice or knowledge by the employer of the injury and inasmuch as claimant was also the employer in this instance the statute of limitations probably would not apply. As a self-employed worker, claimant presumably qualified as a subject workman under ORS 656.128 and had failed to produce a satisfactory corroborative evidence of his injury as required by subsection (3) of that statute.

The Board, on de novo review, agrees with the Referee's conclusion that claimant has not suffered a compensable injury but not because of claimant's lack of credibility. The Board finds that claimant failed to furnish sufficient medical corroboration of a compensable injury.

The Board finds that the claimant filed a claim on April 30, 1976 which was not denied until August 6, 1976. ORS 656.262(5) requires written notice of acceptance or denial of a claim to be furnished to the claimant by the Fund or direct responsibility

employer within 60 days after the employer has notice or knowledge of the claim. Furthermore, ORS 656.262(4) requires that the first installment of compensation shall be paid claimant no later than the fourteenth day after the employer has notice or knowledge of the claim. In this case, no compensation was paid to claimant nor was his claim accepted or denied within the 60 day statutory period.

The Board, following the decision of the Supreme Court in Jones v. Emanuel Hospital, 280 Or 147, that even though a claim is ultimately found to not be compensable, it is the duty of the Fund or the employer, as the case may be, to commence payments for temporary total disability within 14 days after notice or knowledge of a claim and also to make a timely acceptance or denial of the claim, concludes that penalties are to be assessed and attorney's fees are to be awarded.

ORDER

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

The State Accident Insurance Fund shall pay to the claimant compensation, as provided by law, from March 3, 1976 and until August 6, 1976, the date of its denial.

The Fund shall, pursuant to the provisions of ORS 656.262(8), pay claimant additional compensation equal to 20% of the compensation due and owing claimant from March 3, 1976 until August 6, 1976.

Claimant's attorney shall be paid as a reasonable attorney's fee for his services before the Referee the sum of $600, payable by the State Accident Insurance Fund.

Claimant's attorney shall be paid as a reasonable attorney's fee for his services at Board review the sum equal to 25% of the compensation awarded claimant by this order, payable out of said compensation as paid, not to exceed the sum of $500.

In all other respects the Referee's order of June 21, 1977 is affirmed.

WCB CASE NO. 77-3166 FEBRUARY 23, 1978

HENERITTA L. JOHANNTOBERNS, CLAIMANT
David R. Vandenberg, Jr., 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.

WCB CASE NO. 77-1844 FEBRUARY 23, 1978

JIMMY LEE RUST, CLAIMANT
Maurice V. Engelgau, 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 granted claimant an award for permanent and total disability. The order did not state the date on which claimant became permanently and totally disabled.

The Board, after de novo review, affirms and adopts the findings and conclusions contained in the Referee's order, a copy of which is attached hereto and, by this reference, made a part hereof.

The Board finds that claimant has been permanently and totally disabled since February 3, 1976 as a result of his compensable injury suffered on April 8, 1975.

ORDER

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

Claimant shall be considered to have been permanently and totally disabled since February 3, 1976.

The Fund shall be allowed as a credit for payments for permanent and total disability from this period all payments of compensation paid to claimant pursuant to the Determination Order entered March 9, 1977 whereby claimant was awarded compensation for temporary total disability from April 9, 1975 through January 19, 1977, less time worked, and 96° for 30% unscheduled low back disability.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum of $400 payable by the State Accident Insurance Fund.

WCB CASE NO. 77-5622-SI FEBRUARY 23, 1978

In the Matter of the Petition of
BURELBACH INDUSTRIES CORPORATION
For Reimbursement from the Second Injury Reserve Fund
In the Case of DONALD L. WALTERS
Jerome L. Noble, Claimant's Atty.
James Blevins, Defense Atty.
Order on Review

Reviewed by Board Members Wilson, Moore and Phillips.

On January 4, 1978 Referee Raymond S. Danner recommended that the Board affirm the Determination Order dated August 3, 1977 which had denied a request by the employer, Burelbach Industries Corporation for second injury relief.

No exception to arguments against the Referee's findings of fact, conclusions of law and recommended order were filed within 30 days of 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 Danner, dated January 4, 1978, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

The Determination Order dated August 3, 1977 is affirmed.

WCB CASE NO. 77-1913 FEBRUARY 23, 1978

In the Matter of the Compensation of
TERRY LYNN WILSON, CLAIMANT
and the Complying Status of
McKENZIE AUTO SALES, INC.
Hammons, Phillips & Jensen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Harms, Harold & Leahy, Defense Atty.
Order of Remand

McKenzie Auto Sales, Inc., on February 7, 1978, requested Board review of the Referee's order entered on January 5, 1978 awarding attorney's fees to claimant's attorneys pursuant to OAR Rule 436-82-010.

The Board is informed that, initially, the Referee had been advised that only the issue of the complying status of the employer, McKenzie Auto Sales, Inc., would be heard at the hearing set for March 14, 1978 at Eugene, Oregon and therefore, the Referee on request of the claimant's attorneys issued the order awarding attorney's fees. It now appears that resolution of all the issues may have to be made at the March 14, 1978 hearing and the order awarding attorney's fees may be premature.

The Board concludes that it would be in the best interest of all parties concerned if all issues were before the Referee at the March 14, 1978 hearing and, therefore, the order awarding attorney's fees should be remanded to the Referee for such action he may choose to make. The request for review should be dismissed.

IT IS SO ORDERED.

WCB CASE NO. 76-3683 FEBRUARY 24, 1978

HUGH MONROE FARRELL, CLAIMANT
Brian L. Welch, Claimant's Atty.
Marshall C. Cheney, Defense Atty.
Order of Remand

On October 14, 1976 an Opinion and Order was entered in the above entitled matter by Referee Raymond S. Danner and on October 21, 1976 the claimant, by and through his attorney, filed a request for review of said Opinion and Order of the Workers' Compensation Board which was acknowledged by the Board on October 26, 1976.

The proceedings at the hearing before Referee Danner were reported by Larry Gryniewski, a free-lance reporter. Before Mr. Gryniewski completed the transcript of the proceedings, he left Oregon to become a resident of Florida. Several attempts have been made to obtain from him the completed transcript, but to no avail.

Therefore, the Board concludes it has no alternative but to remand the above entitled matter to the Hearings Division to be reheard. ORS 656.295(5).

IT IS SO ORDERED.

WCB CASE NO. 77-2341 FEBRUARY 27, 1978

ED BEA, CLAIMANT
Allen G. Owen, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF
Cross-appeal by the Claimant

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 cross-appeals, contending that the Referee erred in making this compensation effective the date of his order; in his opinion, the award should be granted as of January 25, 1977, or at least the date of the hearing, June 21, 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 August 12, 1977, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services in connection with this Board review an amount equal to $100, payable by the Fund.

WCB CASE NO. 77-4322 FEBRUARY 27, 1978

WILLIAM E. FRIEND, 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 claimant's aggravation claim to it for acceptance and payment of compensation as provided by law.

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

ORDER

The order of the Referee, dated 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 $150, payable by the Fund.

WCB CASE NO. 77-3539 FEBRUARY 27, 1978

ALLEN D. GABER, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's claim for an injury suffered on November 5, 1976 to it for acceptance and payment of compensation to which he 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 October 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 $350, payable by the Fund.

SAIF CLAIM NO. EC 192507 FEBRUARY 27, 1978

RONALD D. McCAULEY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a low back injury on June 25, 1969. He was hospitalized from August 16, 1969 through August 24, 1969 for conservative treatment. He was in the hospital again in October 1969 for a spinal fusion. He returned to work as a florist in September 1970. The claim was closed on October 5, 1970 with time loss benefits paid up through September 8, 1970 and an award of 64° for unscheduled low back disability plus 49° for loss of wage earning capacity.

Claimant was hospitalized several times in 1971 and his claim was reopened on February 2, 1972. His claim was closed on September 29, 1972 with an award for additional time loss only. Claimant returned to work on July 4, 1972.

From August 19, 1975 until September 12, 1975 claimant attended the Pain Clinic. He returned to work in March 1976 and had to quit in September 1976. His claim was reopened with payment of time loss benefits commencing September 2, 1976. Subsequently, he was admitted to the hospital for conservative back care.

Claimant, after a psychological evaluation in 1975, had been found to have a significant psychogenic factor related to his pain problems and he underwent psychiatric counseling. Dr. Seres, on April 15, 1977, felt claimant had a serious schizo-affective psychiatric disorder together with an increase in his physical symptoms.

The Orthopaedic Consultants examined claimant on February 8, 1977 and found him to be drug dependent with symptoms that outweighed any objective physical findings. They did not feel that his condition was medically stationary at that time.

Dr. Pasquesi, on October 27, 1977, found claimant's drug problem to be arrested. He felt claimant's psychiatric condition was under control and that there were no physical symptoms except when claimant exerted himself. He found him to be medically stationary.

On November 17, 1977 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 benefits from September 2, 1976 through

October 27, 1977, less time worked. In their opinion claimant had been adequately compensated for his permanent disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability benefits from September 2, 1976 through October 27, 1977, less time worked.

WCB CASE NO. 76-4194 FEBRUARY 27, 1978

HOWARD S. MEYER, CLAIMANT
Bell, Bell & Rounsefell, 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 July 2, 1976 Determination Order granting him compensation equal to 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 October 7, 1977, is affirmed.

WCB CASE NO. 76-4747 FEBRUARY 27, 1978

JACK P. MONGEON, CLAIMANT
Carney, Probst & Levak, Claimant's Atty.
Miller, Anderson, Nash, Yerke & Wiener, 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. 76-5250 FEBRUARY 27, 1978

GLEN ROWLEY, CLAIMANT
Ringle & Herndon, 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 August 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 $100, payable by the carrier.

WCB CASE NO. 77-2719 FEBRUARY 27, 1978

JOSEPH D. SULENTICH, 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 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 September 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 $100, payable by the Fund.

WCB CASE NO. 77-1669 FEBRUARY 27, 1978

DENNIS E. WELDEN, 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 affirmed the carrier's denial of his 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.

ORDER

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

WCB CASE NO. 77-3594 FEBRUARY 27, 1978

PHILLIP E. ZERR, 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 Moore.

The State Accident Insurance Fund seeks Board review of the Referee's order which granted claimant compensation equal to 112° for 35% unscheduled 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 October 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 $100, payable by the Fund.

WCB CASE NO. 76-796 FEBRUARY 28, 1978

IRAL ALDRIDGE, CLAIMANT
Charles Paulson, 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 of a Referee's order which awarded claimant 160° for 50% unscheduled cervical and lumbosacral disability, an increase of 45% over the award made by the Determination Order of February 3, 1976.

Claimant is a 58 year old truck driver who injured his back on February 17, 1975 while unloading a truck. He has a high school education and some college education.

Dr. Heusch indicated claimant gave a vague history of low back pain for the past 10 years with relief by chiropractic manipulation. The ultimate diagnosis was degenerative cervical and lumbar disc disease. No surgery has been performed and treatment has been conservative, utilizing traction, manipulation and anti-inflammatory medication.

The members of the Orthopaedic Consultants who saw claimant on July 25, 1975 felt the loss of function of the lower back as it existed on that date was mild with loss of function due to this injury minimal. The loss of function in the neck was considered mildly moderate with loss function due to the injury considered minimal. There appeared to be a moderate degree of interference with the examination from functional disturbances. A previous claim of psychological disability has been denied by the Fund.

The Referee in his order stated:

> "He has not looked for work during the year 1977 and does not know what he would do to make money. Any wages that he is able to earn would jeopardize his $100 a month Teamster disability pension. He also receives $150 Teamster pension on the basis of retirement at 55 years. He receives Social Security benefits."

The Board, on de novo review, finds that apparently claimant does not want to look for work because he does not want to jeopardize his unearned income and for that reason has voluntarily retired. If this is true, and it was not contradicted, there is no basis for a finding that claimant has lost one-half of his earning capacity.

Based on his education and his physical residuals the

only impediment to claimant's retraining was his flat refusal to entertain the idea.

The Board concludes that, considering claimant's physical residual disability and the criteria for establishing loss of wage earning capacity, claimant's loss of wage earning capacity is more equal to 35%.

ORDER

The order of the Referee, dated August 29, 1977, is modified.

Claimant is awarded 112° for 35% unscheduled disability. This is in lieu of the Referee's order which, in all other respects, is affirmed.

WCB CASE NO. 77-3119 FEBRUARY 28, 1978

FRED S. BASCOM, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Wilson.

Claimant seeks Board review of the Referee's order which affirmed the October 13, 1976 Determination Order granting temporary total disability benefits from June 15, 1976 through July 12, 1976 and 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.

ORDER

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

WCB CASE NO. 77-2134 FEBRUARY 28, 1978

BILLY D. BROCKMAN, CLAIMANT
Schumaker & Bernstein, 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.

SAIF CLAIM NO. A 310030 FEBRUARY 28, 1978

OHMAN CHRISTOPHER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On December 31, 1977 the claimant requested the Board to exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for a compensable industrial injury to his left foot suffered while in the employ of Jim Whitaker Logging Company, whose Workers' Compensation coverage was furnished by the State Industrial Accident Commission, the predecessor to the State Accident Insurance Fund. The request was supported by medical reports from Dr. James W. Brooke, dated September 30, 1977 and January 28, 1978. Dr. Brooke was of the opinion that claimant's present episode of ankle distress is one of the late sequelae of the osteomyelitis for which he was treated in 1952 and that the time loss he has experienced during the treatment of this latest episode is associated with that initial industrial injury.

The Fund was the recipient of Dr. Brooke's letter of January 28, 1978 which enclosed a copy of his earlier letter of September 30, 1977. On February 17, 1978 the Fund responded, stating that it would not resist the reopening of the claim.

The Board, after reviewing the medical reports in support of claimant's request, concludes that the claim should be reopened pursuant to the provisions of ORS 656.278 for such medical care and treatment as claimant may require.

ORDER

Claimant's claim for an industrial injury suffered on August 7, 1952 is remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing September 15, 1977, the date claimant was hospitalized

for exploration of the old area of osteomyelitis, and until the claim is closed again pursuant to the provisions of ORS 656.278, less time worked.

WCB CASE NO. 77-5293 FEBRUARY 28, 1978

GERALD L. DOUD, CLAIMANT
Helm & Peterson, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Employer's Atty.
Philip A. Mongrain, Defense Atty.
Own Motion Order Referring for Hearing

On January 23, 1978 the Board received from claimant, by and through his attorney, a request that it exercise its own motion jurisdiction pursuant to the provisions of ORS 656.278 and reopen his claim for an industrial injury suffered on February 19, 1967 while in the employ of Boise Cascade, whose workers' compensation coverage at that time was furnished by Employers Insurance of Wausau. Claimant's claim for that injury has been closed and his aggravation rights have expired.

On December 15, 1977 claimant had requested a hearing on the denial by Boise Cascade, a self insurer, on October 19, 1977, of his claim for an occupational disease.

On January 25, 1978 the attorney representing Boise Cascade and the attorney representing Wausau were informed by the Board of the request for own motion relief and asked to inform the Board of their respective positions within 20 days thereafter.

On February 6, 1978 the attorney for Boise Cascade advised the Board that claimant's physical problems, if covered, should be the responsibility of the workers' compensation carrier for Boise Cascade at the time of claimant's 1967 injury, namely, Wausau, and not the responsibility of Boise Cascade as a self-insured. He stated his opinion that the medical reports relating to claimant's current disability indicated it was not related to his work activity under any circumstances. Enclosed with this letter were seven medical reports, a copy of the denial letter dated October 19, 1977 and claimant's application for benefits with NHA, indicating an injury date of October 17, 1976 (a date referred to by Dr. Johnson's report of October 7, 1977).

On February 14, 1978 the attorney representing Wausau advised the Board that claimant's most recent and continuing problems should be the responsibility of Boise Cascade, under its self-insurance program, based on the theory of a new compensable injury or occupational disease.

At the present time, the Board does not have sufficient evidence before it upon which to make a determination on whether claimant's present condition is compensable and, if so, if it results from his 1967 industrial injury and represents a worsening thereof or is a new compensable injury or occupational disease. Therefore, the Board remands the request for own motion relief to the Hearings Division to set for hearing on a consolidated basis with the claimant's hearing on the propriety of the denial of his claim for occupational disease made by Boise Cascade on October 19, 1977.

Upon conclusion of the hearing, the Referee shall cause a transcript of the proceedings to be prepared and shall submit such transcript to the Board together with the Referee's recommendations.

WCB CASE NO. 75-4371 FEBRUARY 28, 1978

ALVIN F. KEEVY, CLAIMANT
Ringle & Herndon, Claimant's Atty.
Rankin, McMurry, Osburn & Gallagher,
Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of the Referee's order which 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 July 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 $400, payable by the carrier.

WCB CASE NO. 77-2325 FEBRUARY 28, 1978

FREDERIC E. McGREW, JR., CLAIMANT
McMenamin, Joseph, Herrell & Paulson,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Moore and Phillips.

The claimant seeks review by the Board of the Referee's order which affirmed the carrier's denial of claimant's claim for aggravation.

Claimant suffered a compensable injury on June 2, 1972 which resulted in acute low back strain. He was seen by Dr. Zeller at the Providence Medical Center emergency room. His claim was closed on September 18, 1972 with an award for temporary total disability to June 12, 1972 only.

In October 1972 claimant had a hiatal herniorraphy and in May and again in August of 1974 claimant consulted Dr. Mueller complaining of low back pain which in August was complicated with bilateral leg pain and numbness. Claimant again was seen by Dr. Mueller on November 4, 1976 with complaints of low back and left hip pain. On December 28, 1976 claimant's low back pain became symptomatic when he bent over to pick up a piece of paper. Claimant filed an aggravation claim which was denied on May 19, 1977.

Dr. Zeller, the original treating physician, was unable to relate the December 28, 1976 incident to the 1972 injury. Dr. Gritzka, Dr. Misko and Dr. Mueller were of the opinion that the claimant's herniated disc which was discovered after December 28, 1976 was related to the 1972 injury, but the Referee found no evidence that either Dr. Gritzka or Dr. Misko had ever been furnished with an accurate medical history of claimant's back problems. He did find that Dr. Mueller had some information but he was inclined to give more weight to Dr. Zeller's opinion inasmuch as his report reflected more background information.

Claimant's symptoms were not initiated on June 2, 1972; evidence indicates that claimant first had low back problems approximately 20 years prior to the date of the hearing. On May 22, 1971 a medical report indicated claimant was complaining of pain in his left low back and hip while at work. Claimant had complained of low back pain and lower extremity numbness in 1974 and the hospital report reveals information that claimant had had back pain and left hip complaints following a mastoid surgery in 1954.

The Referee felt that the medical opinion, with the exception of Dr. Zeller's, was of very little value. Where the hypothesis upon which a specialist predicates his opinion is not supported by the evidence his opinion is not entitled to any weight.

The Referee concluded the doctors had not been given an accurate medical history on which to base their respective opinions and that claimant had failed to support his claim for aggravation with adequate medical evidence.

Based on the ruling of the Court of Appeals in Jones v. Emanuel Hospital, 29 Or Ap 265, the Referee did not assess penalties and attorneys' fees because claimant failed to prevail on the merits of his claim.

After de novo review, the majority of the Board agrees with the Referee that because of the inaccuracies contained in the medical history related to Drs. Gritzka, Misko and Mueller, and especially as to the former two, that little weight can be accorded to their expressed opinions concerning the causal relationship between the 1976 incident and the claimant's compensable injury suffered on June 2, 1972. On the other hand, Dr. Zeller, who saw claimant immediately after he suffered the acute low back strain on June 2, 1972 felt that that injury was primarily a muscle or ligament strain which had been "well for over 4 years." The denial was properly affirmed.

At the time the Referee wrote his order, he was correct in not assessing penalties and awarding attorney's fees. However, since the date of his order the Supreme Court has ruled that regardless of whether a claim ultimately may be found to be not compensable, the Fund (or the employer) must within 14 days after such notice or knowledge of the claim make payment of compensation to claimant and it must also either accept or deny the claim within 60 days after such knowledge or notice. If the Fund (or employer) fails to do either, it is subject to the assessment of penalties and must pay claimant's attorney a reasonable attorney's fee. Jones v. Emanuel Hospital, 280 Or 147 (October 18, 1977).

This was a claim for aggravation. ORS 656.273(6) provides that a claim submitted in accordance with this section shall be processed by the Fund (or employer) in accordance with the provisions of ORS 656.262 except that the first installment of compensation due under subsection (4) of 656.262 shall be paid no later than the 14th day after the employer has notice or knowledge of medically verified inability to work resulting from the worsened condition.

The evidence indicates that the Fund was not given medical verification of claimant's claim for aggravation until Dr. Gritzka advised them by letter dated February 15, 1977 and the first payment of compensation for temporary total disability was made by the Fund prior to that information, therefore, claimant received his compensation timely. However, the denial of claimant's claim filed on January 13, 1977 was not made until May 19, 1977, which was over 60 days after the Fund had knowledge of the claim, therefore, the Fund must pay claimant compensation from January 13 to February 14, 1977, the date it paid the first installment of compensation and must pay claimant an additional sum based on a percentage of the compensation due and owing claim-

ant from January 13, 1977 to February 14, 1977 and pay claimant's attorney a reasonable attorneys' fee.

ORDER

The order of the Referee dated September 1, 1977 is modified.

The denial on May 19, 1977 by the State Accident Insurance Fund is affirmed.

The Fund is directed to pay claimant's compensation, as provided by law, from January 13, 1977 to February 14, 1977.

The Fund is further directed to pay claimant an additional sum equal to 25% of the compensation due claimant from January 13, 1977 to February 14, 1977 pursuant to the provisions of ORS 656.262(8).

The claimant's attorney is awarded as a reasonable attorney's fee for his services at hearing before the Referee the sum of $600, payable by the Fund.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board level a sum equal to 25% of the additional compensation awarded claimant by virtue of this order, payable out of said compensation as paid not to exceed $2,300

Board Member Phillips dissents as follows:

This reviewer finds it impossible to discount the opinions of Drs. Mueller, Gritzka and Misko in favor of the opinion of Doctor Zeller in which he states: "It is difficult for me to see how this last accident had anything to do with his original injury. His original injury was primarily a muscle or ligamentous strain which was well for over four years." The statement is a little equivocal and is contrary to testimony regarding the back pain in the period between the first and last incidents.

Although the reports of Drs. Mueller, Gritzka and Misko are based to some degree on history, they are consistent and reflect their opinions regarding medical probability.

I would reverse the decision of the Referee, remand the claim to the State Accident Insurance Fund and impose the appropriate penalties as found by the majority decision of the Board.

Kenneth V. Phillips

Kenneth V. Phillips, Board Member

WCB CASE NO. 76-4563 FEBRUARY 28, 1978

RALPH C. MINOR, CLAIMANT
Larry Dawson, Claimant's Atty.
G. Howard Cliff, Defense Atty.
Request for Review by Claimant
Cross-appeal by Employer

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which granted him compensation equal to 160° for 50% unscheduled low back disability. Claimant contends that he is permanently and totally disabled while the employer, on cross-appeal, argues that the award granted by the Referee 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 August 17, 1977, is affirmed.

WCB CASE NO. 77-72 FEBRUARY 28, 1978

CARL OAKES, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Referee's order which required the Fund to accept claimant's claim for medical expenses, connected with his aggravation claim, as a compensable claim and further, that it pay claimant 25% of this amount as a penalty plus an attorney fee.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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 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 $350, payable by the Fund.

WCB CASE NO. 77-1579 FEBRUARY 28, 1978

CLAY C. PERKINS, CLAIMANT
D. Keith Swanson, 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 awarded claimant 64° for 20% unscheduled low back disability, 19.2° for 10% loss of his right arm and 9.6° for 5% loss of his left arm. A Determination Order dated February 2, 1977 had awarded claimant 32° for 10% unscheduled neck disability.

Claimant, a 48-year-old bulldozer driver, on June 29, 1976, suffered a compensable injury when his truck collided with a train; claimant was thrown from the cab of his bulldozer. He was taken to a hospital where Dr. N.C. Lewis diagnosed multiple contusions and a laceration of the right elbow.

Dr. John Burr, who had previously treated claimant, examined claimant on July 1, 1976, at which time, the claimant walked humped over and complained of great pain in the upper neck and pain in the left calf. Dr. Burr found marked tenderness in the posterior cervical and upper thoracic spine. He diagnosed severe sprain and contusions to the elbow and forearms, abrasions of the hands, a cervical strain, upper thoracic spine and an abrasion to the left calf. Claimant received conservative treatment for these injuries.

On August 26, 1976, because of a bursitis condition, Dr. Burr performed a bilateral olecranon bursa resection and ulnar acromioplastics. After this surgery, claimant's problems with his elbows were practically gone. On September 30, 1976 claimant returned to his former employment; he was found to be medically stationary by Dr. Burr on December 17, 1976 and the aforementioned Determination Order was entered.

On May 2, 1977 Dr. Burr saw the claimant for the last time and noted he continued to have symptoms of tightness and soreness in the muscles of the shoulders and upper arms and neck.

Claimant has only an 11th grade education and all of his work experience has been in manual labor. He testified he has continuing and constant pain and discomfort in the neck and upper back area, as well as continuing problems with both elbows. Claim-

ant also alleges low back pain and numbness and weakness in his left elbow and right elbow.

The Referee found the claimant had met his burden of proof to show a slight permanent disability existing in both arms and in the lower back, in addition to his neck and cervical area. Claimant has returned to his former employment, therefore, any loss of earning capacity is mild. The Referee concluded that claimant was entitled to additional compensation for his unscheduled disability and to awards for loss function of both arms.

The Board, after de novo review, finds no medical evidence which would support or indicate that claimant suffers any greater loss of earning capacity because of low back disability nor any medical evidence that claimant has suffered any loss of function of his arms due to this injury. Therefore, the Board would reverse the Referee's order and reinstate the Determination Order of February 2, 1977.

ORDER

The Referee's order, dated July 8, 1977, is reversed.

The Determination Order, dated February 2, 1977, is reaffirmed.

SAIF CLAIM NO. RC 228129 FEBRUARY 28, 1978

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

On January 23, 1978 the Board received from claimant, by and through her attorney, a request that it exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an industrial injury suffered on January 23, 1970.

Claimant had previously requested own motion relief which was denied on September 9, 1977; however, the present request indicates that claimant underwent surgery by Dr. Dunn on December 8, 1977, to wit; the rhizotomy which Dr. Dunn recommended after he reexamined claimant on October 25, 1977.

On January 25, 1978 the Board requested the Fund to respond within 20 days stating its position with regard to the request for own motion relief. On February 3, 1978 the Board was informed by the Fund that it had asked Dr. Dunn to express his opinion of the causal relationship between the surgery and claimant's initial industrial injury and on February 17, 1978 the Fund advised the Board that it had received Dr. Dunn's letter and enclosed operative reports and it would not resist reopening claimant's claim.

The Board, after reviewing the matter, concludes that the L4 rhizotomy performed by Dr. Dunn on December 8, 1977 was causally related to claimant's industrial injury of January 23, 1970 and inasmuch as the claimant's claim for that injury was initially closed by Determination Order dated December 10, 1970 and claimant's aggravation rights have now expired, concludes that it would be proper to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen claimant's claim.

ORDER

Claimant's claim for an industrial injury suffered on January 23, 1970 is remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on December 8, 1977 and until the claim is closed pursuant to the provisions of ORS 656.278.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in behalf of claimant a sum equal to 25% of the compensation for temporary total disability which claimant shall receive as a result of this order, payable out of said compensation as paid, not to exceed $350.

WCB CASE NO. 77-711 MARCH 2, 1978

DENNIS BERLINER, CLAIMANT
Malagon, Starr & Vinson, Claimant's Atty.
Newhouse, Foss, Whitty & Roess, Defense Atty.
Order

On February 14, 1978 the employer, by and through its attorney, filed its motion to dismiss the claimant's Request for Review in the above entitled matter on the grounds and for the reason that the request was not filed within the time allowed by law.

On February 21, 1978 the Board received a letter from the claimant's attorney opposing the employer's motion to dismiss. OAR 436-83-480 provides:

> "The Referee may reopen the record and reconsider his decision before a notice of appeal is filed, or, if none is filed, before the actual period expires."

In this case, the Referee had entered his Opinion and Order on November 18, 1977 and within 30 days of its entry and before an appeal had been taken, a Motion for Reconsideration was received from claimant's attorney. On December 7, 1977 the Referee entered an order which suspended his prior Opinion and Order,

directed the employer and its carrier to submit a written response to the motion within 10 days, pursuant to OAR 436-83-260, and stated that the Referee's jurisdiction would continue until further order. This was not a final order from which appeal could be taken.

On January 9, 1978 an Order on Motion for Reconsideration was entered by the Referee which denied claimant's motion for reconsideration, vacated the order entered on December 7, 1977 and reinstated and republished in its entirety the Referee's Opinion and Order dated November 18, 1977.

The Board, after giving full consideration to the employer's brief in support of his motion to dismiss the request for review and also the letter brief filed by the claimant's attorney in opposition to said motion, concludes that when the Referee set aside his Opinion and Order he still had jurisdiction to do whatever he chose with such order because neither party had requested a review by the Board of said Opinion and Order nor had 30 days expired from the date that Opinion and Order was entered.

In order to give himself and the parties involved sufficient time to present evidence in support of, or in opposition to, the matters requested to be reconsidered by the Referee, the Referee correctly stayed his original Opinion and Order until he could issue an order on said motion. The only final and appealable order in this matter was the Referee's Order on Motion for Reconsideration entered on January 9, 1978. Claimant's Request for Review was received on February 8, 1978 and, therefore, it was timely filed.

ORDER

The employer's motion to dismiss claimant's request for review in the above entitled matter is hereby denied.

The claimant's Request for Review is acknowledged and upon receipt of the transcript of proceedings the parties involved will be advised of a schedule for the filing of briefs.

WCB CASE NO. 77-5494 MARCH 2, 1978

DALE CLOUGH, CLAIMANT
Williams, Spooner & Graves, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through his attorney, on August 26, 1977, filed a claim for aggravation of a compensable injury suffered on December 1, 1971. This claim had been closed on February 23, 1972 by a Determination Order granting claimant compensation for temporary total disability only.

After the denial of the aggravation claim on September 14, 1977 the claimant, through his attorney, requested a hearing which was set for December 8, 1977. The Fund, by and through its counsel, moved to dismiss the request on the grounds and for the reason that the aggravation rights of claimant had expired. Claimant's attorney, on December 2, 1977, advised the Board that in the event the motion to dismiss was granted he would desire that the matter be considered by the Board under its own motion jurisdiction.

On December 8, 1977 Referee Terry L. Johnson entered an Order of Dismissal and, in accordance with the request by claimant's attorney, the Board prepared to consider the matter under its own motion jurisdiction.

On January 25, 1978 the Fund was advised by the Board of its decision to consider the matter under the provisions of ORS 656.278, reciting a brief background of the initial claim for aggravation and the request by claimant's attorney for own motion relief in the event claimant's aggravation rights had expired. The Board furnished the Fund with a copy of the Referee's Order of Dismissal, a copy of Dr. Boals medical report dated August 5, 1977, and a copy of Dr. Gilsdorf's medical report dated July 27, 1977 and asked the Fund to advise the Board within 20 days of its position with respect to the request for own motion relief.

More than 20 days have expired and no response has been received from the Fund. The Board concludes that there has been an ample showing made by the claimant to warrant reopening of his claim under the provisions of ORS 656.278 for treatment by a neurosurgeon and such other medical care as was recommended by Dr. Boals in his report of August 5, 1977.

ORDER

Claimant's claim for a compensable injury suffered on December 1, 1971 is remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on or about June 5, 1977, the approximate date that claimant took sick leave from his employment as a member of the Oregon State Police, and until the claim is closed pursuant to the provisions of ORS 656.278, less any time claimant may have worked between these dates.

SAIF CLAIM NO. HC 58084 MARCH 2, 1978

JACK FISHER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 30, 1977 an Own Motion Determination was made in the above entitled matter, based on a closing examination made by Dr. Misko on June 14, 1977, which granted claimant compensation for temporary total disability from March 16, 1977 through April 24, 1977.

On January 31, 1978 claimant, by and through his attorney, furnished the Board a current medical evaluation from Dr. Misko who had examined claimant on November 21, 1977. As a result of this examination Dr. Misko found claimant was tender over the medial epicondyle, had good strength throughout the right upper extremity and found no intrinsic muscle loss. The digiti quinti abductor was normal but there was decreased sensation to pin and temperature over the small finger.

A copy of Dr. Misko's report was furnished to the Fund and the Board advised it to respond within 10 days, stating its position. On February 15, 1978 the Fund advised the Board that, in its opinion, claimant had been adequately compensated for his permanent disability resulting from the January 31, 1967 injury and requested the Board to determine the issue based on the medical reports of record.

The Board, after careful consideration of Dr. Misko's latest report and the prior medical reports, concludes that the matter should be resubmitted to the Evaluation Division of the Workers' Compensation Department for a determination of claimant's present disability.

ORDER

Claimant's claim for a compensable injury suffered on January 31, 1967 is hereby submitted to the Evaluation Division of the Workers' Compensation Department for a determination of claimant's present disability, taking into consideration not only Dr. Misko's report of January 17, 1978 but also all previous medical reports relating to claimant's condition.

If the Evaluation Division determines that the claimant should be awarded additional compensation, either for temporary total disability or for permanent partial disability, it is requested to make its recommendation to the Board in the form of an advisory opinion.

WCB CASE NO. 77-2912 MARCH 2, 1978

SHIRLEY GUINN, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Atty.
Collins, Velure & Heysell, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer has requested Board review of the Referee's order wherein he awarded claimant 45° for 30% loss of the left hand. This represented an increase of 15% of the award made by the Determination Order of April 6, 1977.

On December 2, 1976 claimant caught the ring and long fingers of her left hand in the Raimann machine she was operating. Dr. K. Clair Anderson amputated those fingers at the distal phalanx of the ring finger and at the middle phalanx of the middle finger. On January 14, 1977 claimant was released to return to light work and within three or four weeks returned to her former job.

Claimant testified she has no sense of touch or feeling in these two fingers and that she cannot use them to pick up objects. She testified the tips are still tender, they swell in cold weather and she has a lack of grip.

When claimant last saw Dr. Anderson, however, he noted she had "excellent motion", that her fingers were "well healed" with "good skin coverage which appeared relatively non-tender".

The Board, on de novo review, finds the award made by the Referee excessive. The Board concludes the award for 15% loss of the left hand made by the Determination Order adequately compensates claimant for the loss of function of her left hand.

ORDER

The order of the Referee, dated September 12, 1977, is reversed.

The Determination Order, dated April 6, 1977, is affirmed.

WCB CASE NO. 76-3586 MARCH 2, 1978

DILLARD D. RICHISON, 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 requests Board review of a Referee's order which awarded claimant 240° for 75% of the maximum allowable by statute for unscheduled disability. Claimant contends he is permanently and totally disabled.

Claimant, age 47, was a wallboard installer who suffered a compensable injury on February 15, 1973. Shortly thereafter he underwent a laminectomy at L4-5, and in May of that year had a second laminectomy at the L5-S1 level. After this surgery, claimant was dropped in his hospital bed and developed sharp pain radiating into both hips and his left leg. His claim was closed by a Determination Order granting claimant 160° for 50% unscheduled disability resulting from the low back injury.

In June 1974, at the Disability Prevention Division, Dr. Hickman found a moderately severe relationship between claimant's accident and his psychopathology. Prognosis for restoration and rehabilitation was relatively poor. Dr. Hickman recommended further counseling.

Claimant's training program for completion of his GED under the Division of Vocational Rehabilitation was discontinued in March 1975 because of alleged pain, difficulty with math, and claimant's financial problems. Claimant then attempted to perform some light drywall work but was unsuccessful.

Claimant was examined by the Orthopaedic Consultants in April 1976. The diagnosis was chronic lumbar strain with probable radiculopathy on the left and situational depression. Job training and placement was required. Loss of function due to the injury was considered to be in the 40-60% disability range.

Dr. John R. Painter, a clinical psychologist, who interviewed and tested claimant in October 1976, did not think claimant could be rehabilitated to the extent that he could return to gainful employment, owing to the numerous and complex psychological variable involved. Dr. James C. Cheatham, also a clinical psychologist, examined claimant and was of the opinion that claimant's psychological condition had deteriorated to the point where he could not accept counseling. Dr. Cheatham recommended claimant be classified as permanently and totally disabled.

The Board, on de novo review, finds that the preponderance of the medical evidence indicated claimant could not return to any gainful and regular work. His work background is exclusively in heavy manual labor. Claimant's serious low back problem when combined with his serious psychological problem precludes a possibility of retraining even though claimant is comparatively young.

The Board concludes that claimant is permanently and totally disabled.

ORDER

The order of the Referee, dated August 31, 1977, is modified.

Claimant is considered to be permanently and totally disabled as of the date of this order.

Claimant's counsel is awarded as a reasonable attorney's fee 25% of the claimant's compensation which was increased by this order, payable from said increased compensation as paid, not to exceed $2,300.

WCB CASE NO. 76-3524 MARCH 6, 1978

LEE ANDROS, CLAIMANT
Zafiratos & Roman, Claimant's Atty.
MacDonald, Dean, McCallister & Snow,
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 16, 1975 Determination Order granting no further permanent disability above the 160° he has already been 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 October 11, 1977, is affirmed.

WCB CASE NO. 76-2235 MARCH 6, 1978

RICHARD E. DONKERS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
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 of Dismissal entered on August 31, 1977. An Order to Show Cause

why claimant's request for hearing should not be dismissed was entered on July 27, 1977 and no response was made thereto nor good cause shown.

The Board, after de novo review, finds claimant has failed to show good cause why his request for hearing should not be dismissed with prejudice and therefore, affirms the Referee's Order of Dismissal.

ORDER

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

WCB CASE NO. 77-275-B MARCH 6, 1978

GERHARD ERICKSON, CLAIMANT
Richardson, Murphy & Nelson, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Jones, Lang, Klein, Wolf & Smith, Defense Atty.
Request for Review by Associated Indemnity Corporation

Reviewed by Board Members Wilson and Phillips.

Associated Indemnity Corporation 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 in addition to reimbursing United States Fidelity Guaranty Company for all sums it paid out as a result of the Order Designating Paying Agent. The denial issued by U.S. Fidelity was approved and an attorney fee equal to $750 was assessed against Associated Indemnity.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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 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 $200, payable by Associated Indemnity Corporation.

WCB CASE NO. 77-2081 MARCH 6, 1978

ROBERT HILL, CLAIMANT
Thomas O. Carter, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which found that claimant's condition had worsened since the issuance of the Determination Order on November 19, 1974, that claimant was medically stationary, and granted claimant an award for permanent total disability.

Claimant was employed as a steel pourer in a foundry and injured his back on February 12, 1971. He came under the care of Dr. Eckhardt who had been his treating physician since 1966. Dr. Eckhardt diagnosed recurrent lumbosacral strain. Claimant's psychological evaluation indicated he had an 11th grade education with an IQ of 78 with a schizophrenic reaction of paranoid type. Claimant underwent a laminectomy in May 1972.

Claimant was retrained as a barber. A Determination Order, dated March 13, 1973, which granted him 160° for 50% unscheduled disability, was upheld by a Referee, the Board, and a circuit court.

In June 1974 Dr. Eckhardt requested claim reopening as claimant had suffered an acute exacerbation when washing his car. In July, Dr. Eckhardt reported claimant's back condition was gradually degenerating and he considered claimant to be a permanent total.

On November 19, 1974 a Second Determination Order which granted claimant an additional 144° for a total award of 304° for 95% unscheduled disability was affirmed by the Referee and the Board, but a circuit court on February 13, 1976 granted claimant an award of permanent total disability. The Court of Appeals, on June 14, 1976, reversed the decision of the lower court and reinstated the award of 144° made by the Second Determination Order.

On January 28, 1977 Dr. Eckhardt reported claimant had been having over the past couple of years increasing problems with low back pain and paresthesias and muscular weakness of the left lower extremity which now prevents him from being employable.

Claimant was examined by the Orthopaedic Consultants on March 14, 1977; the diagnosis was chronic lumbosacral sprain, radiculopathy mild left leg, severe functional overlay and an unrelated left ankle arthritis. Claimant's condition was stationary. He could not return to foundry work but could be a

barber part time. Loss of function rating was only an educated guess due to functional interference, but the low back was considered to have moderate disability.

On March 29, 1977 the Fund denied claimant's claim for aggravation which had been filed by claimant's attorney.

On May 10, 1977 Dr. Eckhardt reported claimant had suffered an acute exacerbation of low back pain with radiation into the lower left extremity after he had attempted to cut hair on April 15, 1977 and he had hospitalized claimant on April 19, 1977. He requested claimant's claim be reopened. Claimant now walks with a cane to prevent falling.

Dr. Eckhardt testified that he now sees claimant once a month and claimant has physical therapy three times a week. Claimant's physical capacity to work has gradually decreased over a 5-year period. He said claimant had not become medically stationary since the latest aggravation of April 1977.

The Referee found claimant must prove his condition had worsened since the Determination Order of November 1974 which the Referee found was the last award or arrangement of compensation. The Referee found that claimant had done so and awarded claimant compensation for permanent total disability.

The Board, on de novo review, does not agree that the date of the last award or arrangement of compensation is the Determination Order dated November 19, 1974, but finds it is the date of the Court of Appeals' decision which was June 14, 1976, however, this does not affect the aggravation claim because there is ample evidence claimant's condition has worsened since June 14, 1976. Dr. Eckhardt testified that the claimant had not been medically stationary since the aggravation in April 1977. Therefore, the Referee had no authority to evaluate claimant's disability and claimant's claim must be remanded to the Fund for the payment of compensation, as provided by law, until closure is authorized under the provisions of ORS 656.268.

The issue before the Referee was the compensability of a claim for aggravation. The Referee never directly ruled on this issue but instead found a worsening of claimant's condition but apparently assumed the reader was to understand that the denial was improper. Unfortunately, such assumption is not enough. If the denial was improper, and the medical evidence supports a finding that it was, then it should have been disapproved in the order and the Fund directed to pay claimant's attorney a reasonable attorney fee under the provisions of ORS 656.386. In the Referee's amended order, the Fund was directed to pay a reasonable attorney fee.

ORDER

The order of the Referee, dated July 5, 1977, as amended on July 29, 1977, is hereby reversed.

Claimant's claim for aggravation is hereby remanded to the State Accident Insurance Fund for acceptance and payment of compensation, as provided by law, commencing April 19, 1977 and until closure is authorized under 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 Fund pursuant to ORS 656.386.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at this Board review a sum equal to 25% of the additional compensation for temporary total disability which claimant may receive as a result of this order, payable out of such compensation as paid, not to exceed $500.

SAIF CLAIM NO. AC 412870 MARCH 6, 1978

NEWTON J. JORGENSEN, CLAIMANT
Ringo, Walton, Eves & Gardner, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On February 22, 1978 the Board received from claimant, by and through his counsel, the request to reopen his claim based on aggravation. Claimant was injured on December 9, 1972 and presumably claimant's aggravation rights have expired and claimant is requesting the Board to exercise its own motion jurisdiction pursuant to ORS 656.278.

The request was supported by medical reports dated June 20, 1977 which, in the opinion of the Board, are not sufficient to justify directing the State Accident Insurance Fund to reopen claimant's claim at the present time.

If claimant is able, at a future time, to supply the Board with adequate medical information which indicates that his present condition is directly related to his 1972 injury, that his aggravation rights have expired, and that his present condition represents a worsening of his condition since his last award of compensation for said injury, then the Board will be in a position to determine whether the claim should be reopened.

ORDER

Claimant's request to reopen his claim for an injury suffered on December 9, 1972 is at this time denied.

WCB CASE NO. 77-945 MARCH 6, 1978

HENRY E. OLDS, CLAIMANT
Knappenberger & Tish, 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 further temporary total disability and affirmed the January 25, 1977 Determination Order awarding 32° for 10% unscheduled disability. Claimant contends that there is a scheduled disability in both of his legs and he is entitled to compensation therefor.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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 11, 1977, is affirmed.

WCB CASE NO. 76-1345 MARCH 6, 1978

In the Matter of the Compensation
of the Beneficiaries of
FORREST RAINES, DECEASED
Banta, Silven & Young, Claimant's Atty.
Cheney & Kelley, Defense Atty.
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Defense Atty.
Request for Review by Beneficiaries

The beneficiaries of Forrest Raines, deceased, seek Board review of the Referee's order which affirmed the carrier's denial of their claim and dismissed the request for hearing.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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. 77-1011 MARCH 6, 1978

EARL W. RICHARDSON, CLAIMANT
Moore, Wurtz & Logan, 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 granted claimant 256° for 80% unscheduled disability and 96° for 50% loss of his right arm.

Claimant, a lifetime bucker and faller, sustained a compensable injury on April 12, 1976 when he tossed an axe underhanded and felt a snap in his shoulder. The diagnosis was a ripped proximal portion of the right biceps muscle from the shoulder.

Dr. McHolick recommended surgery to reattach the biceps tendon to the humerus. Claimant wanted to think about it.

In April 1976 Dr. McHolick, after examination, reported claimant had slight grating in the shoulder and obvious drop of the right biceps muscle. Claimant's chief complaint was his shoulder and the doctor recommended against surgery. Dr. McHolick advised claimant to return to work on a trial basis on April 26, 1976.

In May 1976 claimant returned to see Dr. McHolick because of shoulder pain. At that time Dr. McHolick diagnosed degenerative rotator cuff disease with rupture of the long head of the biceps muscle and small tear of the supraspinatus muscle. He still advised claimant to keep on working for two more months.

In August 1976 Dr. McHolick reported claimant still complained of sharp pains in his shoulder with weakness when reaching overhead. All of these complaints were related to the degenerative rotator cuff. Claimant was not able to find lighter work with this employer and was considering drawing social security retirement, but Dr. McHolick told him he didn't know if claimant was disabled as a result of his shoulder injury; claimant said he had had an earlier injury to his right lower extremity and would attempt to secure social security from that injury.

A Determination Order of September 22, 1976 granted claimant 80° for 25% unscheduled disability.

On November 17, 1976 Dr. Rockey examined claimant and found a rupture of the long head of the right biceps, moderate weakness of abduction of the right shoulder apparently inhibited by pain. In April 1977 Dr. Rockey found loss of function of the right shoulder was mild at waist level but severe overhead.

Dr. Rockey testified that the small tear of the rotator cuff was unrelated to the injury. He felt claimant would regain all of his elbow function. Claimant should not continue to work as a faller and bucker, but he was capable of bench type work. Claimant could drive a log truck but couldn't throw wrappers over the truck; he also could drive a cat. Surgery would not improve claimant's condition. Claimant was able to work in any job that was not heavy in nature.

Dr. McHolick testified claimant's condition was a "wearing out" of his shoulder and biceps muscles, a common thing with working. Claimant could not return to the woods with a ruptured biceps muscle but the overhead work restriction was due to the rotator cuff problem. The biceps muscle would get stronger.

Claimant testified he has sought no employment and is now drawing social security.

The Referee found that the physicians in this case were too optimistic. He found claimant a credible witness and he found him to be seriously injured from the biceps muscle alone. He granted claimant 80% unscheduled disability and 50% loss of the right arm.

The Board, on de novo review, finds that Dr. Rockey indicated that the loss function of the arm and shoulder was mild. One serious problem claimant experiences is the tear of the rotator cuff which is not related to this injury. A proper award for loss of function of claimant's right arm would be 20%; he has retained at least 80% use of this arm.

The shoulder disability is rated on loss of wage earning capacity which is difficult to appraise because claimant has never sought employment and has now retired. Because of claimant's age and because he can not return to working as a bucker and faller, which was his lifelong occupation, the Board concludes claimant has sustained a substantial loss of wage earning capacity and is entitled to an award of 160° for 50% unscheduled disability.

ORDER

The order of the Referee, dated August 8, 1977, is modified.

Claimant is granted an award of 160° for 50% unscheduled disability and an award of 38.4° for 20% loss of the right arm.

These awards are in lieu of the awards granted by the Referee, which in all other respects is affirmed.

WCB CASE NO. 77-2371 MARCH 6, 1978

JOHN A. RISKE, 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 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 9, 1977, is affirmed.

WCB CASE NO. 77-1986 MARCH 6, 1978

GARY SOUTHWICK, CLAIMANT
Doblie, Bischoff & Murray, 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 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 October 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 carrier.

WCB CASE NO. 77-1722 MARCH 6, 1978

THOMAS E. STEFFL, CLAIMANT
A. Thomas Cavanaugh, 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 partial denial of January 19, 1977 refusing responsibility for claimant's surgery and continuing 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 13, 1977, is affirmed.

WCB CASE NO. 76-490 MARCH 6, 1978

GENEVA L. TAYLOR, 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 aggravation claim to it for acceptance and payment of compensation to which she is entitled in addition to 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 September 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. 76-6592 MARCH 6, 1978
WCB CASE NO. 76-5213

JANET HICKS MARSH WOLF, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Collins, Velure & Heysell, 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 approved the denial of Industrial Indemnity Company and remanded claimant's claim to the Fund for acceptance and payment of compensation to which she 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 October 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 $100, payable by the carrier.

WCB CASE NO. 77-1569 MARCH 7, 1978

LINDA K. BAXTER, CLAIMANT
Malagon, Starr & Vinson, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer requests review by the Board of the Referee's order directing it to reimburse claimant for housekeeping expenses in the amount of $688.74 for the period from December 1976 through March 4, 1977, plus a penalty of 15% of that sum for the employer's unreasonable refusal to pay it.

Claimant sustained a compensable injury on February 5, 1974, diagnosed as a lumbar strain. Claimant is married with two children 10 and 11; she did all of her own housewook prior to this injury but since her injury she stays in bed a substantial part of the day and cannot perform the housework. Claimant's husband and children did all the housework.

In December 1976 claimant's husband was injured and required surgery. He was disabled for 13 weeks and he hired a housekeeper at $2.50 an hour to do all the work and to cook the evening meal. Her total bill for this period was $688.74.

On January 3, 1977 claimant's treating physician, Dr. Carter, wrote claimant's husband that claimant could only perform light household chores. He recommended hiring a housekeeper and that he continue to help claimant until she was able to do the tasks herself.

On March 3, 1977 the carrier denied payment for the housekeeping services.

The Referee found that medical and other related services are provided for under the provisions of ORS 656.245(1). He cited the Board's decision in Peggy Roberts, Claimant, WCB Case No. 75-296 (15 Van Natta, 761) and ordered payment of the bill for the housekeeping services. He also imposed a penalty against the employer for unreasonable resistance to payment of said bill and awarded claimant's attorney a fee payable by the employer.

The Board, on de novo review, finds Dr. Carter's report does not even suggest that the housekeeper was necessary in assisting claimant in her recovery. ORS 656.245(1) provides for medical services and other related services, but in this case the housekeeping was not a related service. The housekeeper was hired because of claimant's husband's injury and not her own.

ORDER

The order of the Referee, dated August 22, 1977, is reversed.

The employer's denial of responsibility for the housekeeper's bill is approved.

WCB CASE NO. 77-1178-B MARCH 7, 1978

PHYLLIS GALASH, CLAIMANT
Lee Finders, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Atty.
Order

An Opinion and Order was entered in the above entitled matter on October 19, 1977 from which the employer's carrier, EBI Company, requested Board review.

On February 28, 1978 the Board was advised by claimant's attorney that prior to the hearing before the Referee he had requested the attorneys for each of the insurance companies to agree that it would not be necessary for claimant to attend the hearing but met with no success. The sole issue before the Referee was which insurer of the employer, Northern Insurance Company or EBI, was responsible for payment of compensation to the claimant. After the hearing the Referee directed the claim be accepted by EBI, however, he did not award any attorney's fees to claimant's attorney.

It is the opinion of the Board that claimant's attorney is entitled to a fee pursuant to the provisions of ORS 656.382(2) even though the primary issue before the Referee was which carrier was responsible for claimant's compensable condition.

Upon receipt of the request for Board review the Referee was divested of jurisdiction over this matter, therefore, the Board concludes that the Referee's Opinion and Order entered on October 19, 1977 should be amended by awarding claimant's attorney as a reasonable attorney's fee for his services before the Referee the sum of $400 payable by EBI Company.

IT IS SO ORDERED.

WCB CASE NO. 77-2179 MARCH 7, 1978

EDWARD HOOVER, 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 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 September 13, 1977, and reaffirmed after reconsideration on September 29, 1977, is affirmed.

WCB CASE NO. 77-454 MARCH 7, 1978

KENNETH LARSEN, CLAIMANT
Coon & Anderson, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
McMenamin, Joseph, Herrell & Paulson,
Defense Atty.
Order

On February 10, 1978 the Board received from claimant, by and through his attorney, a motion to remand the above entitled matter to Referee J. Wallace Fitzgerald for purposes of correction and receiving further evidence consisting of a deposition of Dr. James W. Brooke taken on January 31, 1978. In the alternative, claimant offered as an exhibit the deposition of Dr. Brooke and requested that the record be reopened in order to admit said transcript.

On February 21, 1978 the Board received a response from Great American Insurance Company, stating it did not oppose the remand requested by claimant's attorney but felt the better procedure would be to allow the deposition of Dr. Brooke to be included in the record except that the attorney for the other carrier involved, Argonaut, did not participate in the deposition.

On February 23, 1978 the Board received a response from Argonaut which opposed granting of claimant's motion for remand on the ground and for the reason that claimant had failed to establish that the evidence which he now sought to have introduced into the record was not available at the time of the hearing.

The evidence must not have been obtainable and must not merely be a situation in which the hearing referee has ruled against the claimant. Claimant cannot strengthen his case by presenting new evidence which, with due diligence, could have been produced at the original hearing. Buster v. Chase Bag Company, 14 Or App 323.

It is the contention of Argonaut that the deposition of Dr. Brooke now being offered into the record would be new evidence which could have been obtained with due diligence on the part of claimant.

The Board, having given full consideration to the motion and the responses thereto and taking into consideration the recital in the Referee's order that "following the hearing the matter was continued for a doctor's deposition, however, the receipt of this evidence was subsequently waived", concludes that Dr. Brooke's deposition could have been obtained at the time, at least before the hearing was formally closed. Furthermore, the Board finds no basis for allowing the deposition of Dr. Brooke to be considered on Board review.

ORDER

The motion to remand the above entitled matter to Referee J. Wallace Fitzgerald to receive the deposition of Dr. James W. Brooke taken on January 31, 1978 and the alternative motion to accept as an exhibit the aforesaid deposition are hereby denied.

WCB CASE NO. 76-6721 MARCH 7, 1978

KENNETH W. METZKER, CLAIMANT
Blair & MacDonald, 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 and dismissed the case. Claimant contends that his aggravation claim should be compensable and that he is also entitled to permanent partial disability benefits for his original injury suffered on October 31, 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. The Board would like to comment that it finds the Referee was correct in not assessing penalties and attorney fees because there was no evidence of a valid claim for aggravation having ever been filed.

ORDER

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

WCB CASE NO. 77-377 MARCH 7, 1978

DAVID MIDKIFF, CLAIMANT
David Vandenberg, Jr., 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 240° for 75% unscheduled (low back) disability, 45° for 30% scheduled left leg disability and 7.5° for 5% scheduled right leg disability.

Claimant, at the age of 30, while employed as a laborer in a lumber mill, suffered a compensable injury to his neck and back on May 4, 1972.

Claimant received chiropractic adjustments for two years without relief, however, he continued to work during this time.

In May 1974 Dr. Balme began treating claimant conservatively and suggested claimant engage in lighter work. In October of 1974 claimant was hospitalized for one week's bed rest; upon his discharge claimant was given a work-release of October 21, 1974.

The first Determination Order, dated December 4, 1974, awarded claimant only temporary total disability benefits.

Claimant, in March of 1976, was examined by Dr. Lilly who found claimant to have 75% of normal range of motion of his low back. He concluded claimant had a herniated disc at L5-S1 left with a lot of nerve root compression and suggested surgery.

On May 20, 1976 a myelogram and left L5-S1 hemilaminectomy, discectomy and foraminotomy were performed.

In August 1976 Dr. Lilly found claimant had almost a full range of motion of the back. Claimant told Dr. Lilly he had an 8-acre place on which he was doing easy work and still had some low back pain. Dr. Lilly found claimant stationary on November 11, 1976 with some permanent partial disability, a degenerative disc L5-S1. He suggested claimant not engage in any real heavy work involving a lot of bending or lifting. Claimant returned to work as a trimmer saw operator in November 1976.

A Determination Order, dated December 14, 1976, awarded claimant temporary total disability benefits and 16° for 5% unscheduled disability for his low back injury.

Claimant was examined in April 1977 by Dr. James Coughlin, an orthopedic specialist, who reported that the claimant felt constant pressure in his low back area, constant pain in his left thigh, both legs felt leadened; also, he had some numbness and tingling in his left leg when the pain got worse. He thought claimant was unable to do anything but light work without any bending, squatting, stooping or lifting. Claimant would need rest periods if he was required to sit or stand for prolonged periods.

Claimant has a GED and currently he and his wife operate a motel complex. He is able to assist in light maintenance and minor repairs.

The Referee found claimant was a credible witness who had suffered a loss of 75% of his earning capacity because he had depended on his back to earn his livelihood and now he was unable to do any heavy work and only a few hours of light work. Claimant was

not trained for any clerical or office type of employment. The Referee awarded claimant 240° for 75% unscheduled disability for his low back injury, 45° for 30% scheduled disability to his left leg and 7.5° for 5% scheduled disability to his right leg. The awards for the legs were based on the Referee's finding that the leg pain was disabling.

The Board, after de novo review, finds that Drs. Lilly and Coughlin do not, in their medical reports, relate any loss of function in either of the claimant's legs. Therefore, he is not entitled to any award for his legs.

Dr. Lilly found that prior to surgery the claimant had a 25% loss of motion in his low back and after surgery he had an almost full range of motion. However, both doctors concurred that claimant is barred from performing any heavy work. Dr. Coughlin placed many restrictions upon claimant's physical activities and said claimant would require rest periods if his employment required him to sit or to stand for prolonged periods of time.

The Board concludes that the claimant has suffered a 50% loss of his earning capacity as a result of his unscheduled low back disability, but is not entitled to any award for a scheduled injury.

ORDER

The Referee's order, dated June 17, 1977, is modified.

Claimant is awarded 160° for 50% unscheduled low back disability. This is in lieu of the awards granted by the Referee's order, which in all other respects, is affirmed.

WCB CASE NO. 77-1079 MARCH 7, 1978

ALVIS SMITH, CLAIMANT
David C. Glenn, 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 compensation equal to 52.5° for 35% loss of the right arm. 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 26, 1977, is affirmed.

WCB CASE NO. 76-6578 MARCH 7, 1978

THOMAS TOMPKINS, CLAIMANT
Ringo, Walton & Eves, 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 for aggravation to the Fund for payment of compensation until closure pursuant to ORS 656.268. The Fund contends its denial of claimant's claim for a carpal tunnel syndrome was proper.

Claimant sustained a compensable injury on May 12, 1971 to his neck and low back while moving and unloading a guard rail. In November of 1971 Dr. Richard Hall reported claimant complained of pain in his low back and he found evidence of impairment and pain in the use of the right arm, pain in the neck and head and lumbosacral area.

The Disability Prevention Division, in August of 1973, found complaints of burning and soreness in the low back and right hip, neck and shoulder pain, numbness in the right arm and poor grip.

The Back Evaluation Clinic, in August of 1973, found claimant unable to return to his former employment and opined claimant suffered a minimal loss of function to his neck and a mild loss of function to his low back.

Claimant now alleges his condition has worsened since his last award of compensation, a circuit court order, dated September 2, 1976, affirming the Board's award of compensation equal to 240° for 75% unscheduled disability for injury to his neck and back.

Claimant, at the hearing, complained of problems with his neck, arms, and hands. He contends he suffered severe neck cramps in September of 1976 caused by the use of his arms. Claimant also has lost strength and control in his arms. There is no contention his back condition has worsened.

The Referee found that both Drs. Tsai and Knox agreed claimant was suffering from a carpal tunnel syndrome.

Dr. Knox in January of 1977 related claimant's current symptoms to his back and neck injury of May 1971. Claimant's symptoms were diagnosed as multiple entrapment ischemic mononeuropathic involving the upper extremities, particularly the ulnar nerves bilaterally. Dr. Knox believed, based on his clinical findings and the EMG findings that claimant's condition had been definitely aggravated since March of 1976.

The Referee found claimant had met his burden of proof in proving his aggravation claim.

The Board, after de novo review, would affirm the Referee but corrects his statement that both Dr. Tsai and Dr. Knox thought claimant had a carpal tunnel syndrome. Claimant suffers from a condition which is similar to a carpal tunnel syndrome and it is related to his May 1971 injury. Had claimant had a carpal tunnel syndrome such condition could not have been related to claimant's original industrial injury.

ORDER

The Referee's order, dated July 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 $300, payable by the carrier.

WCB CASE NO. 76-3829 MARCH 7, 1978

D. B. TOON, 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 requests review by the Board of the Referee's order which awarded claimant 32° for 10% unscheduled disability. Claimant cross-requests Board review.

Claimant had worked for this employer for 16 years; first, pulling on the greenchain, then as a millwright. Claimant developed respiratory problems and claimed an occupational disease which was accepted as an aggravation of an underlying problem. A Determination Order of July 21, 1976 granted claimant compensation for time loss only.

Claimant took a demotion to cleanup man where dust and fumes were less irritating. Claimant is presently driving a cleanup truck and still breathes dust and continues to suffer from it.

Claimant's symptoms are shortness of breath, hoarseness, coughing and nasal stuffiness which requires claimant to breath through his mouth.

Dr. Turner, in June 1974, upon consultation, told claimant to start wearing a mask at work. Claimant testified that he tried the mask for a week but could not tolerate it. After an hour of wearing it, he couldn't breath.

In May 1976 Dr. Turner reported claimant's pulmonary function was normal but claimant always had, and complained of, a cough and nasal stuffiness. Claimant was unable to tolerate the medication appropriate for his case. Dr. Turner diagnosed allergic rhinitis. Dr. Tuhy examined claimant and made the same diagnosis.

On October 19, 1976 Dr. Minor, an allergist, reported his examination revealed intrinsic asthma, not allergic asthma, and that claimant was not allergic to wood dust. Claimant's intrinsic asthma caused him to wheeze but claimant was not allergic to anything in his environment. Dust and fumes merely trigger the asthma, they were not the cause of it.

The Referee found claimant's underlying medical problem, despite the diagnosis, was aggravated by his work environment. Claimant's condition was permanent but his disability would be less if he used the protective mask. He granted claimant 32° for 10% unscheduled disability.

The Board, after de novo review, disagrees with the conclusion reached by the Referee. The Board finds, based on the report of Dr. Minor, that claimant's basic problem is asthma which is not work related.

The Board concludes that claimant has no permanent disability.

ORDER

The order of the Referee, dated August 16, 1977, is reversed.

The Determination Order of July 21, 1976 is affirmed.

WCB CASE NO. 77-506 MARCH 7, 1978

MARIE VAN HARDENBERG, CLAIMANT
Rankin, McMurry, Osburn & Gallagher,
Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant has requested review by the Board of a Referee's order granting her 16° for 5% unscheduled sinus disability. Claimant's claim had been closed by a Determination Order with an award for time loss only. On cross-appeal, the employer contends claimant has sustained no permanent disability.

Claimant, who was 35 years old, was employed in the production department of Bluebell Potato Chip Division of Sunshine Biscuits when she was exposed to airborne barbecue powder in March of 1972. Claimant was referred to Dr. Frank Perlman at the Allergy Clinic, who prescribed immunotherapy and prepared an antigen. By September 1976 Dr. Perlman was of the opinion the immunotherapy could be concluded.

In January 1973 claimant was off work because of an unrelated problem and was terminated from her job.

Based on minimal medical evidence, the Referee awarded 5% unscheduled disability.

The Board, on de novo review, relies on the report of Dr. Perlman, dated April 17, 1973, wherein he stated that there was no evidence of any permanent residuals at the time of his examination, and concludes that claimant is not entitled to any award for permanent disability.

ORDER

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

The Determination Order, dated January 27, 1976, is reinstated.

WCB CASE NO. 77-819 MARCH 9, 1978

LEO ALBERTSON, CLAIMANT
James Lynch, Claimant's Atty.
James Gidley, Defense Atty.
Own Motion Order

On February 2, 1977 claimant requested the Board to exercise its own motion jurisdiction and reopen his claim for an industrial injury suffered on May 20, 1970. The request was supported by a report from Dr. Campagna.

The carrier was advised of the request and responded on February 22, 1977, stating they would resist the reopening of the claim for the reason that there was a serious medical question as to whether claimant's current condition was a direct result of his May 20, 1970 injury.

Therefore, the Board issued an own motion order on May 9, 1977 referring the matter to its Hearings Division with instructions to set the matter down for hearing and take evidence on the issue of whether claimant's present condition was a direct result of his injury suffered on May 20, 1970.

On May 18, 1977 a hearing was held before Referee Henry L. Seifert and, as a result of said hearing, Referee Seifert recommended that claimant's present condition be considered a direct result of his industrial injury sustained on May 20, 1970.

The Board, after giving full consideration to the transcript of the proceedings, furnished to it by the Referee, and the Referee's own motion recommendation, affirms and adopts as its own the said own motion recommendation, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

Claimant's claim for an industrial injury sustained on May 20, 1970 is remanded to the employer to be accepted and for the payment of compensation, as provided by law, commencing on January 16, 1976, the date claimant had neck surgery, and until the claim is again closed pursuant to the provisions of ORS 656.278, less any time worked in the interim.

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

WCB CASE NO. 76-5933 MARCH 9, 1978

BOYD ALLEN, CLAIMANT
Malagon, Starr & Vinson, 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 dismissed the matter after finding that the carrier was not responsible for medical bills from Dr. Dunn and Medford Laboratories and therefore, a penalty and an attorney fee were not indicated.

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

ORDER

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

WCB CASE NO. 75-3119 MARCH 9, 1978

CHARLES CULP, CLAIMANT
Anderson, Fulton, Lavis & Van Thiel,
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 compensation equal to 30° for 20% loss of the left leg. Claimant contends that this award does not fully 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 October 10, 1977, is affirmed.

WCB CASE NO. 77-1936 MARCH 9, 1978

LAURA DUCAT, CLAIMANT
Malagon, Starr & Vinson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Mel Kosta, Defense Atty.
Order of Dismissal

A request for review, having been duly filed with the Workmen's Compensation Board in the above entitled matter by the employer, John Patterson, dba Summers Lane Tavern, 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. 77-4184 MARCH 9, 1978

JAMES GREENSLITT, CLAIMANT
Alan R. Jack, 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 claimant 19.2° for loss of the right arm and 30° for loss of the right leg. 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 September 27, 1977, is affirmed.

SAIF CLAIM NO. GC 165711 MARCH 9, 1978

KENNETH H. HART, CLAIMANT
Robert E. McMillan, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, on June 1, 1968, suffered a compensable low back injury while doing heavy lifting and repetitive bending for his employer, a building contractor. Dr. Goodwin diagnosed his condition as an extruded intervertebral disc with radiation of pain in the left leg.

After a myelogram and laminectomy, claimant returned to work on March 12, 1969 but quit the following day because of the pain. He returned to work on March 31, 1969 and his claim was then closed by an order dated September 17, 1969 with an award of 48° for 25% unscheduled disability. Claimant was treated by Dr. Goodwin conservatively a few times after that date.

Because of increased symptoms, claimant quit work on April 18, 1977 and a further myelogram and laminectomy were performed by Dr. Goodwin. He returned to work on June 27, 1977 with no symptoms.

Claimant was examined on October 4, 1977 by the Orthopaedic Consultants who found mild residual radiculopathy of the lower extremities. They noted that claimant had returned to his former occupation with no limitations. Dr. Goodwin concurred with the findings and conclusions of the Orthopaedic Consultants.

On December 6, 1977 the Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department concludes that claimant's condition has improved since the last claim closure. They recommend further temporary total disability compensation from April 18, 1977 through June 26, 1977 with no award for permanent disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from April 18, 1977 through June 26, 1977, less time worked.

WCB CASE NO. 77-2585 MARCH 9, 1978
WCB CASE NO. 77-2586

JOHNNY KAMMERZELL, CLAIMANT
Corey, Byler & Rew, 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 claimant had no permanent disability as a result of the April 23, 1974 injury (WCB Case No. 77-2585), thereby dismissing his request for hearing, and that the Determination Order of May 12, 1977 (WCB Case No. 77-2586) granting no permanent disability should be 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 October 31, 1977, is affirmed.

WCB CASE NO. 76-6335 MARCH 9, 1978

ROBERTA MALSON, 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 awarded her compensation equal to 96° for 30% unscheduled low back injury. Claimant contends she is permanently and totally disabled.

Claimant, a 60-year-old drapery consultant, sustained a compensable injury to her low back on May 2, 1974 when she tried to move a large box. Dr. H. Dan Moore diagnosed a progressive spasm of the right leg and lower back and treated claimant conservatively. He released her to return to part time work on July 5, 1974 and to full time employment on August 24, 1974, the date he found her medically stationary.

A Determination Order, dated October 21, 1974, awarded claimant 32° for 10% unscheduled low back disability.

Claimant continued to work full time until September of 1975 when, at age 62, she retired. She did work part time until May 7, 1976 when her condition became aggravated by her work, to-wit: she had an aching or "giving way" of legs. Claimant quit. Dr. Moore found the back pain was in the area of L4-L5 and L5-S1 radiating down both sides, primarily to the right leg.

Claimant was examined in September of 1976 by the Orthopaedic Consultants who diagnosed chronic lumbosacral strain. They felt she was medically stationary and did not require a job change, but could return to her former employment on a part time basis and with certain limitations. They felt claimant's total loss of function of the back due to her injury was mild.

A Determination Order, dated November 4, 1976, awarded claimant compensation for temporary total disability only.

Dr. Thomas Martens examined claimant in December 1976 and found claimant had pain in her back and right leg coincidental with any strenuous activity and she had difficulty standing on the right leg alone. He diagnosed strain of the lumbosacral spine with right sciatic nerve root irritation and osteoarthritis. of the lumbosacral spine and right knee. He thought that claimant was permanently and totally disabled as far as her occupation as a drapery consultant was concerned. Drs. Moore and Martens opined in January of 1977 that claimant was permanently and totally disabled for any gainful employment because of her disability, age and past work experience.

Vocational Rehabilitation found claimant ineligible for retraining due to her disability and age.

Mr. R.E. Adolph, a vocational consultant, reported that claimant has a high school education and had briefly attended college. He found claimant had worked in sales and as a telephone supervisor in her early years, but quit to raise her family. She returned to work at the age of 59 with the employer for which she was working when she had her injury. Mr. Adolph believed that claimant, based on her abilities, skills and work experience, if she could perform work allowing the option of sitting or standing and requiring no bending, repetitive twisting, stooping or lifting, could be employed as a central telephone operator, telephone answering services, or production worker at a ceramic cookie stamp manufacturer. He testified that claimant would not be able to work full time in these fields but he felt claimant's age would not hinder her in obtaining such employment.

Claimant testified that she had intended to work until she was 65 but quit due to her injury. She currently has pain in her right thigh, numbness in both legs and her right knee gives out going up and down stairs. She can drive for only 15-20 minutes because she cannot sit in one place for prolonged periods. She experiences pain on twisting, lifting or bending and requires two one-hour rest periods daily.

The Referee found that the claimant was not permanently and totally disabled. Claimant could not return to her former employment and was restricted to light or sedentary work but claimant had residual skills which would qualify her for several suitable occupations including light sales work. Claimant had not worked since May of 1976 and had sought employment at the State Employment Office just once in January of 1977.

He concluded that because claimant was precluded from entering a large segment of the general labor market, she was entitled to a larger award of compensation and increased her award of 32° to 96° for 30% unscheduled disability.

The Board, after de novo review, finds that both Dr. Martens and Dr. Moore were of the opinion claimant was permanently and totally disabled from any gainful and suitable employment. Dr. Martens concurs, essentially, in the Orthopaedic Consultants' diagnosis and recommendation that claimant was able to return on a part time basis to her former occupation with certain limitations, but he also indicates that claimant was still having difficulty with her right leg. Mr. Adolph felt claimant was capable of performing part time work.

The Board concludes, based on claimant's age, education, work experience, and very limited potential for retraining, that she is not permanently and totally disabled, but she has not been adequately compensated for her loss of wage earning capacity resulting from her injury. It awards claimant 256° for 80% unscheduled low back disability and 15° for 10% loss function of her right leg, this scheduled award being based upon Dr. Martens' report.

ORDER

The Referee's order, dated August 31, 1977, is modified.

Claimant is granted 256° for 80% unscheduled low back disability and 15° for 10% loss function of her right leg. These awards are 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 such compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-3914 MARCH 9, 1978

DAVID NOBLE, 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 Phillips.

Claimant seeks Board review of the Referee's order which granted him compensation equal to 45° for 30% loss of his left leg. Claimant contends that his disability is greater than that awarded by 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 October 3, 1977, is affirmed.

SAIF CLAIM NO. FC 13552 MARCH 9, 1978

BILLY DEATON NORRIS, CLAIMANT
Donald R. Duncan, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On January 3, 1978 the Board received a letter from Mrs. Billy Deaton Norris, wife of the claimant, stating that her husband had had surgery performed on his back by Dr. Grewe on November 17, 1977. She requested the Board to exercise its own motion jurisdiction and reopen claimant's claim for an April 15, 1966 injury which had required spinal fusion L5-S1 on May 13, 1966. Claimant's aggravation rights have expired.

The Fund, on July 28, 1977, had denied claimant's request to reopen claimant's claim, alleging that his present condition was the result of lifting a lawn mower onto the back of a pickup truck. However, subsequent information received by the Fund from Dr. Grewe indicated that there was an overgrowth of the fusion mass which required the surgical correction which he performed on November 17, 1977. Upon receipt of this information, the Fund advised the Board that it would not resist the reopening of claimant's claim.

The Board, after considering the medical records which were forwarded to it by Dr. Grewe and the information contained in his cover letter of February 7, 1978, concludes that claimant's

request for own motion relief should be granted and his April 15, 1966 claim reopened.

ORDER

Claimant's claim for a compensable injury suffered on April 15, 1966 is remanded to the Fund for acceptance and for the payment of compensation, as provided by law, commencing on November 15, 1977, the date claimant was admitted to Emanuel Hospital, and until the claim is again closed pursuant to the provisions of ORS 656.278.

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

SAIF CLAIM NO. KC 120599 MARCH 13, 1978

EDNA AICHELE, CLAIMANT
William A. Galbreath, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Order Allowing Attorney Fee

The Board's Own Motion Order entered January 17, 1978 in the above entitled matter failed to include an award of a reasonable attorney's fee.

ORDER

IT IS HEREBY ORDERED that claimant's attorney receive as a reasonable attorney's fee a sum equal to 25% of the temporary total disability benefits granted by this order, payable out of said compensation as paid, not to exceed $500.

WCB CASE NO. 76-6633 MARCH 13, 1978

WILLIAM R. ANDERSON, CLAIMANT
Bedingfield, Joelson, Gould & Barron,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests review by the Board of the Referee's order which affirmed both denials of claimant's claim but ordered the State Accident Insurance Fund to pay compensation for temporary total disability from October 31, 1975 to October 18, 1976, less time worked.

Claimant had sustained a crushing type hand injury in California in 1967. Claimant went to work for Pacific Lumber Inspection Bureau in Oregon in January 1974. Subsequently, claimant went to work for Coos Head Lumber Company. He worked as a lumber grader for both companies.

Claimant quit working for Coos Head on May 13, 1975 and sought medical treatment.

In August 1975 Dr. Wilson diagnosed a hand infection and on August 21 claimant underwent surgery for incision and drainage of massive intramuscular abcess of the right arm. Claimant told Dr. Wilson that he had developed a "gist ball" from the 1968 injury and he felt this lump break during an incident using a jack on his car.

In November, 1975 Dr. Wilson opined that at the time of the 1968 injury, based on the history given to him by claimant, that bacteria was walled off during the injury. This bacteria was broken off by the jack incident.

On October 30, 1975 claimant's attorney had requested Coos Head to furnish claimant a Form 801; he also had asked Pacific Lumber Inspection Bureau for this claim form on November 9, 1975. Early in 1976 an 801 was sent by the latter, but Coos Head was requested again on March 5, 1976.

In June 1976, after repeated inquiries by the Fund, Dr. Wilson stated that since the 1968 injury claimant had had intermittent swelling and tenderness. Any type of physical activity would irritate the hand. Therefore, claimant's lumber grader job would relate directly to the problem, already irritated from previous motion and contusions.

On October 18, 1976 the Fund, which furnished workers' compensation coverage for both employers, denied claimant's claim against each employer.

The Referee found that Dr. Wilson had believed that claimant's condition was related to his work solely based on claimant's history to him. The Referee found claimant to be inconsistent and not credible and concluded claimant had failed to prove compensability.

The Referee found that claimant was entitled to compensation for time loss because of the Fund's unreasonable failure to comply with the statute; however, because claimant's claim was not found to be compensable claimant was not entitled to penalties and attorney fees. He granted claimant time loss from October 31, 1975 to October 18, 1976, less time worked, and an attorney fee out of the compensation awarded to claimant.

The Board, on de novo review, concurs with the Referee's finding that claimant's claims were not compensable. However,

based on the Supreme Court's decision in Mary Jones v. Emanuel Hospital, 280 OR 147, which was issued after the Referee's order, the Board finds claimant is entitled to penalties and attorney fees for the Fund's failure to comply with the statute.

ORDER

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

Claimant is granted an additional sum equal to 15% of the compensation for temporary total disability from October 31, 1975 to October 18, 1976. This is in addition to the compensation for temporary total disability granted by the Referee's order which is in all other respects 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 compensation granted claimant by this order, payable out of such compensation as paid, to a maximum of $500.

WCB CASE NO. 76-4425 MARCH 13, 1978

JESSE CLINE, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Atty.
Keith D. Skelton, 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. 77-2351 MARCH 13, 1978

TIMOTHY H. CRUCHELOW, CLAIMANT
Peterson, Susak & Peterson, Claimant's Atty.
Roger R. Warren, Defense Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Emp. Ins.

Reviewed by Board Members Wilson and Moore.

Employers Insurance of Wausau seeks Board review of the Referee's order which remanded claimant's claim to it for

acceptance and payment of compensation thereby affirming the denial issued by 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 September 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 Employers Insurance of Wausau.

WCB CASE NO. 76-3215-SI MARCH 13, 1978

In the Matter of the Second Injury
Fund Relief of
FMC MARINE & RAIL EQUIPMENT DIV., EMP.
DIANE DUVENECK, CLAIMANT
Miller, Anderson, Nash, Yerke &
Wiener, Defense Atty.
Dept. of Justice, Defense Atty.
Order on Review

Reviewed by Board Members Wilson, Moore and Phillips.

On February 25, 1977 Referee Joseph D. St. Martin recommended that the Board grant the employer's request for reimbursement from the Second Injury Fund in the amount of 50% of the additional cost which is attributable to the results of the second injury suffered by claimant.

The Board, after de novo review of the abstract of record, accepts the recommendation of the Referee and adopts as its own the findings of fact and conclusion of the law as set forth in the recommended order, dated February 25, 1977, a copy of which is attached hereto and, by this reference, made a part of the Board's order.

WCB CASE NO. 77-1486 MARCH 13, 1978

HAROLD P. GRAMLEY, CLAIMANT
Doblie, Bischoff & Murray, 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 remanded claimant's claim to it for acceptance and payment of compensation.

Claimant is President of the Newcomers Service International and is also the manager of the Portland-Vancouver Newcomers Service. The Newcomers Service is a service offered to persons new in the area which includes introducing them to products, businesses, etc. The company has franchises in 17 cities in the Northwest. Claimant, with his employer's approval, arranged an evening social event in his home for the franchise holders and their spouses, to be held in conjunction with the annual business meeting. The expenses of this event were to be paid by the employer.

On May 16, 1976, one day before the upcoming social event, claimant spent a large amount of time preparing his home, both inside and out. Claimant's son, several weeks earlier, had asked his father to repair the basketball hoop, but claimant had not taken the time to do it up to that point. While cleaning up his front yard on May 16, claimant noticed that the condition of the basketball hoop detracted from the appearance of his premises. While he was using a 5-foot ladder to reach the hoop, he slipped, fell and fractured his right leg.

Two major issues needed to be decided by the Referee. He first found that the social event was definitely for the benefit of the employer, a fact which is not disputed in the record. The remaining question is whether adjusting the basketball hoop should be a covered activity. If claimant had injured himself while shopping for food items for the party there would be little doubt that that would be a covered activity.

The Referee believed that the employer would, logically, assume that claimant would do some work on his premises to prepare his home for the event and even though the repairing of the hoop served a personal purpose, the reason claimant performed the job on that particular day was to improve the appearance of the premises in time for the social event to be held on the following day.

After full consideration, the Referee concluded that claimant had sustained his injury within the scope and during the course of his employment and therefore, his injury is compensable.

The Board, after de novo review, concludes that claimant's injury is not compensable.

The Board bases its opinion upon the fact that claimant did not meet the seven criterion accepted by the Court of Appeals in determining if an injury arose out of and in the course of employment. Jordan v. Western Electric, 1 Or App 441.

The repairing of the basketball hoop in which claimant was engaged was of absolutely no benefit to the employer.

ORDER

The order of the Referee, dated August 22, 1977, is reversed.

The denial of the carrier is hereby affirmed.

WCB CASE NO. 76-5681 MARCH 13, 1978

BERNIE B. HINZMAN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's aggravation 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 thereof.

ORDER

The order of the Referee, dated August 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 $150, payable by the Fund.

WCB CASE NO. 77-1687 MARCH 13, 1978

LORETTA IVERSON, CLAIMANT
Williams, Spooner & Graves, Claimant's Atty.
Clark, Marsh & Lindauer, 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 payment of compensation as provided by law with temporary total disability benefits to

commence as of September 23, 1976. Penalties and attorney fees were also assessed against the defendant.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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.

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. 77-4254 MARCH 13, 1978

SID T. McCAFFERTY, CLAIMANT
Galton, Popick & Scott, Claimant's Atty.
Davies, Biggs, Strayer, et. al.,
Defense Atty.
Philip A. Mongrain, Defense Atty.
Own Motion Order

On November 29, 1977 claimant requested the Board to exercise its own motion jurisdiction and reopen his claim for a May 2, 1969 industrial injury. At that time claimant's employer was Portland Car Wash, whose carrier was Employer's Insurance of Wausau.

On May 6, 1977 claimant allegedly suffered a compensable industrial injury while in the employ of Owens-Illinois, Inc., a self-insured employer; this claim was denied on June 15, 1977 and claimant requested a hearing on the propriety of the denial.

The Board did not have sufficient evidence to determine whether claimant's present condition was related to the May 18, 1969 injury and the responsibility of Wausau or was the result of the incident of May 6, 1977 and the responsibility of Owens-Illinois, Inc. Therefore, on December 12, 1977, the Board referred claimant's request for own motion relief to the Hearings Division with instructions to set it down for hearing in conjunction with the hearing on the propriety of the denial of the May 6, 1977 incident and to determine if claimant's present condition was an aggravation of his 1969 injury or claimant had suffered a new injury in May 1977.

On February 1, 1978, after a hearing, Referee H. Don Fink concluded that claimant had suffered a new industrial in-

jury on May 6, 1977 while in the employ of Owens-Illinois, Inc., a self-insured employer. An Opinion and Order entered on February 21, 1978 by Referee Fink directed the claim be accepted by Owens-Illinois for the payment of benefits to which claimant was entitled under the Workers' Compensation law.

The Board concludes that it is no longer necessary to consider claimant's request for own motion relief pursuant to ORS 656.278 and that the request for such own motion relief should be dismissed.

IT IS SO ORDERED.

WCB CASE NO. 77-1008 MARCH 13, 1978

GARY N. PATTERSON, CLAIMANT
David W. James, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-appeal by Employer

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which granted him an award of 30° for 20% loss of the right leg. Claimant contends that this award is inadequate and the employer, on cross-appeal, contends that the award of 7.5° granted by the Determination Order is sufficient.

Claimant, age 32, suffered a compensable injury on April 16, 1976 when his right knee struck a fare box on his bus. Dr. Larson, on May 14, 1976 performed an arthrotomy and arthroscopy. His condition was diagnosed as an osteochondral fracture of the medial ridge and lateral facet of the patella, which areas were removed at the time of the surgery.

Claimant was able to return to work on August 2, 1976 and indicated to Dr. Larson that he was able to perform his duties as a bus driver quite satisfactorily. The doctor's conclusion was that claimant had some residual aching and small snapping due to the irregularity of the patellar surface, but his condition was stable and further treatments were not necessary.

On January 26, 1977 a Determination Order granted claimant temporary total disability compensation from April 20 through August 1, 1976 and 7.5° for 5% loss of the right leg.

Dr. Larson, on May 10, 1977, indicated that claimant was still complaining of discomfort when he knelt, climbed stairs, or sat too long. At times he has a pop and sensation of giving way of the knee, and some tenderness over the area of the scar. The doctor explained to claimant that the patellar irritation was

not unexpected; he recommended that claimant use a patellar stabilization support whenever he anticipated taking part in any vigorous activity or planned to be on his feet for a long period of time. Dr. Larson suggested no other course of treatment or care in addition to the exercise program claimant was on.

At the hearing, claimant again complained of a "popping" in his knee that caused severe pain, although the support Dr. Larson recommended helped the problem somewhat. He said he was unable to drive a car for any length of time and could tolerate his bus driving job only because he is able to get out and move around frequently during the course of his working day.

The Referee found, based on claimant's testimony and the medical evidence which substantiates it, that claimant had lost more than 5% use of his right leg and was entitled to compensation for 20% loss function of said leg.

The Board, after de novo review, concludes that the award granted by the Referee is somewhat high. The medical evidence does not substantiate such a degree of impairment. Based on Dr. Larson's most recent report, the Board feels that claimant is entitled to an award of 22.5° for 15% disability of the right leg.

ORDER

The Referee's order, dated October 13, 1977, is modified.

Claimant is hereby granted 22.5° for 15% scheduled right leg disability. This is in lieu of the award granted by the Referee's order, which in all other respects is affirmed.

WCB CASE NO. 77-2271 MARCH 13, 1978

WILLIAM WILLETTE, CLAIMANT
Richardson, Murphy & Nelson, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by United Pacific Insurance Co.

Reviewed by Board Members Moore and Phillips.

United Pacific Insurance Company seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation for an injury suffered on August 31, 1976, thereby affirming the denial issued by the 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 September 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 $100, payable by United Pacific Insurance Company.

SAIF CLAIM NO. DC 273226 MARCH 14, 1978

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

Claimant suffered a compensable injury to his left knee on October 20, 1970 while working as a meter reader for the City of Forest Grove Light and Power. After conservative treatment failed, Dr. Jones, an orthopedist, performed a medial meniscectomy on November 16, 1970. A Determination Order of July 26, 1971 granted temporary disability compensation and permanent partial disability compensation for 15% of the left leg.

Claimant again saw Dr. Jones on May 10, 1972 with complaints of pain and instability in the knee. During October and November of that year he received hydrocortisone injections resulting in relief of pain. Dr. Jones, in September 1973, noted that claimant was having back problems which caused his right leg to become weak thereby putting more pressure on his already instable left leg.

Dr. Coletti saw claimant during late 1975 and early 1976. On December 4, 1975 a left knee arthrogram was performed.

Claimant's claim was reopened in November 1976 at the request of Dr. Hauge who subsequently performed an arthroscopy and arthrotomy with removal of loose portion medial meniscus and osteophytes, joint margin, on April 11, 1977. Claimant was allowed to return to work for half days only and wearing a knee brace. When his condition did not improve he was referred to Vocational Rehabilitation. Claimant is, at this time, receiving on-the-job training at his employer's plant.

Dr. Hauge found claimant's condition to be medically stationary on December 1, 1977 with some residuals; claimant has pain after an hour of walking, swelling at the end of a busy day, and his knee occasionally gives way and he must change position frequently.

On December 8, 1977 the Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted temporary total disability benefits from November 4, 1976 through December 1, 1977 and 22.5° for 15% scheduled disability of the left leg.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability benefits from November 4, 1976 through December 1, 1977, less time worked.

Claimant is granted 22.5° for 15% scheduled left leg disability. This is in addition to the award received by claimant by the Determination Order dated July 26, 1971.

WCB CASE NO. 76-6208 MARCH 14, 1978

ROBERT BRITZ, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Gilbert Feibleman, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund requests review by the Board of the Referee's order which granted claimant an award of 160° for 50% unscheduled disability and ordered it to pay compensation for temporary total disability from September 16, 1976 to December 23, 1976.

Claimant, a 52-year-old car salesman, sustained a compensable injury on February 4, 1975 when he was pinned between a car and a truck. Claimant suffered injuries to both legs and his low back. The employer was non-complying, and the Fund, pursuant to a Board's order, accepted the claim. Claimant continued to work for a short period and quit work on February 13, 1975.

Claimant was treated conservatively for this injury by Dr. Teal and Dr. Fax. Dr. Fax, in June 1975, diagnosed acute lumbosacral strain secondary to severe muscle spasms. In August 1975 Dr. Fax found claimant medically stationary with claimant still complaining of pain and of an inability to stand up straight.

A Determination Order of September 29, 1975 granted claimant compensation for time loss only.

In January 1976 claimant was examined by the Orthopaedic Consultants. The physicians diagnosed sprain of the lumbosacral spine superimposed on a pre-existing osteoarthritis and conversion reaction. They found claimant was not stationary and recommended psychiatric evaluation.

On March 15, 1976 Dr. Howard opined claimant was permanently and totally disabled. He based this opinion on his diagnosis of severe lumbar strain which aggravated a pre-existing arthritic change resulting in a severe chronic lumbar and lower thoracic sprain.

Claimant was evaluated by Dr. Parvaresh who diagnosed psychoneurotic disorder and psychophysiological musculoskeletal disorder. Claimant's psychological problems were not of sufficient magnitude to prevent him from returning to his regular occupation. However, Dr. Parvaresh felt there was a possibility that the injury had aggravated the pre-existing psychiatric disorder to the extent of 5%.

A Second Determination Order was issued on November 10, 1976 which awarded claimant additional compensation for time loss, and no compensation for permanent partial disability.

On December 23, 1976 Dr. Howard felt claimant was medically stationary and was permanently and totally disabled from doing any type of physical and gainful employment. Claimant was limited to motion in all planes; he had no ability to bend, stoop, lift or stand for long periods of time and excessive walking was totally limited.

Claimant appeared at the hearing in a stooped over position and testified he could not straighten up.

The Referee found claimant was not permanently and totally disabled. He felt that claimant's stooped over position was real but that claimant could return to his regular occupation as a car salesman. Although claimant could not return to any type of heavy physical labor and the Referee felt that claimant was probably exaggerating his condition to some extent, he did find claimant to be severely impaired.

Based upon all of the evidence, the Referee concluded that claimant was entitled to 50% unscheduled disability because of limited types of occupation he now could perform. The Referee found that claimant was not medically stationary until December 23, 1976 and ordered the Fund to pay claimant the compensation for temporary total disability to which he was entitled.

The Board, on de novo review, concurs with the Referee's finding that claimant was not medically stationary until December 23, 1976. However, the Board finds that claimant has not lost 50% of his wage earning capacity; claimant can return

to his regular occupation as car salesman. His job restriction is mainly imposed on all forms of heavy physical labor.

The Board concludes claimant is entitled to an award for 40% loss of wage earning capacity.

ORDER

The order of the Referee, dated July 13, 1977, is modified.

Claimant is hereby granted 128° for 40% unscheduled disability. This award is in lieu of the award made by the Referee's order which in all other respects is affirmed.

SAIF CLAIM NO. BC 165096 MARCH 14, 1978

ALICE L. (HUNTER) EVANS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, a 35-year-old female bartender, fell and injured her left groin on September 30, 1968. The diagnosis was a left inguinal hernia which was repaired on January 17, 1969. Further surgery was performed on July 18, 1969 after a defect was found. The claim was closed on October 13, 1969 with time loss benefits from September 30, 1968 to March 18, 1969 and from July 18, 1969 to September 18, 1969.

The hernia was again repaired on February 15, 1971 and on August 2, 1971 a fourth herniorrhaphy was performed. Because of incisional pain, claimant underwent surgery on February 4, 1972 with a diagnosis of neurolysis of the left inguinal and genitofemoral nerves which resulted in neurological changes in her left leg.

Claimant complained of back pain in July 1972 but the Fund issued a partial denial early in 1973 for this condition.

A Determination Order of May 2, 1973 granted further temporary total disability compensation from February 14, 1971 through March 23, 1973 and 15° for 10% loss of the left leg.

Claimant had refused all offers of rehabilitation services in 1973.

A Referee's Opinion and Order, dated October 19, 1973, found that the partial denial of February 26, 1973 should be affirmed and granted claimant additional compensation for 15%, making a total of 37.5° for 25% loss of the left leg. The Board affirmed the Referee's order.

The Fund voluntarily resumed time loss compensation as of July 15, 1977, after claimant was admitted to the hospital the day before for her sixth surgery connected with the hernia condition. Dr. Gerstner released claimant for work and found her condition stationary on October 3, 1977. Dr. Knox, who had treated claimant since 1972, had found her stationary about a month prior to that date. Neither doctor found any neurological changes in claimant's left leg since her last award of compensation.

On November 14, 1977 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 July 14, 1977 through November 7, 1977 with no further award for permanent disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from July 14, 1977 through November 7, 1977, less time worked.

SAIF CLAIM NO. YC 288182 MARCH 14, 1978

LEO R. GILTNER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On February 4, 1971 claimant suffered a back injury while pushing a wheelbarrow full of cement mortar across a road. The diagnosis was probable herniated intervertebral disc on the right and at the L5-S1 level. The case was closed on August 2, 1971 with compensation for time loss only.

The case was reopened by a Board's Own Motion Order, dated March 31, 1977. A myelogram was performed on April 13, 1977 and a partial laminectomy L5-S1 was done on April 18, 1977. Dr. Miller's closing report, dated October 25, 1977, indicates a good recovery. The only abnormal finding, in his opinion, was an absent right ankle jerk. The doctor did not feel claimant could return to his former employment as a linoleum and tile layer, but he could do any work not requiring any repetitive bending at the waist or any lifting over 25 pounds.

Dr. Miller released claimant from treatment on October 25, 1977 but recommended that he enter some program of rehabilitation. Under the auspices of Vocational Rehabilitation claimant is now studying Fishery and Wildlife at a community college.

On February 13, 1978 the Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted temporary total disability from April 12, 1977 (per Own Motion Order of March 31, 1977) through October 25, 1977 and 48° for 15% unscheduled low back disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability benefits from April 12, 1977 through October 25, 1977, less time worked.

Claimant is granted 48° for 15% unscheduled low back disability.

WCB CASE NO. 76-6936 MARCH 14, 1978

RICHARD JOHNSON, CLAIMANT
Gearin, Landis & Aebi, 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 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 20, 1977, is affirmed.

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

SAIF CLAIM NO. YA 524926 MARCH 14, 1978

SHERMAN KEY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his right eye on April 2, 1956 when a large stick caught in a saw and ricocheted into claimant's eye piercing the anterior fossa and producing a frontal lobe abscess as well as other problems with the eye. The claim was closed on June 21, 1956 with the cranial problems resolved, but with only light perception in the right eye. Since that time claimant has undergone surgery three different times for which the Fund paid.

On February 21, 1978 the Fund requested a determination of claimant's disability. The Evaluation Division of the Board recommended that claimant be granted temporary total disability from August 8, 1977 through December 21, 1977. No further permanent disability can be granted as claimant received 100% of the eye at the time of the June 21, 1956 closure.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability compensation from August 8, 1977 through December 21, 1977, less time worked.

WCB CASE NO. 77-450 MARCH 14, 1978

CHARLES KING, CLAIMANT
Burl Green, Claimant's Atty.
Delbert J. Brenneman, Defense Atty.
Joint Petition and Order of a Bona Fide Dispute

FACTS

Charles King, while employed by Harvey Aluminum Company, allegedly suffered an occupational disease of a pulmonary nature. Claim was made with the employer, and benefits were denied on February 15, 1977. Claimant subsequently requested a hearing before the Workers' Compensation Board asserting that the denial was improper. The bona fide dispute arose upon three grounds; first, whether or not claimant complied with the filing requirements of ORS 656.807; second, whether or not claimant complied with ORS 656.319 when he requested a hearing from the February 15, 1977 denial; third, whether or not the alleged occupational disease had arisen out of and in the scope of claimant's employment with Harvey aluminum Company. Both parties had evidence sustaining their views.

PETITION

Claimant, Charles King, in person and by his attorney, Burl Green (Green & Griswold) and employer, Harvey Aluminum Company, and its insurance carrier, CNA Insurance, in person and by their attorney, Delbert J. Brenneman (Souther, Spaulding, Kinsey, Williamson & Schwabe), now make this petition to the Board and state:

1. Charles King and Harvey Aluminum Company and its insurance carrier, CNA Insurance, have entered into an agreement to dispose of this claim for the total sum of $64,000, said sum to include all benefits and attorney fees.

2. The parties further agree that from the settlement proceeds, $4,000 shall be paid to the firm of Green & Griswold as a reasonable and proper attorney fee.

3. 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. All parties understand that if this settlement 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 respondent for injuries claimed or their results, including attorney fees, and all benefits under the Workers' Compensation Law and that he will consider said payment as being final, except injury to foot sustained prior to coverage by CNA Insurance at Harvey Aluminum.

4. 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 respondent, by whom liability is expressly denied; that it is a settlement of any and all claims whether specifically mentioned herein or not under the Workers' 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 of the sums 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 this matter is dismissed.

SAIF CLAIM NO. ZA 928712 MARCH 14, 1978

KENNETH E. MASON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On February 10, 1978 an Own Motion Determination was entered in the above entitled matter whereby claimant was granted compensation for temporary total disability from June 6, 1977 through November 10, 1977, less time worked, and compensation for 40% loss of function of the left leg.

The Board has now been advised by the State Accident Insurance Fund that their request for a claim closure was premature because claimant's condition was not medically stationary at that time. The Fund has made no payments of compensation for permanent partial disability but has continued to pay claimant compensation for temporary total disability beyond November 10, 1977. A letter from Dr. Stevens indicates that claimant is still under his medical care and that he is planning to perform surgical repair of the left knee on March 29, 1978.

Therefore, the Board concludes that the issuance of its Own Motion Determination on February 10, 1978 was premature and when claimant's condition ultimately becomes medically stationary, the Fund shall request closure pursuant to ORS 656.278.

ORDER

The Own Motion Determination entered in the above entitled matter on February 10, 1978 is hereby rescinded.

CLAIM NO. 133CB2906035 MARCH 14, 1978

JERALD McCARTNEY, CLAIMANT
Own Motion Determination

Claimant sustained a compensable industrial injury to his low back on June 1, 1970. Determination Orders dated November 9, 1970, July 8, 1971 and September 20, 1971 have given claimant an aggregate award of 64° for 20% unscheduled disability.

A Board's Own Motion Order, dated June 21, 1977, remanded claimant's claim to the carrier for acceptance and payment of compensation commencing December 17, 1976.

After conservative care, a laminectomy and discectomy at the L4-5 level were done on August 29, 1977. Claimant was released for work on October 2, 1977.

On December 14, 1977 the carrier requested a determination of claimant's disability from the Board. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted temporary total disability from December 17, 1976 through October 1, 1977 with no additional permanent disability compensation.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from December 17, 1976 through October 1, 1977, less time worked.

WCB CASE NO. 77-3695 MARCH 14, 1978

KENNETH MURPHY, CLAIMANT
Richard O. Nesting, Claimant's Atty.
Merten & Saltveit, 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. 77-1789 MARCH 17, 1978

BERTHA E. AUGARD, 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 affirmed the carrier's denial of her claim.

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

ORDER

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

WCB CASE NO. 76-3957 MARCH 17, 1978

CARROLLE A. CLARK, CLAIMANT
Anderson, Fulton, Lavis & VanThiel,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the carrier's denial of her claim for 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 April 15, 1977, is affirmed.

WCB CASE NO. 77-5494 MARCH 17, 1978

DALE CLOUGH, CLAIMANT
Williams, Spooner & Graves, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On March 2, 1978 the Board entered an Own Motion Order in the above entitled matter remanding claimant's claim for a compensable injury suffered on December 1, 1971 to the State Accident Insurance Fund to be accepted for the payment of compensation provided by law.

On March 7, 1978 the Board received from the Fund a request that it reconsider its Own Motion Order based on a report from Dr. Boals, dated August 5, 1977, and the failure of claimant to keep an appointment to be examined by Dr. Raaf in Portland on December 22, 1977.

On January 25, 1978 the Fund had been advised by the Board that it was going to consider the matter under the provisions of ORS 656.278, furnished a brief background of claimant's initial claim for aggravation, the subsequent request by claimant's attorney for own motion relief, a copy of the Referee's order of dismissal, a copy of Dr. Boals' report, dated

August 5, 1977, and a copy of Dr. Gilsdorf's medical report, dated July 27, 1977.

The Fund was requested to advise the Board within 20 days of its position with respect to claimant's request for own motion relief. This request was addressed to the SAIF, Legal Services, SAIF Building, Salem, Oregon 97312.

The Board concludes that the Fund has had ample time within which to furnish the Board with any information which it felt the Board should consider before entering its Own Motion Order. The request to reconsider should be denied.

The Fund may request own motion relief from the Board if it can obtain and furnish to the Board the medical reports which indicate that there is no relationship between claimant's present condition and his December 1, 1971 industrial injury. At the present time, all that the Fund has furnished to the Board is a medical report signed by Dr. Raaf indicating that claimant did not keep his appointment on December 22, 1977 and a copy of a notice of this appointment mailed to claimant.

ORDER

The State Accident Insurance Fund's motion that the Board reconsider its Own Motion Order entered in the above entitled matter is hereby denied.

WCB CASE NO. 76-6483 MARCH 17, 1978

LEROY COLLINS, CLAIMANT
Elden M. Rosenthal, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The Employee Benefits Insurance Company seeks Board review of the Referee's order which found claimant had suffered a new injury on May 28, 1976, set aside their denial of the claimant's claim, and granted claimant an award of compensation equal to 64° for 20% unscheduled disability to his low back. EBI contends claimant did not suffer a new injury but an aggravation of an injury suffered on December 7, 1972 and on such grounds denied the claim.

Claimant had suffered a compensable injury to his back on December 7, 1972. This claim was closed without an award for permanent partial disability by a Determination Order dated February 22, 1973. The Fund, at that time, had provided workers' compensation coverage for the employer.

On May 26, 1976, while employed by the same employer, claimant alleges he suffered a new injury to his back while picking up boxes. EBI provided workers' compensation coverage for the employer at this time. Dr. Ho diagnosed a chronic right sacroiliac and iliolumbar strain. Dr. Ho found claimant medically stationary on September 9, 1976 and felt claimant had made a complete recovery with no impairment of function of the lower back.

A Determination Order dated November 12, 1976 awarded claimant temporary total disability benefits only. Claimant appealed.

Claimant's 1972 claim had been reopened in January 1974 for treatment. Dr. Lorey, who had treated claimant for this first back injury, saw claimant in April 1976 for pain in the right sacroiliac joint with radiation into the right leg. Claimant advised Dr. Lorey he had been having intermittent problems with the area injured in his 1972 accident, but Dr. Lorey found that lumbosacral motion was normal.

On May 26, 1976 claimant advised his supervisor of his injury. He also called his attorney and advised him he had reinjured his back.

Dr. Ho reported on May 27, 1976 that claimant reported low back pain while sitting, walking (guarded), toe walking (painfully limited), heel walking (guarded), running in place (painfully limited), squatting (guarded). Claimant's backward or forward bending was painfully limited.

The depositions of Drs. Ho and Lorey were taken. Dr. Lorey, after reading Dr. Ho's May 27 report and the additional information that straight leg raising to 40° for the left and to 10° for the right was painfully limited with reactive spasms with palpatory pressure over the right lumbosacral area and over the right sacroiliac fossa, felt claimant's condition was significantly different on May 27 than on May 21 (the last day he had seen claimant).

Dr. Ho, in his deposition, stated the change in claimant's condition from May 21 to May 27 was consistent with an acute injury in the interim period.

The Referee found, based on this evidence, a new injury had been suffered on May 26, 1976, for which he was entitled to an award of 64° for 20% unscheduled disability.

The Board, after de novo review, concurs with the Referee that claimant met his burden of proving he had suffered a new injury on May 26, 1976, but believes the award of compensation is higher than the evidence justified.

Based on Dr. Ho's report of September 23, 1976, the

Board finds an award of 32° amply compensates claimant for his May 26, 1976 injury.

ORDER

The Referee's order, dated August 15, 1977, is modified.

Claimant is awarded 32° for 10% unscheduled disability resulting from his low back injury of May 26, 1976. This is in lieu of the award made by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 77-2247 MARCH 17, 1978

JESSE B. COOPER, CLAIMANT
Harms & Harold, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Referee's order which awarded claimant 128° for 40% unscheduled disability.

Claimant, a 48 year old truck driver, suffered a compensable injury to his right shoulder on February 26, 1976 while tightening binder chains on a load of logs. His injury was diagnosed as a tear of the musculotendinous junction of the right pectoralis major muscle. Claimant was treated conservatively.

In July of 1976, Dr. Schachner stated that claimant was basically stationary but would require a job change. The claimant had difficulty in rotating his shoulder as well as in bringing his arm up over his head and internally rotating it. The doctor noted that that was a maneuver necessary when claimant had to throw the binders over his loaded logs, therefore, claimant could not return to his regular occupation. He also was limited in lifting and "push-pull" activities.

The claimant did not wish the services of the Disability Prevention Center because he was starting up his own business.

In September of 1976 claimant was examined by the Orthopaedic Consultants who noted that claimant had had a prior injury involving a tear of the right pectoris muscle which occurred under the same circumstances as his current injury. Their diagnosis was a tear of the right pectoris major and tendinitis of the right shoulder. They felt that the claimant's condition was stationary and that the total loss of function of the right shoulder due to his present injury was mild.

A Determination Order, dated November of 1976, awarded claimant 32° for 10% unscheduled right shoulder disability.

Dr. Schachner, in February of 1977, reported that the claimant had a mild loss of rotation both internally and externally in the shoulder which did not appear to interfere with function. He did note, however, claimant had a moderate degree of loss of extension in the shoulder and weakness in the grip of the right hand.

The claimant, since his injury, has become self employed in a tire and wheel business. Because of his limitations he does not mount, change or balance tires. He testified at the hearing that this reduced his prospective business income.

Claimant has a ninth grade education and no other skills.

The Referee found the claimant to be credible and, based on the evidence presented at the hearing, concluded that claimant was entitled to an additional 96° for a total of 128° for 40% unscheduled disability.

The Board, after de novo review, finds that claimant's loss of wage earning capacity would be fully compensated by an award of 96° for 30% unscheduled disability. The Orthopaedic Consultants found the total loss of function to the claimant's right shoulder due to the injury of February 26, 1976 was mild. The criteria to determine unscheduled disability is loss of wage earning capacity; although claimant cannot return to his old occupation because of the possibility of further injury to his shoulder, he refused to accept vocational rehabiliation services, preferring to commence his own business selling tires and rims.

ORDER

The Referee's order, dated August 11, 1977, is modified.

Claimant is hereby granted an award of 96° for 30% unscheduled disability. This award is in lieu of and not in addition to the prior award made by the Referee's order which, in all other respects, is affirmed.

WCB CASE NO. 76-5997 MARCH 17, 1978

ROBERT FULLER, CLAIMANT
Marvin J. Garland, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 14, 1977 Referee Page Pferdner entered an order of dismissal in the above entitled matter. In his

order the Referee stated that the record indicated that claimant's claim for a 1953 low back injury had been closed in 1958 and his aggravation rights expired. He dismissed claimant's request for hearing and stated that it appeared that the provisions of ORS 656.278 might be indicated.

Based upon the Referee's statement, claimant, by and through his attorney, advised the Board on December 29, 1977 that he was under the impression that the matter had been referred by the Referee to the Board for a determination under its own motion jurisdiction, but stated he had not heard from the Board.

Apparently all of the documents which Referee Pferdner directed to be furnished were lost, either from misdirection of mail or because of some other reason unknown to the Board and it was not until February 27, 1978 that the Board was furnished with copies of all said documents and advised that it was the desire of claimant that the Board exercise its own motion jurisdiction and reopen his 1953 claim.

The State Accident Insurance Fund was advised of the present situation; because of the hearing before Referee Pferdner the Fund's legal department had in its possession all of the documents upon which claimant intended to rely. The Fund was requested to advise the Board within 20 days of its position regarding claimant's request for own motion relief.

On March 3, 1978 the Fund responded, stating that based on the medical evidence in their file claimant had been free of pain from 1967 until he reinjured himself moving a barber chair on approximately February 19, 1976; he also slipped and twisted his back on the following day which exacerbated his problem. Based on this information, the Fund stated it would oppose the reopening of the claim on the basis that claimant's present back problems were the result of a subsequent trauma and not the natural progression or worsening of the original injury.

The Board, after reading all of the medical reports submitted, concludes that the incident which occurred on or about February 19, 1976, must be considered as an independent, intervening incident which was not work-related and, furthermore, that claimant's present condition cannot, based upon the medical evidence before the Board, be causally related to his 1953 industrial injury. Therefore, the claimant's request for the Board to reopen his 1953 claim pursuant to the provisions of ORS 656.278 must be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-1067 MARCH 17, 1978

HERBERT A. JENNINGS, 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 directed it to pay claimant's attorney's fee of $1,000. This is the sole issue before the Board on review.

Claimant had suffered a compensable injury on September 2, 1975 which was diagnosed by Dr. Sanders as a contusion of the lumbar thoracic spine. Claimant was also examined by Dr. Grossman and by the physicians at the Orthopaedic Consultants.

In late 1975 claimant moved to Texas where he was treated by Dr. O'Lavin and Dr. Steele. Dr. O'Lavin was of the opinion that claimant was medically stationary on July 30, 1976; claimant had a fragile back and that restrictions should be placed upon lifting, bending or stooping in his work activities. A myelogram was performed in January 1977 which showed no abnormalities.

On January 28, 1977 the Fund submitted to the Evaluation Division its Form 802 which indicated it was not requesting a determination as claimant was not yet medically stationary; despite this, the Evaluation Division entered a Determination Order on February 3, 1977 which granted claimant temporary total disability benefits up to December 6, 1976 and awarded 48° for 15% unscheduled disability.

On February 14, 1977 claimant requested a hearing alleging, among other things, that the Determination Order had been prematurely issued which brought before the Referee the issue of claimant's need for additional medical care and treatment and the continuation of temporary total disability benefits.

After this request for a hearing, Dr. Moore restated his opinion that claimant was not medically stationary and Dr. Paltrow reported, on April 12, 1977, that claimant had a psychiatric component to his condition. The treatment recommended by both Dr. Moore and Dr. Paltrow was the same as had been indicated prior to the closure by the Evaluation Division, therefore, the Fund issued a denial of "a claim for aggravation" on May 5, 1977, stating there had been no change in claimant's condition since the closure three months previous. Subsequently claimant amended his request for hearing to include an appeal from this denial.

The Referee found that since the Fund had not requested a determination and that the claim should never have been evaluated in the first place there was a premature closure of the claim. He vacated the Determination Order and remanded the claim to the Fund for the payment of compensation, as provided by law. He also found that the denial by the Fund was improper and, therefore, claimant's attorney should be paid a reasonable attorney's fee by the Fund.

The Board, on de novo review, finds that the medical reports which were submitted by claimant after the closure indicated that the treatment recommended before closure was still necessary, therefore, there could be no aggravation or worsening of claimant's condition and the denial was correct in that respect.

The true issue was not aggravation but rather premature closure, an issue already raised in claimant's original request for hearing made in February 1977. The Board further finds that the Fund had never requested claim closure, therefore, the premature issuance of the Determination Order was the reason claimant was required to hire an attorney to protect his rights. The Fund did not actually deny claimant's "claim for aggravation" because that issue cannot be raised until after a valid initial evaluation of claimant's disability.

The only matter before the Referee was claimant's appeal from the Determination Order of February 3, 1977 and the Referee properly set it aside and remanded the claim to the Fund. Therefore, the Referee should have awarded claimant's attorney a reasonable attorney's fee payable out of the compensation, payable as paid, not to exceed the maximum set by OAR 436-82-040.

ORDER

The order of the Referee, dated July 15, 1977, is modified.

The denial by the Fund of claimant's "claim of aggravation", dated May 5, 1977, is approved.

Claimant's counsel is awarded as a reasonable attorney's fee for his services before the Referee at the hearing a sum equal to 25% of the compensation for temporary total disability which claimant shall receive, payable out of said compensation as paid, not to exceed $500; and a sum equal to 25% of any compensation which claimant may receive when his claim is closed, the total fees not to exceed $2,000.

The affirmance of the Fund's denial and the award of attorney fees made by this order are in lieu of those two portions of the Referee's order which in all other respects is affirmed.

WCB CASE NO. 76-4734 MARCH 17, 1978

M. LINDA KEENON, CLAIMANT
Richard B. Kingsley, 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 the Determination Order, dated July 19, 1976, which granted claimant an award of 16° for 5% unscheduled disability. Claimant contends the award is inadequate.

Claimant, then a 32-year-old police matron, suffered a compensable injury on February 6, 1973 to her tailbone and the back of her head when she slipped out of a chair and fell backwards striking the wall with her head and the floor with her low back. She was seen by Dr. Denker the next day; he diagnosed contusions of the coccyx and neck strain. Claimant was treated with pain pills and chiropractic treatments.

In July 1974 Dr. Fry examined claimant. He found the claimant was 5' 8-1/2" tall and weighed over 200 pounds. His diagnosis was a mechanical low back pain. He prescribed physical therapy and encouraged claimant to lose weight. Dr. Fry opined claimant's prognosis for improvement was in direct relationship to her weight loss.

Claimant continued to have back problems and was seen by Drs. Tsai and Patton; both commented on her weight problem. A myelogram was performed in January of 1976 which was negative. Dr. Tsai found no neurologic problem and suggested traction. He felt claimant had a herniation nucleus pulposus with left S1 nerve root compression at L5-S1 related to her injury by history. Claimant was hospitalized approximately one week in late November 1976 for traction. She did not benefit from this treatment.

Claimant was found medically stationary by Dr. Tsai on May 25, 1976 and the aforementioned Determination Order was issued.

Claimant has continued at her job as a police matron except for brief periods of time loss. She testified she currently is unable to do her housework the way she had previously done it. She described her problem as involving her lower back, left hip, left leg and tingling of her left toes as well as left knee difficulty. Claimant's weight has increased from 185 pounds in 1965 to 230 pounds in 1975. She had reduced to 215 pounds at the time of the hearing.

The Referee found claimant had been adequately compensated by the Determination Order for any loss of earning capa-

city she may have sustained as a result of her injury. Claimant's doctor recommended weight reduction which he felt was directly related to any discomfort claimant was currently having. The Referee noted that claimant was doing the same job she had been doing at the time of her injury and is now making more money than she previously had been making.

Claimant has been employed as a police matron for nine years and has taken police science courses at a community college. Claimant's pain was not disabling.

The Referee concluded, based on all the evidence, that claimant has suffered minimal, if any, loss of earning capacity as a result of her injury.

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

ORDER

The Referee's order, dated June 24, 1977, is affirmed.

WCB CASE NO. 77-488 MARCH 17, 1978

BEVERLY MARVEL, CLAIMANT
Kirkpatrick & Howe, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Remand

On March 6, 1978 the Board received from claimant, by and through her attorney, a motion to remand the above entitled matter to the Hearings Division on the grounds and for the reason that since the issuance of the Referee's Opinion and Order, claimant has undergone further medical care and treatment resulting in several medical reports and medical evidence which could possibly change the findings and conclusions of the Referee.

The Board is informed by a letter from claimant's attorney, dated March 1, 1978, that Mr. Hall, Associate Counsel for the Fund, has no objection to the motion.

The Board, after considering the reports submitted with the motion and taking into consideration the lack of opposition to the granting of said motion, concludes that it would be in the best interest of all parties to remand the above entitled matter to Referee J. Wallace Fitzgerald, who initially heard the case and whose Opinion and Order is now before the Board on claimant's request for review.

The Board will give consideration to claimant's request that the matter not be assigned for hearing in the Redmond/Bend

area because claimant now lives in Portland; but it does not believe it is desirable that the matter be submitted to a new referee.

The Board finds that the record before it at the present time is not complete, therefore, it will remand the matter to Referee Fitzgerald, who, after this remand, will be reinvested with jurisdiction over the matter with directions to rescind his Opinion and Order of October 5, 1977 and, after hearing the new medical evidence and possibly reconsidering the evidence previously received, to issue his Opinion and Order based thereon.

It appears that the pending request for Board review should be withdrawn inasmuch as the facts presently before the Board for review may be substantially changed by the Opinion and Order eventually written by Referee Fitzgerald, however, the Board will await a formal request from claimant to do so.

ORDER

The claimant's motion to remand the above entitled matter to the Hearings Division for the taking of further evidence and possible reconsideration of evidence already in the record is granted with specific instructions that the matter be heard by Referee J. Wallace Fitzgerald.

SAIF CLAIM NO. GA 759520 MARCH 17, 1978

LEONA A. RIGGS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered an injury to her right knee on August 4, 1959. In October 1975 she had an excision of the medial and lateral meniscus. When she failed to improve because of chondromalacia, the patella was removed. After a patellar tendon transfer was performed on October 28, 1960 claimant was able to return to work. The claim was subsequently closed on August 10, 1961 with compensation for 25% loss of function of the right leg.

After a reopening and second closure on June 20, 1962, a circuit court order of August 10, 1962 granted claimant a total award for 75% loss of function of the leg.

An automobile accident in 1961 caused an injury to her back for which a fusion was performed. Another back injury occurred in 1970 and a laminectomy was done.

When claimant's knee pain continued the carrier reopened her claim voluntarily. In November 1973 Dr. Wade replaced her

knee with a Geomedic prosthesis. She continued to have problems with her knee and in August of 1975 a Sheehan prosthesis was installed in place of the Geomedic prosthesis. The range of motion in her knee improved rapidly and she had no difficulty until October 1975 when, after her knee started giving way and becoming painful, she had to use crutches for walking. She began wearing a long-leg brace to help relieve the strain on the knee, but this aggravated her back so that she could wear the brace for only short periods at a time.

Dr. Groth, on March 15, 1976, operated on claimant's right knee to tighten the prosthesis. Since that time she has found it necessary to use crutches constantly. Her knee is unstable with a valgus deformity and because of the condition of her knee, she has aggravated her back problems.

On December 21, 1977 the Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted temporary total disability compensation from November 28, 1973 through February 28, 1978 and an additional 20% loss of function of the right leg.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from November 28, 1973 through February 28, 1978, less time worked.

Claimant is also granted compensation for 20% loss of function of the right leg. This award is in addition to the previous award of 75% of the maximum allowable by statute.

WCB CASE NO. 77-201 MARCH 17, 1978

BARBARA TROW, 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 claimant 16° for 5% unscheduled disability.

Claimant, at age 27, slipped and fell on January 9, 1976 while working at Hoody's bruising her shoulders, right side and both knees. Dr. Smith, on January 16, 1976, found

mild contusion of the ribs. An x-ray report, dated February 23, 1976, revealed essentially normal findings with a very minimal scoliosis.

Dr. Donald Smith, on June 10, 1976, indicated that claimant had symptoms of a mild cervical strain; her complaints were largely subjective or functional in origin and he recommended that she return to work on a trial basis. Dr. Thompson, who saw claimant on several occasions, agreed with Dr. Smith that claimant should return to work on a trial basis. He had no recommendation for further treatment, unless her symptoms worsened, at which time he would perform a myelogram.

On August 2, 1976, Dr. Thompson noted that claimant had attempted to return to work but had had great difficulty with neck pain and headaches and she quit after two days. He felt most of her problems were probably functional and recommended that she be evaluated by the Disability Prevention Division.

The Orthopaedic Consultants, on September 8, 1976, diagnosed claimant's problem as cervical and dorsal strain, by history. They felt she was not medically stationary and recommended a further work-up from an EMG standpoint and from a psychological standpoint.

Dr. Wilson, on September 23, 1976, found claimant's right-sided weakness and sensory loss to be functional and noted there was no objective evidence of neurological deficit. The Orthopaedic Consultants, on October 20, 1976, indicated that claimant was medically stationary and that the total loss of function of her back, due to the injury, was minimal.

Dr. Thompson, on December 21, 1976, opined that claimant should not return to her former job and restricted her to lifting no more than 20 pounds or doing any repetitive bending or lifting. On December 22, 1976 a Determination Order granted time loss benefits only.

Dr. Ferrante, a chiropractic physician, in his March 24, 1977 report, indicated that claimant was showing a definite increase in severity of her original accident. He based this on the premise that she had not been under an effective treatment schedule and requested that her case be reopened. On August 3, 1977 the doctor indicated that she was improving under his care and treatment.

The Referee found that claimant's emotional state preexisted the injury and that the opinion of the majority of her doctors was that her complaints were functional. Dr. Ferrante's treatment was not curative. He found that most of the evidence indicated that her condition was stationary. Based on the fact that her industrial injury did mildly affect her wage earning capacity, he granted her 16° for 5% unscheduled permanent partial disability.

The Board, after de novo review, concludes that the award granted by the Referee's order is inadequate to compensate claimant for her disability. Dr. Thompson, who was claimant's major treating physician, restricted claimant to some extent in her activities and he believed that claimant could not return to her old job.

Based upon the reports of Dr. Thompson, the Board concludes that claimant is entitled to 48° for 15% unscheduled disability to adequately compensate her for her loss of wage earning capacity.

ORDER

The Referee's order, dated August 30, 1977, is modified.

Claimant is hereby granted 48° for 15% unscheduled 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.

WCB CASE NO. 77-2384 MARCH 22, 1978

RICHARD BECK, CLAIMANT
Merten & Saltveit, Claimant's Atty.
Cosgrave & Kester, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the Disability Prevention Division's letter of termination of vocational rehabilitation and also the Determination Order of January 8, 1975.

Claimant, a 26-year-old laborer, sustained a compensable injury on August 7, 1974 when he picked up a hose and experienced pain in his back.

Claimant was seen by Dr. Halferty at the Disability Prevention Center on January 29, 1975. X-rays revealed the dorsal and lumbar spines had moderate scoliosis with a list to the left. Claimant was medically stationary and his physical impairment was rated as mild. Dr. Halferty found claimant highly motivated to become a photographer.

Dr. Kayser found claimant stationary on October 15, 1974. Dr. Davis, in October 1974, felt claimant couldn't perform work requiring lifting, twisting and turning that was expected in manual labor occupations.

A Determination Order of January 8, 1975 granted claimant 48° for 15% unscheduled disability. A stipulation, dated April 18, 1975, increased claimant's award to 55°.

Claimant testified he had enrolled in a course at Portland Community College to become a photo laboratory technician. He went through one year of this course when his counselor advised him that he had to get a certificate or degree to appease vocational rehabilitation. A certificate or degree was not required to become a photo lab technician, instead a student worked toward a portfolio.

Claimant was also informed that he needed to carry a minimum of 12 hours and maintain a certain grade point average. Because of this advice claimant began taking commercial art courses for which he wasn't suited, and managed to get only 10 hours credit, however, by February 1977 claimant had completed the assignments sufficient to give him the two needed credit hours.

On February 1, 1977, the Disability Prevention Division terminated claimant's program even though by this time claimant's attorney was corresponding with the vocational rehabilitation office. Claimant, at the time of this termination, lacked two courses to be qualified as a full fledged photo lab technician.

There was testimony that claimant did not follow up for a job interview with GAF but claimant testified that no interview was ever discussed, just a phone conversation took place.

Movies were shown at the hearing depicting claimant building cabinets all afternoon long with only a 10-minute break. Before the films were shown claimant had testified that he did build things and sometimes worked all day long.

The Referee found that claimant lacked motivation to secure employment, therefore, his loss of wage earning capacity cannot be determined. He found the 48° granted by the Determination Order, dated January 8, 1975, plus the 7° per the Stipulation, was adequate. The Referee further found that claimant failed to achieve what was expected of him at vocational rehabilitation and DPD was justified in terminating him.

The Board, on de novo review, finds that the action by DPD in terminating claimant's vocational rehabilitation pro-

gram was arbitrary. Claimant was forced to change courses in "mid stream" because he was told he had to take a certain number of credit hours and maintain a certain grade point average. In October 1976 claimant was advised that he was in full compliance with the requirements of his program, yet in February 1977, he was terminated. At that time claimant was carrying the required 12 credit hours and his attorney so informed the Disability Prevention Division.

Although it was very doubtful, initially, that claimant had a vocational handicap, nevertheless, it was determined that he did have and the manner in which his program was terminated was improper.

ORDER

The order of the Referee, dated September 15, 1977, is reversed.

The Determination Order, dated April 4, 1977, is hereby set aside and the Disability Prevention Division is directed to refer claimant back to his vocational rehabilitation program and claimant shall be paid compensation for temporary total disability until claim closure is authorized pursuant to ORS 656.268.

Claimant's attorney is granted as a reasonable attorney's fee at Board level a sum equal to 25% of the compensation for temporary total disability awarded by this order, payable as paid, not to exceed $500.

WCB CASE NO. 76-1871 MARCH 22, 1978

THELMA E. BECKER, CLAIMANT
Gary D. Rossi, Claimant's Atty.
R. Ray Heysell, 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 held that the claimant's cervical disc condition was compensable and remanded it to the employer for payment of benefits.

Claimant, a 48-year-old mill worker, suffered a compensable injury to her right shoulder while she was pulling veneer on January 5, 1973. She was originally treated by Dr. Samuel, a chiropractic physician, who diagnosed minimal thoracic outlet syndrome; he found no evidence of fractures or dislocation, but some evidence of right shoulder strain. Dr. Samuel referred claimant to Dr. Lynch who diagnosed calcific supraspinatous

tenosynovitis and bicipital tenosynovitis. Claimant was treated conservatively until August of 1973 when she was referred to Dr. Melson, a neurologist, who diagnosed possible bicipital tendinitis and/or pectoral head involvement. He ruled out thoracic outlet syndrome.

Dr. Lynch, on January 18, 1974, found claimant had normal range of all shoulder motions and had calcific tendinitis of the right shoulder. A Determination Order, of March 19, 1974, closed the claim without any award of temporary total disability or permanent partial disability.

On April 3, 1974 claimant reinjured her shoulder while she was pulling veneer off the dry chain. She returned to Dr. Lynch for further treatment; she continued to receive treatment until December 4, 1974 when Dr. Lynch excised the calcium deposit of her right shoulder. Claimant was returned to light work on March 24, 1975.

In November of 1975 Dr. Lynch reported that claimant complained of a pain extending down the whole right upper limb with numbness in her fingers and thumb. Neither the doctor or the claimant was sure if this was related to the industrial injury. Dr. Lynch referred her to Dr. Melson for a neurological consultation.

Dr. Melson examined claimant and referred her to Dr. Dunn, who saw claimant on January 23, 1976 and diagnosed a C6 and C7 root compression. A two level interior cervical fusion was performed on April 7, 1976. On April 1, 1976 the employer denied responsibility for claimant's cervical condition.

Dr. Lynch examined claimant again on July 24, 1976 and still was unsure about any relationship between the industrial injury and claimant's cervical problems. He noted that the cervical neck problems appeared to come within a few weeks after her April 1974 injury.

Dr. Matthews examined claimant on October 4, 1976 and, after reviewing all the medical evidence as well as the x-rays, was unable to find any causal relationship between the industrial injury and the cervical neck problems. He felt it probable that claimant would eventually have had enough neurological symptoms to warrant surgery without these injuries. He found no definite connection between the injuries and the onset of the symptoms that were treated.

Dr. Samuel reported, on October 22, 1976, that he believed that the claimant did receive an injury to the cervical spine as well as a traumatic aggravation to the right shoulder at the time of her injury on January 5, 1973.

A Second Determination Order, dated August 27, 1976, awarded claimant temporary total disability compensation only.

The Referee found claimant had proved a causal connection between her C6-7 nerve root compression and the industrial injury although there was a conflict in the medical evidence on this.

The Referee concluded this was a classic case of masking where the shoulder symptoms diverted attention from cervical manifestations, and ordered that the claim be accepted by the employer.

The Board, after de novo review, finds that the preponderance of the medical evidence is, contrary to Dr. Samuel's opinion, that the cervical problem was not related to the industrial injury. This is not the classic case of masking of symptoms; it is apparent from the medical evidence that claimant's cervical problems had developed a substantial length of time after the industrial injury to claimant's shoulder and thus were not masked thereby.

Neither Dr. Dunn or Dr. Lynch were able to find any causal connection between claimant's industrial injury and her cervical problem.

ORDER

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

The denial by the employer and its carrier of any responsibility for claimant's cervical problems made on April 1, 1976 is affirmed.

WCB CASE NO. 77-2609 MARCH 22, 1978

JOHN HENDERSON, CLAIMANT
Cottle & Howser, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant has requested Board review of a Referee's order which granted claimant an award for 40% unscheduled disability equal to 128°.

Claimant is a 31-year-old mill worker who sustained a back injury in May 1973, diagnosed as a lumbosacral strain. Dr. Hagens treated conservatively and claimant continued to work. His claim was closed on April 1, 1974 with an award for time loss only.

Claimant's back pain became so severe by July 1976 that he could not tolerate it and he was forced to quit work. A myelogram indicated a complete herniation of the disc at L5-S1. Claimant underwent a laminectomy and disc removal; he returned to mill work but had to quit after a week because of pain and muscle spasm. He has not worked since. A Second Determination Order awarded claimant 80° for 25% unscheduled disability.

Dr. Hagens felt claimant should not return to mill work; he recommended vocational rehabilitation. A referral was made to the Division of Vocational Rehabilitation and a plan set up, but it was terminated when claimant complained of migraine headaches. There is no medical evidence that claimant was forced to quit the rehabilitation program because of his physical disability.

Dr. Hagens reported on March 18, 1977 that claimant would always have a problem with his back and estimated his disability at about 25%. The Orthopaedic Consultants agreed.

The Referee concluded that Evaluation was probably correct as to impairment, but, after considering claimant's background, education and training, that claimant's loss of wage earning capacity should be rated at 40%.

The Referee amended the Second Determination Order to reflect claimant's aggravation rights would expire five years from April 1, 1974, the date of the initial claim closure, instead of April 12, 1977, the date of the Second Determination Order.

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

ORDER

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

WCB CASE NO. 76-6979 MARCH 22, 1978

GEORGE H. MOLLERS, CLAIMANT
Bedfield, Joelson, Gould & Barron, 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 December 8, 1976 Determination Order granting claimant 128° for 40% unscheduled upper and low back dis-

ability. Claimant contends that he is permanently and totally disabled.

Claimant sustained an injury on December 22, 1972 when he strained his back while unloading grain sacks. An Opinion and Order issued October 11, 1974 found claimant's injury was compensable and claimant was found to be medically stationary as of November 15, 1973.

Dr. Campagna saw claimant over a period of several years with a basically favorable report of his back condition. On November 11, 1975 he indicated that claimant would be hospitalized for pelvic traction. Subsequent to this hospitalization, the doctor reported satisfactory progress although claimant still had low back pain. He noted at that time (December 1975) that claimant was retired.

On January 20, 1976 claimant told Dr. Campagna of his increased neck and back pain, denying any intervening injury. The doctor indicated a myelography was again indicated. This was performed on February 25, 1976.

Claimant was also under the care of Dr. Boots from the date of his injury. Dr. Boots, on March 19, 1976, indicated that he had hospitalized claimant on February 18, 1976 for a problem directly related to his December 1972 injury. Dr. Boots, on July 31, 1976, indicated that he felt claimant was totally disabled and that because of his age (60) claimant would not benefit from a rehabilitation program.

The Orthopaedic Consultants, on October 7, 1976, diagnosed post-laminectomy, discectomy, with myelograms and chronic lumbar strain. They also found thrombophlebitis of the left calf and cervical arthritis, both unrelated to the industrial injury. Claimant's condition was stationary; no further treatment was recommended and because claimant is retired from the labor market, neither job placement or rehabilitation was recommended. They found the total loss of function of the back was moderate, the loss of function due to the industrial injury was mildly moderate.

Claimant testified that he is unable to hunt, fish, golf and work in his yard like he could prior to the injury. He is able to do a little gardening and light housekeeping, and he can play 9 holes of golf and do light fishing. Because he is unable to do anything strenuous, he did not actively seek employment after his injury. Because of his injury and age, he was turned down by Vocational Rehabilitation.

The Referee found, based on the medical reports from Dr. Boots, Dr. Campagna and the Orthopaedic Consultants, that claimant was not permanently and totally disabled and had been adequately compensated by the award of 128° for 40% unscheduled disability.

The Board, after de novo review, finds that claimant is not permanently and totally disabled, but claimant has a large amount of permanent disability based on the medical evidence in the record. Dr. Boots found him to be permanently totally disabled, however, he was considering physical problems unrelated to his injury along with the residuals of the injury. Dr. Campagna found claimant's neck and back motions were limited to about 50% normal range. The Orthopaedic Consultants found his disability due to the injury was mildly moderate.

Claimant's age and the fact that he is not considered as a good candidate for rehabilitation increases claimant's loss of wage earning capacity resulting from his industrial injury, however, claimant is able to perform light work and to take part to some extent in recreational activities.

The Board concludes that claimant is entitled to an award of 192° for 60% unscheduled back disability.

ORDER

The Referee's order, dated August 23, 1977, is modified.

Claimant is hereby granted 192° for 60% unscheduled 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.

WCB CASE NO. 75-977 MARCH 22, 1978
WCB CASE NO. 76-2059

GEORGE W. PARKE, CLAIMANT
Galton, Popick & Scott, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Gearin, Landis & Aebi, Defense Atty.
SAIF, Legal Services, Defense Atty.
Lindsay, Nahstoll, Hart & Krause, 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 compensation, ordered

the Fund to reimburse Home Insurance Company for all sums paid to claimant as a result of the Order Designating Paying Agent issued on March 2, 1977, and assessed penalties and attorney fees against the 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 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 $150, payable by the carrier.

WCB CASE NO. 77-2824 MARCH 22, 1978

WILBUR J. ROOFENER, 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 him compensation for 75% 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. However, the Board strongly encourages the Field Services Division of the Workers' Compensation Department to do everything possible to get this worker back in the labor market in a very short time.

ORDER

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

WCB CASE NO. 76-6724 MARCH 22, 1978

RICHARD SEYMOUR, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On September 14, 1977 the Workers' Compensation Board directed its Hearings Division to remand the above entitled matter to a Referee to convene a hearing and secure evidence regarding the validity of the contention made by Mr. Seymour, claimant in WCB Case No. 76-6724, that all, or nearly all of the money collected from the judgment in question, is for injuries resulting from a separate and independent accident, totally unrelated to the industrial injuries which are the subject of the State Accident Insurance Fund's Claim No. RC 451820.

A hearing was convened on January 19, 1978 before Referee Raymond S. Danner, evidence was taken and the hearing was closed on January 27, 1978 upon receipt of the transcript.

On February 28, 1978 Referee Danner submitted his recommended finding of fact together with the transcript of the proceeding to the Board for its consideration. The Board, after fully considering the transcript of the proceedings and the recommended finding of fact, adopts as its own the recommended finding of fact, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

The State Accident Insurance Fund has no statutory right to share in the recovery of the judgment which claimant, as plaintiff in Seymour v. White, Coos County Circuit Court Case No. 35710, received against defendant in said case. Said judgment was granted claimant for injuries not related to an industrial accident and the provisions of ORS 656.576 through .595 are applicable.

WCB CASE NO. 77-923 MARCH 22, 1978

DANIEL C. SHERLOCK, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Atty.
G. Howard Cliff, 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 11, 1977 Determination Order

granting him 20.25° for 15% loss of the right foot and approved the non-referral of the Disability Prevention Division. Claimant contends that the award granted by the Determination Order does not adequately 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 September 9, 1977, is affirmed.

WCB CASE NO. 76-4990 MARCH 22, 1978

MARVIN SIMS, CLAIMANT
Ackerman & DeWenter, 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 awarded him 192° for 60% unscheduled disability for his low back injury. Claimant contends he is permanently and totally disabled.

Claimant is a 44-year-old mill worker who sustained a compensable injury to his low back on August 26, 1972 when he stepped on a piece of veneer and fell. After conservative treatment, the claim was closed with no award for permanent disability.

Claimant returned to work but in late 1973, after recurrence of low back pain with radiation, he was hospitalized and underwent a laminectomy at L5-S1. Claimant continued to have low back pain and was referred to the Disability Prevention Division for evaluation. Dr. Van Osdel concluded claimant had a mildly moderate residual from the laminectomy and recommended a job change with no heavy lifting, repetitive bending, stooping or twisting.

Dr. Munsey found claimant suffered from a moderately severe depressive reaction with anxiety. He felt that the prognosis for rehabilitation and restoration was poor considering claimant's limited intellectual resources, educational deficiencies and lack of strong aptitudes in any area.

A Determination Order dated December 27, 1974 awarded claimant temporary total disability benefits and 64° for 20% unscheduled disability.

In September of 1975 claimant had returned to Dr. Campagna, complaining of low back pain with numbness and right hip and leg pain with numbness. A myelogram revealed a recurrent lumbosacral disc and claimant underwent a second laminectomy.

A Determination Order dated July 30, 1976 granted claimant an additional 64° for a total of 128° for unscheduled disability.

Vocational rehabilitation efforts for claimant which had started in July 1975 were interrupted by the second surgery and have not resulted in any successful retraining or job placement.

The Referee found that claimant was not permanently and totally disabled, however, based on claimant's prior work experience in heavy physical work to which he cannot return, he found that claimant had suffered a loss of wage earning capacity equal to 60% unscheduled disability.

Claimant continued to be treated by Drs. Weinman and Campagna. They reported claimant continued to have back pain and imposed substantial limitations on what claimant could do. Dr. Weinman felt claimant was barred from any heavy work and that claimant had lost one-half of his pre-injury capacity for performing bending, stooping, lifting, pushing, pulling and climbing movements. Dr. Campagna, in July of 1976, reported claimant's back motion was 50% of normal.

The Board, on de novo review, concludes that Dr. Campagna's estimate of 50% loss of function did not include the factor of loss of wage earning capacity. Based on claimant's education, work experience and physical limitations, the Board concludes that claimant is entitled to an award of 240° for 75% unscheduled disability for his low back.

ORDER

The Referee's order, dated July 8, 1977, is modified.

Claimant is awarded 240° for 75% unscheduled low back disability. This award is in lieu of the awards 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.

WCB CASE NO. 77-2877 MARCH 24, 1978

CONNIE DANIELS, CLAIMANT
Dye & Olson, 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 compensation equal to 80° for 25% unscheduled 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 October 13, 1977, is affirmed.

SAIF CLAIM NO. BC 263113 MARCH 24, 1978

GARRY C. ELKINS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his right hand on August 21, 1970 when he caught it in a corn picker belt. He entered the hospital with an amputation of his right index finger, compound fractures of the middle phalanx of the middle finger, the proximal phalanx of the ring finger, and lacerations of the little finger. Surgery was performed, however, after gangrene set in, claimant's middle finger was amputated several days later. Claimant was released for work on October 23, 1970 and on March 10, 1971 his claim was closed with permanent disability equal to 24° right index finger, 22° right middle finger, 6° right ring finger and 31° loss of opposition right thumb.

On February 1, 1973 claimant had a silastic arthroplasty of the proximal interphalangeal joint of his right ring finger and the claim was closed again on September 12, 1973 with no additional award for permanent disability.

Claimant in late 1976 complained of persistent pain in the PIP joint of the right ring finger and surgery was performed on October 28 for fusion of the PIP joint to relieve the pain.

Claimant was referred to Vocational Rehabilitation on January 27, 1977 and he completed a commercial truck driving program on April 19, 1977. A week later he returned to his former place of employment driving farm equipment with certain limitations placed on his duties.

On October 27, 1977 an exploration of the dorsal area of the ring finger for K-wire removal was done, without success. His condition was medically stationary on November 10, 1977 and Dr. Ellison considered claimant's condition to be back essentially to his pre-operative state of October 27, 1977.

On December 7, 1977 the State Accident Insurance Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted temporary total disability compensation from October 28, 1976 through April 25, 1977 and temporary partial disability from April 26, 1977 through November 6, 1977; that claimant has been adequately compensated for his permanent disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted temporary total disability from October 28, 1976 through April 25, 1977 and temporary partial disability from April 26, 1977 through November 6, 1977, less time worked.

WCB CASE NO. 76-3115 MARCH 24, 1978

CHARLES GRANT, 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 remanded claimant's aggravation 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 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 $350, payable by the Fund.

WCB CASE NO. 76-3167 MARCH 24, 1978

CHARLES L. GRIFFITH, 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 affirmed the State Accident Insurance Fund's denial of his claim. Claimant contends his claim is compensable and he is entitled to penalties and attorney fees.

Claimant, a 52-year-old boilermaker, contends he sustained a compensable injury to his left foot on December 19, 1975 when blisters, which had not healed, became infected, resulting in the amputation of his foot below the knee on March 10, 1976. Claimant has had diabetes since birth and has been using insulin since 1946.

Claimant had had a similar problem in June 1975 and was hospitalized in August for a non-healing infected ulcer of his left foot. His claim for this incident was denied by the Fund on August 4, 1975 and never appealed. Claimant missed several months from work due to this problem.

Claimant, in addition to being a diabetic, has various other medical problems.

On October 26, 1976, claimant had returned to work for his employer of 10 years and worked until December 19, 1975 when he had to leave his job because blisters which had formed under the toes of the left foot became infected. Claimant's left lower leg was surgically amputated on March 10, 1976 by Dr. McConnell.

Claimant testified that on his last day at work he had done considerable walking and at the end of the day his left foot was swollen in front and there was blistering around his little toe.

Dr. Blumberg, a thoracic and vascular surgeon, testified that the infection that occurred in 1975 would recur spontaneously because of the advanced stage of claimant's

disease. He explained it is common to advise patients with diabetes or peripheral vascular disease to walk to regenerate small blood vessels. Dr. Blumberg agreed that the considerable walking claimant did at work could be an aggravating factor, but he did not believe it was the cause of claimant's problem. Dr. Blumberg also noted that claimant suffered from lack of sensation in his foot.

Dr. McConnell, who treated claimant from December 26, 1976, opined that the walking claimant did on December 19, 1975 was a material contributing factor in the development of the blister on claimant's left foot and the resulting infection which required the amputation. He also testified that claimant would not have pain from the blisters which would cause him to stop walking because of his diabetic peripheral neuropathy.

The Referee found that the claimant had not proven he had engaged in excessive walking on his last day at work which would cause the blisters on his left foot. He further found claimant to not be a credible witness. Therefore, he affirmed the Fund's denial of claimant's claim.

The Board, after de novo review, found that Dr. McConnell had testified that any blunt trauma, including excessive walking, could cause claimant's foot to form a blister. It is not necessary for claimant to prove "excessive walking"; the fact is that claimant did walk at work and as a result of this walking did develop a blister that became infected and resulted in claimant's left leg being amputated. Claimant, because of his diabetic peripheral neuropathy would not receive any warning in the nature of pain from a blister and, therefore, would not know when to stop walking.

ORDER

The Referee's order, dated August 12, 1977, is reversed.

Claimant's claim is remanded back to the Fund to be accepted and for the payment of compensation, as provided by law, commencing December 19, 1975 and until his claim is closed pursuant to ORS 656.268.

Claimant's attorney is awarded $850 as a reasonable attorney fee in this matter for his services before the Referee at the hearing.

Claimant's attorney is awarded $350 as a reasonable attorney's fee for his services at Board review.

WCB CASE NO. 77-454 MARCH 24, 1978

KENNETH LARSEN, CLAIMANT
Coons & Anderson, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
McMenamin, Joseph, Herrell & Paulson,
Defense Atty.
Order

On March 7, 1978 the Board denied claimant's request that it remand the above entitled matter to Referee J. Wallace Fitzgerald for the purpose of admitting into evidence the deposition of Dr. James Brooke.

On March 10, 1978 claimant filed a motion with the Board to reconsider its order of March 7, 1978.

The Board, after due consideration of the facts recited in support of claimant's motion, finds no justification therein for reconsideration of its order.

ORDER

Claimant's motion for reconsideration of the Board's order entered on March 7, 1978 in the above entitled matter is hereby denied.

WCB CASE NO. 76-6398 MARCH 24, 1978

LEONARD E. MATHEUS, 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 granted claimant compensation for permanent total disability.

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

ORDER

The order of the Referee, dated August 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.

WCB CASE NO. 77-4257 MARCH 24, 1978

EDGAR A. POWELL, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Atty.
Lindsay, Nahstoll, Hart, Neil & Weigler,
Defense Atty.
SAIF, Legal Services, 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 15° for 10% loss of his right leg.

Claimant, a 32-year-old logger, sustained a compensable injury to his right knee on July 14, 1976 when he tripped and cut his right knee with his power saw. His injury was diagnosed as a laceration without bone injury. Claimant was found medically stationary on August 14, 1976.

Claimant returned to his regular job but terminated due to back and leg pain. His back condition results from another injury and is not an issue in this case.

Claimant testified he has numbness in his right knee which is affected by weather changes and he notices tightness and numbness when going up and down stairs or kneeling.

Dr. Reiger reported in February of 1977 that claimant's scar was well healed and flexion and extension were good. He did not find any tenderness.

Dr. Van Olst examined claimant in July of 1977 and found claimant had normal range of motion in his right knee and a mild feeling of tightness. He found no other evidence of any functional impairment. A Determination Order dated May 3, 1977 awarded claimant temporary total disability benefits only.

The Referee found that any pain claimant experienced was not disabling, but the tightness and discomfort appeared to restrict the full use of his knee. Therefore, he found claimant had sustained a loss of function equal to 15° for 10% loss of his right leg.

The Board, after de novo review, finds no evidence in the record of any functional impairment of claimant's right knee. Claimant has all the use of his knee that he had be-

fore the injury. Dr. Van Olst found only numbness in claimant's right knee, no loss of function.

ORDER

The Referee's order, dated October 11, 1977, is reversed.

The Determination Order, dated May 3, 1977, is affirmed.

WCB CASE NO. 77-1368 MARCH 24, 1978

SHIRLEY RADDATZ, CLAIMANT
Pozzi, Wilson, Atchison, Kahn, &
O'Leary, Claimant's Atty.
Flinn, Lake & Brown, 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 compensation equal to 128° for 40% unscheduled back disability. Claimant contends this award does not adequately compensate her for her 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 30, 1977, is affirmed.

WCB CASE NO. 77-3550 MARCH 24, 1978

MICHAEL H. ROGERS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Merlin Miller, 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 found that claimant was not entitled to any benefits for temporary total disability beyond the date of February 5, 1977. The Referee also found that the denial of vocational rehabilita-

tion services by the Disability Prevention Division was arbitrary and capricious and should be reversed; he remanded the matter to the DPD for appropriate action.

Claimant contends that, should the Board find that he was medically and vocationally stationary, the award for his disability resulting from his low back injury of September 21, 1976 was greater than the 5% awarded by the Determination Order dated March 30, 1977.

Claimant's injury was diagnosed as acute strain of the lumbosacral spine and strain of the paravertebral musculature predisposed by degenerative spondylosis. Claimant was treated by Dr. Plamodon, a chiropractic physician, and also examined by Dr. Pasquesi. No measurable impairment was found but because of claimant's history of back problems, i.e., Scheuermann's disease, he was advised to obtain work not requiring repetitive stooping, bending and twisting of the trunk. Dr. Plamodon concurred with Dr. Pasquesi's opinion except that he felt that the chiropractic treatment he was giving claimant was curative and directed at healing the injury. On February 5, 1977 Dr. Plamodon found claimant to be medically stationary; he considered him a candidate for vocational rehabilitation.

On February 18, 1977 the Disability Prevention Division declined referral for vocational assistance, based on the fact that claimant had a latent pre-existing problem which was revealed by the industrial injury which returned to its prior state following proper treatment. Furthermore, claimant has an education which includes three years of college credits which was considered sufficient to enable him to compete in the labor market or work within his physical capabilities. Again, on March 21, 1977, the Disability Prevention Division advised claimant that they were declining referral for vocational assistance, stating that claimant's education was sufficient to qualify him to reenter the job market in a light type occupation.

Claimant has not worked since his injury; he testifies he can no longer chop wood, hike, back pack or play tennis and he is unable to bend or twist without causing pain to himself. At the present time he is attending chiropractic college; he started his course in July 1977. He has not looked for work which he could do after his classes are over, claiming he has a very heavy study load. Claimant also stated that he had only one prior back problem which required two treatments and was resolved before his present injury.

The Referee found that claimant's contention that he was not medically stationary until May 1977 rather than February was not supported by the medical evidence. Dr. Pasquesi had found claimant to be medically stationary in November of 1976 and Dr. Plamodon had said he was on February 5, 1977. Dr. Hanna, another chiropractic physician, stated he had been treating claimant during March 1977, nevertheless considered claimant to

be medically stationary on February 5, 1977. The Referee concluded that claimant was entitled to no benefits for temporary total disability beyond that date.

On this issue of whether or not the Disability Prevention Division acted capriciously in refusing to refer claimant for vocational rehabilitation services, the Referee found that claimant had been denied referral chiefly because he had approximately three years of college and it was felt that although he was restricted physically he could return to light work because of his education. The Referee found the evidence indicated that claimant's college studies were mostly in the remedial basic courses without any particular training in any specific area. He cited OAR 61-005(4) which defines a vocationally handicapped worker as a worker who is unable to return to his regular employment because of the permanent residuals of an occupational injury or disease, and who had no other skills which would enable him to return to gainful employment.

The Referee concluded in this case that claimant had no other skills which would enable him to return to a gainful employment; the basic studies he had pursued in college did not necessarily endow claimant with such skills.

The Board, on de novo review, finds that the medical evidence is clear and uncontradicted on the issue of when claimant became medically stationary. Claimant is entitled to no compensation for temporary total disability beyond February 5, 1977.

The Board also finds, based upon Dr. Pasquesi's medical report, that claimant has not suffered any severe impairment and concludes that claimant has been adequately compensated for any loss of wage earning capacity which he may have suffered as a result of his industrial injury by the award of 16° for 5% of the maximum allowable by law for unscheduled disability.

In this case the Board finds that claimant was not a vocationally handicapped worker as defined by OAR 61-005(4). The Referee apparently believed that because claimant's college studies were mostly in the remedial basic course area without any particular training in any specific field that participation therein did not result in providing claimant with any skills which would enable him to return to a gainful employment. Not every person who attends college leaves with specific qualifications, but a general college education often opens the door for many job opportunities.

Claimant is only 23 years old, his physical impairment is slight, and his work background varied. The Board finds no evidence that claimant could not reenter the labor market at the present time in many fields involving lighter type

employment. Therefore, the Board finds that the non-referral by the Disability Prevention Division was not arbitrary or capricious and the Referee's order remanding the matter to the DPD for appropriate action must be reversed.

ORDER

The order of the Referee, dated October 11, 1977, is reversed.

The Determination Order of March 30, 1977 which granted claimant compensation for temporary total disability from September 21, 1976 through February 5, 1977 and 16° for 5% unscheduled low back disability is affirmed.

WCB CASE NO. 77-713 MARCH 28, 1978

BILL BRANTON, CLAIMANT
Bodie, Minturn, Van Voorhees, Larson & Dixon, 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 the claimant to be permanently and totally disabled as of the date of his order.

Claimant, 43 years old, suffered two compensable injuries to his back while working for the same employer.

On November 22, 1971 he stepped off a tractor and suffered an injury, diagnosed as a lumbosacral strain. Claimant was released to work and his claim was closed by a Determination Order, dated March 29, 1973, which granted him 64° for 20% unscheduled low back disability.

On March 29, 1972 he again injured his back while logging; at this time his employer was a non-complying employer. Dr. Denker found a previous laminectomy and spinal fusion L4-5-S1 with an incomplete fusion of the left L4-5. He referred claimant to Dr. Anderson who examined claimant in May 1972 and found a fracture of the fusion at the L4-5 level. Dr. Anderson felt that, as a result of both injuries, claimant had suffered a fracture of a fusion performed in 1964.

A myelogram revealed a significant defect at the L4-5 interspace. Claimant first declined surgery but when his condition worsened, he underwent a lumbar laminectomy and fusion at

the L4-5 level on April 17, 1975. He reported a continuation of significant symptoms and his doctor opined that claimant was unable to return to work as a rancher, but would be able to do some work and suggested vocational rehabilitation.

Claimant went to the Disability Prevention Center in September 1976. While he was there he complained of low back pain, pain, numbness and weakness in the left leg. The doctors diagnosed chronic lumbosacral sprain L3-L4 and L5 radiculopathy and post-operative status of his two surgeries; also, moderate emotional disturbance with mild depression. Claimant was found to be functionally illiterate and possessed so few skills, the prognosis for reemployment was not good. The Disability Prevention Division rated claimant's vocational handicap as moderate based on his physical limitation and advised a job change and referral to vocational rehabilitation.

Claimant was declared ineligible for vocational rehabilitation services in December 1976 because of physical problems and limited educational and vocational aptitudes.

A Determination Order dated January 27, 1977 awarded claimant additional time loss benefits and 144° for 45% unscheduled low back disability.

Dr. Tiley reported in April 1977 that the lumbar fusion was solid with no evidence of pseudoarthrosis. He felt claimant was retrainable; but could not repeatedly lift more than 40 pounds. Low back rotation or prolonged position maintenance were contraindicated.

Claimant still complains of pain. He has worked almost exclusively at common heavy labor jobs. He has tried to do the various ranching activities he used to perform, but now it takes longer and requires prolonged rest periods after working for only an hour.

The Referee found the claimant was permanently and totally disabled. He found that claimant was not a "basket" case; he was able to occasionally perform certain activities, but he was unable to perform them on any regular and gainful basis. Claimant's training, experience and aptitudes all indicated he was suited for only heavy labor type employment to which he now cannot return.

The Referee did not find any lack of motivation or malingering. The Fund requested the Referee to separate the disability attributable to each claim and the Referee found claimant's present disability was attributable to the March 29, 1972 incident, based on Dr. Anderson's opinion that this incident aggravated and made a definite determination of the fracture of the fusion.

The Board, after de novo review, finds that the evidence clearly establishes that the claimant is permanently and totally disabled.

On the issue of the amount of disability attributable to each claim, the Board finds, merely from an advisory point of view, that the injury of March 1972 (when the employer was non-complying) accounted for 2/3 of claimant's current disability and, therefore, that the Fund should apply for reimbursement of 2/3 of the cost of the claim.

ORDER

The Referee's order, dated July 28, 1977, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services before the Board $350, payable by the Fund.

WCB CASE NO. 77-316 MARCH 28, 1978
WCB CASE NO. 77-1199

HARALD (CHRIS) CHRISTOFFERSEN, CLAIMANT
Coons & Anderson, 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 has requested Board review of the portion of the Referee's order relating to WCB Case No. 77-316, which ordered the claim against Cone Lumber Company reopened for payment of additional medical care and treatment and appropriate temporary total disability compensation.

Two cases were consolidated for hearing. Claimant filed a claim against Cone Lumber Co., insured by the Fund, for alleged nervous or emotional problems caused by work-related stress. This claim was accepted, benefits paid and was closed with an award for temporary total disability from September 29, 1975 to December 14, 1975 but no award for permanent disability. Claimant requested a hearing on the adequacy of this determination (WCB Case No. 77-316).

Claimant then went to work in mid-December 1975 for Star Wood Products, also insured by the Fund. In January 1977 he filed a claim alleging essentially the same problem. The Fund denied this claim (WCB Case No. 77-1199). This denial was affirmed by the Referee; the claimant did not appeal.

Claimant began his work for Cone Lumber Company in 1962

as a construction foreman. He soon took on the job of maintenance foreman and later also assumed purchasing duties for the employer. Mr. Cone testified he was a world traveler and had left much of the plant operation up to the claimant. Claimant testified on his last day of work in September 1975 for Cone Lumber Co. an equipment breakdown occurred and he found himself weeping, shaking and cold all over. He then left the job and consulted Dr. Hoskins who referred claimant to Dr. Vergamini, a psychiatrist.

Dr. Vergamini's opinion was that claimant was suffering from a depressive neurosis in addition to a traumatic anxiety neurosis stemming from his employment with the Cone Lumber Company and precipitated again by his experiences after he went to work for Star Wood Products. He felt within reasonable medical probability that this disability was of a permanent nature and would affect claimant in any attempts to again become employed in a mill setting. Claimant, himself, testified he presently was not having any difficulties and as long as he stayed away from sawmills and didn't discuss sawmills, he had no problems.

Citing Dimitroff v. SIAC, 209 Or 316, the Referee found that claimant was not medically stationary, and he ordered the Fund to reopen claimant's claim filed for further medical care and treatment and to pay claimant appropriate temporary total disability benefits.

The Board, on de novo review, is of the opinion that although claimant's emotional difficulty has apparently disabled him from one specific type of employment he is not unable to pursue unrelated employment. The Board finds claimant's condition is medically stationary and, based on reports of his treating psychiatrist, finds that claimant has sustained permanent psychological disability equal to 20%.

ORDER

The Referee's order, dated June 21, 1977, is reversed.

Claimant is awarded 64° for 20% unscheduled psychiatric disability. This is in addition to the award for temporary total disability granted by the Determination Order dated August 3, 1976.

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

WCB CASE NO. 77-1178-B MARCH 28, 1978

PHYLLIS GALASH, CLAIMANT
Lee Finders, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Atty.
Order of Abatement

On March 7, 1978 an order was issued in the above entitled matter awarding claimant's attorney an attorney's fee pursuant to the provisions of ORS 656.382(2). The request for Board review by the employer's carrier, EBI Company, on November 29, 1977 divested the Referee of jurisdiction to amend his order, therefore, the Board made the amendment, awarding claimant's attorney a sum of $400 for his services before the Referee.

The Board is now advised that, at the time of the hearing, there was a discussion, off the record unfortunately, between the Referee, claimant's attorney, and the attorney for each of the employer's carriers,Northern Insurance Company and EBI, concerning claimant's attorney's entitlement to an attorney's fee inasmuch as the only issue before the Referee was which carrier was responsible for the payment of compensation to claimant. There was no denial of compensability of the injury, only a denial of responsibility by each carrier. The Referee made no formal ruling on this discussion.

The attorney representing EBI has now advised the Board he desires an opportunity to file a brief on the question of whether claimant's attorney is entitled to an attorney's fee pursuant to the provisions of ORS 656.382(2) when there has been no denial of compensability and there has been an order issued pursuant to ORS 656.307, designating one of two carriers as a paying agent pending determination of responsibility for the payment of compensation to the claimant. The attorney representing Northern Insurance joined with the attorney for EBI in requesting that the Board's order issued March 7, 1978 be held in abeyance pending receipt of briefs on this question.

The Board, after due consideration, concludes that it would be in the best interests of all parties concerned to abate its order of March 7, 1978 until it has been fully informed of the positions of the respective parties, the two carriers and the claimant, on this question.

ORDER

The Board's order entered on March 7, 1978 shall be held in abeyance pending the receipt by the Board of briefs from all parties concerned, stating their respective positions with regard to this matter.

WCB CASE NO. 77-2987 MARCH 28, 1978

MARIE HAYES, CLAIMANT
Gray, Fancher, Holmes & Hurley,
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 directed it to pay claimant compensation for temporary total disability from November 11, 1976 to February 28, 1977 and granted claimant's attorney, as a reasonable attorney's fee, 25% of the compensation to be paid claimant by the Fund.

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

The issue of the State Accident Insurance Fund's entitlement to be reimbursed from the Rehabilitation Reserve, pursuant to ORS 656.728(3),was not presented at the hearing before the Referee, therefore, the Referee was not obligated to make a decision thereon. However, the Fund in its request for Board review presented only one issue, to-wit: its entitlement to reimbursement from the Rehabilitation Reserve.

In the absence of evidence of other violations by the State Accident Insurance Fund there is no reason apparent to the Board why reimbursement should not be made, providing the Fund meets all the required qualifications and makes proper application to the Compliance Division of the Workers' Compensation Department.

ORDER

The order of the Referee, dated September 1, 1977, is affirmed.

WCB CASE NO. 77-3027 MARCH 28, 1978

THOMAS N. HENNEY, CLAIMANT
Manville M. Heisel, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Michael Arant, 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 ordered it to accept responsibility for payment of medical services incurred by claimant for his low back and leg conditions under the provisions of ORS 656.245. Claimant cross-appeals contending his claim for aggravation is compensable.

Claimant worked for the Medford Corporation, pushing logs in the pond and sustained a compensable injury on August 7, 1973 to his back. On May 14, 1974 Dr. Campagna found claimant's condition stationary; he was pain free with no weakness. Claimant commenced employment, pulling on a greenchain. In 1973 and again in 1974 claimant underwent a laminectomy at L4-5.

A Determination Order of August 1974 granted claimant 32° for 10% unscheduled disability.

Claimant continued having problems and his claim was reopened; on August 4, 1975 Dr. Campagna again found his condition stationary. A Second Determination Order of August 21, 1975 granted claimant an additional 32° for 10% unscheduled disability.

Claimant had started a drafting course at Lane Community College but his back condition was worsening, his grades were poor and his program was terminated. Because he couldn't see Dr. Campagna, claimant saw his family doctor, Dr. Roberts, who hospitalized claimant.

While hospitalized claimant saw Drs. Gilsdorf and Campagna. On Janaury 25, 1977 Dr. Gilsdorf reported claimant weighed 265 pounds when hospitalized. It was his opinion that claimant's weight contributed to a major degree to his increased symptoms. Dr. Gilsdorf felt that with proper weight reduction claimant's symptoms would diminish to a point to allow him to resume his schooling.

On May 5, 1977 the Fund issued its denial of claimant's claim for aggravation.

On July 26, 1977 Dr. Campagna concurred with the opinion of Dr. Gilsdorf. On July 20, 1977 claimant was examined by Dr. Weinman who diagnosed mechanical low back pain, secondary

to degenerative joint disease, degenerative arthritis and settling at L4-5 and L5-S1 with exogenous obesity aggravating the other diagnoses. He felt claimant was now limited from repeated bending, lifting or stooping.

Dr. Campagna's medical report, after he had examined claimant during his hospitalization, indicates claimant had been in severe pain with moderate amounts of lumbar spasm and back motion was limited to 20% of normal.

Claimant testified at the hearing that he always had a weight problem weighing 200 pounds in the eighth grade, 230 at injury and 245 at the hearing.

The Referee found claimant had not proven an aggravation of his original industrial injury since the doctors all agreed that his weight was aggravating his problems. He did find, however, that because the claimant's present condition was related to his original injury, the Fund was responsible for payment of all medical treatment under the provisions of ORS 656.245.

The Board, on de novo review, finds that claimant's condition for which he underwent medical treatment was related to his industrial injury and if claimant had lost no time from work he would be entitled to treatment under the provisions of ORS 656.245. However, claimant's condition required hospitalization and, obviously, claimant was unable to work during that period of time nor was his condition stationary. Under such circumstances claimant's claim must be reopened for payment of time loss during the time he was incapacitated and to have his claim closed when he became medically stationary under the provisions of ORS 656.268.

ORDER

The order of the Referee, dated September 23, 1977, is reversed.

Claimant's claim for aggravation is hereby remanded to the Fund for acceptance and payment of compensation, as provided by law, from the date of his hospitalization by Dr. Roberts and until his claim is closed pursuant to ORS 656.268, less any time worked.

Claimant's attorney is granted as a reasonable attorney's fee the sum of $700, payable by the Fund.

Claimant's attorney is granted as a reasonable attorney's fee for his services at Board level the sum of $300, payable by the Fund.

WCB CASE NO. 76-6390 MARCH 28, 1978

JOE HOLMES, JR., CLAIMANT
Bloom, Ruben, Marandas, Berg, Sly & Barnett, 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 compensation for 135° for 90% loss of the left leg. 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 October 6, 1977, is affirmed.

SAIF CLAIM NO. A 109886 MARCH 28, 1978

EDDIE HOLSTE, CLAIMANT
Gooding, & Susak, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through his attorney, on May 12, 1977 requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered in 1948. The State Accident Insurance Fund was advised of the request and responded, stating that claimant's present symptoms were related to osteoarthritic changes and degenerative disc changes due to normal aging process.

The Board did not have sufficient evidence before it to determine the merits of claimant's request and 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 was related to his industrial injury of 1948 and, if so, whether his condition has worsened since his last award or arrangement of compensation.

On August 10, 1977 a hearing was held before John D. McLeod, Administrative Law Judge (ALJ), who after the hearing caused a transcript of the proceeding to be prepared and submitted

to the Board together with his recommendation.

The Board, after de novo review of the transcript of the proceedings and the ALJ's recommendation, accepts as its own the recommendation, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

Claimant's request of May 12, 1977 that the Board exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered in 1948 is hereby denied.

WCB CASE NO. 77-454 MARCH 28, 1978

KENNETH LARSEN, CLAIMANT
Coons & Anderson, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
McMenamin, Joseph, Herrell & Paulson,
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 his condition to be an aggravation of a November 1966 injury and affirmed the denial issued by Argonaut Insurance Company. Claimant contends that his condition is actually the result of a new injury and therefore the responsibility of Argonaut.

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

ORDER

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

WCB CASE NO. 77-2015 MARCH 28, 1978

WILLIAM SMITH, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
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 compensation equal to 32° for 10% unscheduled low back disability. Claimant contends that this award is inadequate and that he is entitled to penalties and attorney fees for unreasonable resistance by the Fund to pay 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 September 29, 1977, is affirmed.

WCB CASE NO. 77-2435 MARCH 28, 1978

LEROY TANNIEHILL, CLAIMANT
Lively & Wiswall, 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 compensation equal to 320° for 100% unscheduled low back 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 November 18, 1977, is affirmed.

WCB CASE NO. 77-1439 MARCH 29, 1978

TROY AUDAS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund seeks Board review of the Referee's order which reopened claimant's claim as of January 7, 1977 in addition to assessing penalties and attorney fees 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 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 Fund.

WCB CASE NO. 77-2726 MARCH 29, 1978

HELEN BOWERS, CLAIMANT
Harold W. Adams, 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 was entitled.

Claimant, age 53, suffered an injury to her back, right shoulder and right arm on December 1, 1976 when she was involved in an automobile accident while returning home from an official school board meeting. There is no dispute over the fact that claimant was injured.

Claimant, the principal of Evergreen Elementary School, remained on the premises of the school on the day in question until the evening board meeting. The policy of the school district

required her to attend the monthly meetings, although she would not have lost her job had she failed to do so. It was claimant's practice to remain at school until the time of the meetings rather than to go home at the end of the school day and return for the evening meeting, primarily because of convenience and the gas shortage at that time.

The school district did not provide claimant with a car nor did they reimburse her for mileage. Claimant habitually took the same route home that she did on the day of the accident. The accident occurred while claimant was driving through Mt. Angel at about 20 miles per hour; the car she was driving was hit in the left rear, causing claimant to suffer injury.

The Referee found claimant's claim to be compensable. Her attendance at the school board meeting was for the benefit of the employer, was contemplated by it and was either directed or, at least, acquiesed in by the employer. He felt that it was quite possible that claimant would not have had the accident if she had not attended the meeting; the lateness of the hour and the more hazardous conditions under which she had to drive home made the possibility of an accident greater.

The Referee found the "special task" or "special errand" rule applied and he remanded the claim to the employer for acceptance and payment of compensation to which she was entitled.

The Board, after de novo review, finds that the ruling set forth in Davis V. SAIF, 15 Or App 405, upon which the Referee relied, was based upon facts not analogous to those in the present case. The Referee felt that because claimant was forced, because of attendance at the meeting, to drive home late at night and under more hazardous conditions was sufficient to justify a finding of an exception to the going and coming rule which he entitled "special task" or "special errand" rule. Claimant was not required to take a different route home than that which she took when she left the school to return to her home on the days on which an evening meeting was not to be held. Obviously, claimant was familiar with the route, the lateness of the hour may or may not have created a hazard; on this point the evidence is not clear.

The Board finds that on the nights when there were board meetings the school district did not care whether claimant returned to her home right after school was out and later returned to attend the evening meeting; the reason claimant stayed at the school, as the Referee pointed out, was because of her concern for the gasoline shortage at that time. This was a personal reason, her remaining on the school premises until the evening meeting was of no benefit to the employer.

On the night of claimant's injury she was aware that there was a school board meeting that evening and, pursuant to her practice, remained on the premises; her staying after work was not an unexpected duty.

The Board concludes that the fact that claimant drove straight home from the board meeting was of her own choice. Claimant was free to go wherever she chose upon departing from the meeting and at the moment she left the meeting she was in no way furthering her employer's business but was strictly on her own to proceed to wherever she wished by whichever route she chose. Neither the time nor location of the Board meeting was unusual and claimant was not paid any additional salary for attending these meetings. It was not an unanticipated duty, it was not even a duty, it was something which claimant could choose to do or not to do although the school district's policy indicates that it preferred to have its teachers attend, if possible. Therefore, it cannot be identified as a "special task" or "special errand".

Because no special errand or special task was required of claimant her injury cannot be considered as compensable. The Board gives great weight to the ruling in Walker v. SAIF, 28 Or App 127 (1977).

ORDER

The order of the Referee, dated October 11, 1977, is reversed.

The denial by the State Accident Insurance Fund on March 16, 1977 of claimant's claim is approved.

WCB CASE NO. 74-4505 MARCH 29, 1978

JIMMY FAULK, CLAIMANT
Donald Miller, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
SAIF, Legal Services, Defense Atty.
Order

On March 20, 1978 the Board received from the State Accident Insurance Fund a motion to strike its order entered in the above entitled matter on November 18, 1977.

The Board, after carefully studying the affidavit attached in support of the motion, concludes that there is no justification set forth therein for the granting of the Fund's motion to strike and, therefore, said motion should be denied.

IT IS SO ORDERED.

WCB CASE NO. 76-4936 MARCH 29, 1978

EDWARD GIBSON, CLAIMANT
Galton, Popick & Scott, 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 affirmed the denial of claimant's claim for compensability of paroxysmal atrial fibrillation.

Claimant was a 61-year-old asphalt raker for the City of Portland. In February 1976 claimant suffered a non-industrial ankle injury which kept him off work until June 1, 1976. On June 1, 1976 claimant performed his regular job and that evening at home he felt tired, but not overly so. On June 2 at 11 A.M. he experienced symptoms, later diagnosed as paroxysmal atrial fibrillation. Claimant broke out in a heavy sweat, had pain in his chest and sharp pains in his arms. His supervisor drove him to the hospital.

Claimant commenced treating with Dr. Klosterman and remained off work. He filed a claim on June 23, 1976. Claimant continued to experience fibrillation and was hospitalized from July 18 to July 24, 1976. On August 31, 1976 the State Accident Insurance Fund denied claimant's claim; it paid no compensation for temporary total disability.

Dr. McAnulty, assistant professor in the Division of Cardiology at the University of Oregon Medical School, examined claimant in November 1976. He felt that since claimant was working actively when his symptoms occurred the work activity itself was a major contributing factor to the symptoms of heart disease which claimant experienced that day. Although claimant suffered from pre-existing coronary disease, the work episode of June 2, 1976 did not cause this underlying heart disease. It did cause the arrhythmia and the symptoms claimant had on June 2, 1976.

Dr. Lee, a specialist in cardiovascular disease, after examining all of the medical evidence, stated that claimant's work was not a major contributing factor to the paroxysmal atrial fibrillation claimant experienced on June 2, 1976.

Claimant testified that before June 2, 1976 he had never experienced these particular symptoms before. He had subsequent attacks in June and July; once while sitting and once while sleeping.

The Referee did not question claimant's credibility;

his history of the events were consistent throughout. However, he found the opinion of Dr. Lee to be the most logical and plausible under the circumstances of this case and gave his opinion the greatest weight.

Regarding penalties and attorney fees because the Fund failed to commence payment of compensation within 14 days after its knowledge of the claim, the Referee found that the City of Portland had paid claimant his regular salary during the entire period involved in this case. Therefore, claimant was not entitled to any further compensation benefits.

The Board, after de novo review, finds that the opinion of Dr. McAnulty should be accorded the greatest weight because he had the opportunity to examine the claimant and to take his history directly. Dr. Lee did not. The type of occupation in which claimant was engaged was sufficiently strenuous to cause and bring about fibrillation. Claimant did not suffer an infarction on June 2, 1976; he had arrhythmia. Claimant has sustained his burden of proving both medical and legal causation.

The Board finds that the Fund's failure to commence payment of temporary total disability within 14 days after notice or knowledge of the claim and its failure to accept or deny said claim within 60 days constitutes unreasonable resistance to the payment of compensation. The Referee found that claimant was receiving full wages during the entire period he was off sick, therefore, the claimant lost nothing by being absent from work. Claimant was not receiving wages, he was receiving "sick" pay, and each day he was off work cost him a day of this accumulated "sick" pay. Thus claimant was actually losing "wages" and he should have been paid temporary total disability from the date of his injury until his claim was denied. Therefore, the Fund is assessed a penalty on all compensation due and owing to the claimant.

ORDER

The order of the Referee, dated February 28, 1977, is reversed.

Claimant's claim is remanded to the State Accident Insurance Fund for acceptance and payment of compensation as provided by law, commencing on June 2, 1976 and until his claim is closed pursuant to ORS 656.268.

The Fund shall pay claimant a sum equal to 25% of the temporary total disability due and owing to the claimant from June 2, 1976 through August 31, 1976, the date of the Fund's denial.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services before the Referee the sum of $1,000, payable by 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 $300, payable by the Fund.

WCB CASE NO. 77-1323 MARCH 29, 1978

EARL R. LEACH, CLAIMANT
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 the Evaluation Division of the Workers' Compensation Department for closure pursuant to ORS 656.268. The Fund contends that since the Referee failed to find an aggravation the claim cannot be legitimately remanded to it for reopening and reclosure and, therefore, the Referee's order is invalid.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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.

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

WCB CASE NO. 76-5543 MARCH 29, 1978

In the Matter of the Compensation of
ED G. LINDQUIST, CLAIMANT
And in the Complying Status of
EMIL M. CARLSON, EMPLOYER
David R. Vandenberg, Jr., Claimant's Atty.
Beddoe & Hamilton, Employer's Atty.
SAIF, Legal Services, 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 found claimant was a subject employee of a non-complying

employer and that claimant's injury arose out of and in the course of his employment with said employer.

The alleged employer, Mr. Carlson, is the owner and operator of a retail furniture business known as Carlson's Furniture; he has owned and operated this business with his two sons for the last 16 years. Claimant testified that he was trimming limbs from trees on rental property owned by Carlson when he suffered his injury.

Claimant contends that he was a subject employee of Carlson at the time; Carlson contends that claimant was an independent contractor insofar as the work he did for him on his rental property. Carlson's Furniture had always been a complying employer, providing workers' compensation coverage for all of its employees in that business but Carlson had not been a complying employer with regard to the various jobs which he had retained claimant to do on his own home or on any of the rental properties which he owned.

The Referee found that Carlson and claimant met for the first time in January 1974 and Carlson had claimant do a remodeling job on his home. About 18 months later, claimant did another job on a rental home owned by Carlson and a month later a third job was done on some property owned by him; on this last job claimant allegedly suffered a compensable injury.

The Referee found that during the home remodeling claimant worked without supervision from Carlson or any of his family, that there were no deductions of any kind for any form of taxes, social security or income or for insurance or unemployment compensation taxes because Carlson was of the opinion that claimant was an independent contractor, however, claimant was never licensed or bonded as a contractor.

The Referee found that Carlson had authorized claimant to buy materials which he charged to him. When claimant billed Carlson he collected for his wages based on the number of his hours worked and the hours of any person which he, claimant, hired to help on the job and for materials. After claimant cashed his check, he took out his wages and paid the help and the supply houses from which he purchased the materials. Carlson testified he did not retain any right to hire or fire the extra help although, the Referee found, he certainly could have fired claimant at any time. Claimant did use his own tools, however, the Referee found that claimant was not significantly capitalized to undertake any substantial projects, that he was simply working as a carpenter for various contractors.

The Referee found that undoubtedly Carlson did not exercise much control, however, it was difficult after listening to his testimony at the hearing to believe that he ever intended to lose the right to control claimant. There was never any written contract to cover any of the jobs which claim-

ant did for him, but claimant testified that he never considered himself as an independent contractor on any of the jobs which he did for Carlson.

The Referee concluded that claimant had suffered an accidental injury on August 31, 1975 in the manner described in his testimony at the hearing and while trimming a tree on the rental property owned by Carlson. The fact that the injury occurred on a Sunday was not a factor to consider.

The Referee concluded that the common law test of right of control had been met in this case.

The Board, on de novo review, finds that Mr. Carlson was not a subject employer who was required by ORS 656.016 to provide workers' compensation for claimant on the date of claimant's injury, August 31, 1975. The Board further finds that claimant was not a subject workman but was an independent contractor.

Carlson had no actual right of control over the details and performance of the claimant's work. The test of right to control does not refer to the right to control the results of the work but rather to the right to control the manner and means of accomplishing the results. In this case, Carlson retained no right to control the manner or means by which claimant accomplished the job of trimming the two trees on August 31, 1975 when he suffered his injury. In fact, Carlson was at his home recuperating from surgery when the work was being done by claimant; he neither exercised the right of control nor did he retain the right to do so. Claimant provided all of the tools and equipment to trim the tree, including a trailer to haul limbs and cuttings away both for himself and his employee, Morris. Claimant had directed Morris to trim the first tree and paid him for doing so. He also paid his other employee, Boehme, to pick up the limbs and cuttings and haul them to the garbage dump in claimant's trailer.

There is evidence that Carlson even admonished claimant not to work on Sunday, but claimant paid no attention to such warning and, in fact, suffered his injury on a Sunday. There was no specific piece of work which could be finished in a short time, no payroll deductions were made from the monies paid to the claimant by Carlson.

The Board concludes that claimant is clearly an independent contractor who has his own skill, tools and equipment. The work he was doing has a separate calling, i.e., it is not the type of work that would be dependent upon working for just one individual or company, but could be performed for numerous individuals. The evidence in this case indicates that claimant sought work by preparing and distributing business cards and performed jobs for other persons during this same period of

time that he was performing jobs for Carlson. Claimant kept his own records and paid his own employees and the jobs that he performed for Carlson, including the job on which he was injured, were intermittent in character and not a regular part of Carlson's work which was owning and running a furniture store and had been for the last 16 years. Carlson had, in his business, always been and still is a fully complying employer.

The Board concludes that although Carlson did retain the right to require the results of the work to be satisfactory he did not possess sufficient right to control the manner and means of accomplishing the results; he did not retain sufficient right to direct and control as to constitute an employer-employee relationship under the "control test". Furthermore, using the test to distinguish between an employee and an independent contractor as set forth in Woody v. Waibel, 276 Or 189 and Marcum v. SAIF, 2 Or App 843, claimant is clearly an independent contractor and Carlson is not a subject employer. Therefore, the defacto denial by Mr. Carlson of claimant's claim was a proper denial.

ORDER

The order of the Referee, dated August 9, 1977, is reversed.

WCB CASE NO. 76-3925 MARCH 29, 1978

LAURA McKINNON, CLAIMANT
Ackerman & DeWenter, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the April 21, 1976 Determination Order granting claimant 30° for 20% loss of the right leg. Claimant contends that this award does not adequately compensate her for her 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 16, 1977, is affirmed.

WCB CASE NO. 77-5832 MARCH 29, 1978

OPAL POPLIN, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Atty.
Merten & Saltveit, 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. 77-1401 MARCH 29, 1978

JERRY A. TRUITT, CLAIMANT
Dye & Olson, 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 his claim for an 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 September 28, 1977, is affirmed.

WCB CASE NO. 77-3372 MARCH 29, 1978

ROBERT B. WOODWARD, CLAIMANT
Cynthia L. Barrett, Claimant's Atty.
Rankin, McMurry, Osburn & Gallagher,
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.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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 4, 1977, is affirmed.

SAIF CLAIM NO. DC 191397 MARCH 31, 1978

MARGIE M. EWBANK, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, at the time a 30-year-old grocery clerk, injured her low back on April 28, 1969. A spinal fusion was performed on September 15, 1969 and her claim was closed by Determination Order dated April 29, 1970 awarding claimant compensation for temporary total disability and 48° for unscheduled low back disability.

Claimant's back was reinjured in 1971 and her claim was reopened and closed again on July 15, 1972 with no additional award for permanent partial disability. On August 1973 claimant twisted her back while at home and her claim was again reopened. Dr. Pasquesi, on October 10, 1973, diagnosed claimant's condition as a chronic lumbosacral myofascitis. Claimant's claim was closed for the third time on February 24, 1975 with an additional award of 32°.

On June 10, 1975 claimant fell while at home and her claim was reopened and she was hospitalized with a lumbosacral strain in addition to numerous emotional problems. Claimant continued to receive treatment from several doctors and eventually in February 1977 Dr. Brink performed a bilateral sacroiliac fusion. In July 1977 he found claimant's major problem

was stiffness and when said problem was resolved claimant would be able to return to work.

The Orthopaedic Consultants examined claimant on November 28, 1977 and stated that claimant could return to a job which did not require heavy lifting; they found her total loss of function to the back was mildly moderate. Her tension headaches were, in their opinion, not compensable. Claimant's treating physician felt the headaches were the result of her industrial injury, but otherwise agreed with the Orthopaedic Consultant's report.

On February 16, 1978 a fourth Determination Order closed claimant's claim pursuant to ORS 656.268 granting claimant additional compensation for time loss from June 10, 1975 to January 13, 1978 but no additional compensation for permanent partial disability. Claimant's claim was initially closed on April 29, 1970 and her aggravation rights expired on April 28, 1975. Although claimant's claim has been reopened and closed twice before April 28, 1975, the last time it was reopened was after claimant had fallen on June 10, 1975, therefore the claim should have been closed pursuant to ORS 656.278 and not 656.268.

On February 22, 1978 the Fund had requested a determination of claimant's disability by the Evaluation Division of the Workers' Compensation Department. On March 15, 1978 the Evaluation Division requested that the Determination Order of February 16, 1978 be set aside and recommended that an Own Motion Determination be issued granting claimant the same compensation contained in the Determination Order.

The Board concurs.

ORDER

The fourth Determination Order entered in the above entitled matter on February 16, 1978 is hereby set aside in its entirety.

Claimant is granted compensation for temporary total disability from June 10, 1975 through January 13, 1978.

SAIF CLAIM NO. TC 198311 MARCH 31, 1978

GEORGE E. FINNEY, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 8, 1978 the Board received from claimant, by and through his attorney, a request that it exercise its own

motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered on July 29, 1969 while employed by Paul B. Hult Lumber Company, whose workers' compensation coverage was furnished by the State Accident Insurance Fund. The request was supported by a medical report from Dr. Henderson, a psychiatrist, a report from Dr. Gilsdorf, an orthopedic physician, and a report from Dr. Cohen, an orthopedic physician.

On March 9, 1978 the Fund was advised to submit its position with regard to claimant's request within 20 days; the Fund had been furnished a copy of the request for own motion relief and the accompanying medical reports.

On March 15, 1978 the Fund responded, stating that on February 3, 1978 it had authorized ongoing psychiatric treatment for claimant for a period of six months and had requested a narrative report from the treating psychiatrist, Dr. Henderson, of claimant's condition, progress made and recommendation for further treatment, if any.

On November 22, 1977 the Board had entered an Own Motion Determination whereby claimant had been granted temporary total disability benefits from February 12, 1976 through August 3, 1977 and also 15° for loss function of the right leg and 32° for unscheduled low back disability. The Fund contends that the medical records presently furnished do not indicate that claimant's condition is any different at this time than it was on the date the Own Motion Determination order was issued and that claimant's disability has been properly evaluated by said Own Motion Determination.

The Board, after considering the medical reports furnished in support of the request for own motion relief, concludes that, at the present time, all the medical care and treatment which claimant requires as a result of his 1969 injury can be furnished him by the Fund pursuant to the provisions of ORS 656.245 and inasmuch as such care and treatment is presently being furnished claimant by the Fund there is no justification for reopening claimant's claim at this time.

ORDER

Claimant's request for own motion relief received by the Board on March 8, 1978 is hereby denied.

WCB CASE NO. 77-6387-SI MARCH 31, 1978

In the Matter of the Petition of
DILLINGHAM MARINE & MFG.
For reimbursement From the
Second Injury Reserve Fund in the
Case of LEONARD FRITZ
Rankin, McMurry, Osburn & Gallagher,
Claimant's Atty.
Order on Review

Reviewed by Board Members Wilson, Moore & Phillips.

On February 9, 1978 Referee Vinita J. Neal recommended that the Board grant the employer's request for reimbursement from the Second Injury Fund in the amount of 40% of the additional cost which is attributable to the results of the second injury suffered by claimant.

Thirty days have expired since the entry of the Referee's Findings of Fact, Conclusions of Law and Recommended Order and no exceptions or arguments against the same had been filed with the Workers' Compensation Board.

The Board, after de novo review of the abstract of record, accepts the recommendation of the Referee and adopts as its own the findings of fact and conclusions of law as set forth in the recommended order, dated February 9, 1978, a copy of which is attached hereto and, by this reference, made a part of the Board's order.

SAIF CLAIM NO. A 779134 MARCH 31, 1978

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

On December 19, 1977 the Board received from claimant, by and through his attorney, a request for the Board to exercise its own motion jurisdiction and reopen his claim for an injury suffered on February 9, 1960 while in the employ of Oregon Steel Mills, whose workers' compensation coverage was furnished by the State Accident Insurance Fund.

Claimant's claim was closed and his aggravation rights have since expired. A medical report from Dr. Adlhoch, dated December 2, 1977, and certain medical reports attached to a cover letter from a claims representative of the Fund, dated

November 15, 1977, were submitted in support of the request for own motion relief. Copies of the request and Dr. Adlhoch's report were submitted to the Fund.

On December 23, 1977 the Fund was requested to advise the Board of its position within 20 days thereafter. On January 6, 1978 the Fund advised the Board that claimant's claim had been in a closed status since 1961 and its records contained no information between that date and claimant's current request for own motion relief but that it was attempting to obtain additional information to determine whether claimant's present condition was related to his 1969 injury.

On March 13, 1978 the Fund responded, furnishing the Board with a copy of a medical report from the Orthopaedic Consultants who had examined claimant on January 27, 1978 and a copy of the hospital records which indicated that claimant was admitted to the Kaiser Permanente Hospital on August 7, 1977 and, after a diagnosis of arteriosclerotic gangrene, left big toe, a surgical amputation of the left big toe was performed and claimant was discharged on August 10, 1977. The Fund's position is that these medical reports clearly indicated that the recent treatment and amputation were necessitated by an ingrown toenail and atherosclerotic occlusive peripheral vascular disease, neither of which resulted from the February 9, 1960 industrial injury. Therefore, the Fund denied responsibility for claimant's current condition.

The Board, after full consideration of all of the medical reports submitted by claimant and the Fund, concludes that claimant's condition at the present time is not the result of his industrial injury of February 9, 1960 and therefore the request for own motion relief should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-4252 MARCH 31, 1978

DONALD JOHNSON, CLAIMANT
Martin, Bischoff, Tempelton, Biggs & Ericsson, 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. 76-7177 MARCH 31, 1978

EVELYN D. MARTIN, CLAIMANT
Bryant & Guyett, 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 compensation equal to 80° for 25% unscheduled neck and back disability.

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

ORDER

The order of the Referee, dated November 10, 1977, is affirmed.

WCB CASE NO. 77-376-IF MARCH 31, 1978

JAMES O. MEYERS, CLAIMANT
Knappenberger & Tish, 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 State Accident Insurance Fund's determination made pursuant to ORS 656.520(2) that claimant: (1) suffered no permanent partial disability as a result of his injury, (2) was not entitled to an award for temporary total disability, (3) had no medical bills relating to his injury which were unpaid, (4) had his claim determined considering his condition as of his release from prison, (5) did not have his claim prematurely closed, (6) is not entitled to penalties or attorney fees, and (7) that his claim should be classified as non-disabling.

Claimant, a 52-year-old Oregon State Penitentiary inmate, sustained an injury to his back on September 26, 1973 while moving 100-pound sacks of sugar. The diagnosis was acute lumbosacral strain with chronic strain symptoms. The Fund accepted claimant's claim in November of 1973. Claimant was released on terminal leave from the Oregon State Penitentiary in November 1973 and on December

20, 1973, by a govenor's commutation, he was released permanently. No determination was made upon claimant's release.

Claimant was found medically stationary on June 24, 1974.

Claimant's attorney contacted the Fund in October 1976, requesting the status of the claim and further processing. The Fund, upon claimant's attorney's information, contacted the University of Oregon Medical School, requesting additional medical evidence in December 1976. On January 14, 1977 the Fund issued its Determination Order.

Claimant, after his release, had been employed in a sign shop work and sales work, but alleges his back pain made it impossible for him to work. Claimant has a history of low back problems, alcoholism, and drug abuse.

The Board, after de novo review, finds that the Fund was delinquent in processing the claimant's claim. ORS 655.520(2) requires the Fund make an initial award and then, upon the inmate's release, to reaffirm or modify its initial award in a manner appropriate to the condition of the inmate upon his release.

The Fund issued its initial award on November 20, 1973 but there is no evidence that it reaffirmed or modified it upon claimant's release. The Fund has the responsibility of processing the claim and it should have paid claimant temporary total disability compensation from December 20, 1973 (the date of claimant's release) to June 24, 1974 (the date claimant was found to be medically stationary). Because of the delay in processing claimant's claim, claimant is also entitled to a penalty equal to 10% of this compensation and his attorney is entitled to a reasonable attorney fee.

ORDER

The Referee's order, dated September 8, 1977, is reversed.

The State Accident Insurance Fund is directed to pay claimant compensation for temporary total disability from December 20, 1973 through June 24, 1974, less any time worked, and also to pay claimant an additional sum equal to 10% of such compensation as a penalty for its delay in processing claimant's claim.

Claimant's attorney is awarded as a reasonable attorney's fee the sum of $800, payable by the State Accident Insurance Fund.

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 granted claimant by this order, payable out of such compensation as paid, to a maximum of $500.

WCB CASE NO. 76-5426 MARCH 31, 1978

BETTY MORELLO, CLAIMANT
Jones, Lang, Klein, Wolf & Smith,
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 Determination Order of May 25, 1976 which granted claimant compensation for time loss only. Claimant contends she is entitled to an award for permanent partial disability, additional time loss benefits and medical expenses in 1977 and penalties and attorney fees for the Fund's unreasonable denial of her claim.

Claimant, an eighth grade school teacher, attempted on February 27, 1976 to stop an altercation between two students. She was repeatedly struck and/or kicked in the neck, face and chest. She became dizzy and nauseated and was advised to take two days off. On March 1, 1976 claimant developed symptoms of hyperventilation and chest pain. She was hospitalized for three days and found to be suffering from sinus bradycardia and first degree AV block and left bundle branch block.

The claim was closed by the Determination Order dated May 25, 1976.

Dr. Rogers reported in July 1976 that he had found claimant had a complete left bundle branch block on March 1, 1976, but it was incomplete both before and since that date. His diagnosis was idiopathic cardiomyopathy which was probably aggravated by the stress and strain of her February 1976 incident. He reported claimant, since the February 1976 incident, has had anginal throat pains and her endurance has decreased.

Dr. O'Leary, in October of 1976, reported claimant had missed one or two days from work due to angina which he related to her February 1976 incident.

Claimant has missed periods of time from work in 1977 due to chest pain diagnosed as angina.

The Referee found no medical evidence to establish a causal relation between claimant's time loss in 1977 and her February 1976 injury. He found claimant had not proven the origins of her symptoms and, therefore, he was unable to evaluate the extent of claimant's permanent disability. The Referee concluded since claimant had failed on these two issues she was

not entitled to an attorney fee or penalties and she was not entitled to any additional time loss.

The Board, after de novo review, affirms the Referee's order. The Board finds as did the Referee that no medical evidence was introduced to establish a causal relationship between the time claimant lost in 1977 and her 1976 injury; she failed to explain the causes of her time loss in 1977, and the extent of her permanent disability. The Jones case relied on by the Referee has been reversed by the Supreme Court of Oregon, however, the claimant had no time loss in excess of three days for which she was not compensated in 1976.

ORDER

The Referee's order, dated July 26, 1977, is affirmed.

WCB CASE NO. 77-2087 MARCH 31, 1978

LEONARD PESTERFIELD, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Atty.
Rankin, McMurry, Osburn & Gallagher,
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 compensation equal to 97.5° for 65% loss of the left hand in addition 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 October 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 carrier.

SAIF CLAIM NO. YA 932648 MARCH 13, 1978

KATHLEEN J. SCRAMSTAD, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant injured her back on June 15, 1962 while lifting a box of diapers on the obstetrics floor of the Albany General Hospital. After a laminectomy in October 1962 claimant, in 1963, was granted compensation equal to 20% loss function of an arm for unscheduled disability and an additional 20% in 1964. Surgical fusion was performed on November 18, 1965 and Dr. Crist, on July 12, 1967, indicated that claimant's condition was markedly improved. No additional disability compensation was granted by the claim closure.

On November 10, 1975 claimant saw Dr. Crist, who recommended an exploration of the fusion and repair if pseudoarthrosis was present. Claimant requested a reopening for aggravation which was denied by the Fund on February 4, 1976.

An Own Motion Order, dated October 5, 1976, remanded claimant's claim to the Fund for acceptance and payment of compensation to which she was entitled.

A fusion was performed by Dr. Crist on February 3, 1977. The results of this procedure were described in his report of January 31, 1978. Claimant is now required to wear a brace for heavy activities. Dr. Crist found that claimant does have some low back pain without the brace, but that it does not radiate and there is no sciatica. He indicated she was medically stationary and no further medical care was anticipated. Claimant was advised not to sit for long periods of time and not to bend or lift.

On February 16, 1978 the Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted an additional award of compensation for 10% loss function of an arm for a total award equal to 50%. It was also found that claimant should be granted temporary total disability compensation from December 30, 1975 through January 31, 1978.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from December 30, 1975 through January 31, 1978, less time worked.

Claimant is also granted compensation equal to 10% loss function of an arm for unscheduled disability. This award is in addition to the previous awards received by claimant.

CLAIM NO. B 142666 MARCH 31, 1978

RALPH SPURGEON, CLAIMANT
Bailey, Welch, Bruun & Green, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On February 23, 1978 the Board received from claimant, by and through his attorney, a petition for the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered on May 27, 1965 while employed by Gilbert Logging Company. Claimant's claim has been closed and the time within which he was entitled to file a claim for aggravation as a matter of right has expired.

Claimant alleges that in February 1976 he began having episodes of impairment of consciousness and has incurred numerous medical bills and lost time from employment and that such condition and time loss are all due to and related to his industrial injury of May 27, 1965. In support of his petition, claimant submitted medical reports from Dr. Forester, dated February 3, 1978, Dr. Ruth Jens, dated June 25, 1977, and Dr. Schwarz, dated June 24, 1976.

Copies of the petition for own motion relief and the supporting medicals were furnished to the State Accident Insurance Fund by claimant's attorney and, on February 27, 1978, the Fund was requested to advise the Board of its position with respect to the application for own motion relief.

The Board has received no response from the Fund and, after giving consideration to the medical evidence submitted in support of the petition for own motion relief, concludes that said petition should be granted.

ORDER

Claimant's claim for an industrial injury suffered on May 27, 1965 while in the employ of Gilbert Logging Company is hereby remanded to the State Accident Insurance Fund to be accepted for the payment of compensation, as provided by law, commencing February 2, 1976 and until his claim is closed pursuant to ORS 656.278, less any time worked.

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 $500.

WCB CASE NO. 76-566 APRIL 5, 1978

INGRID ADAMS, CLAIMANT
Duncan & Walter, 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 4, 1975 Determination Order granting her no permanent partial disability for her 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 October 19, 1977, is affirmed.

WCB CASE NO. 76-4470 APRIL 5, 1978

BENJAMIN BURKS, CLAIMANT
Coons & Anderson, Claimant's Atty.
Collins, Velure & Heysell, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of the Referee's order which found claimant permanently and totally disabled as of March 15, 1976.

Claimant, a welder, injured his back on March 12, 1968 while lifting pipe. He has undergone three laminectomies between May 16, 1968 and December 16, 1974, all at L4-5.

Claimant had been retrained as a barber in January 1970.

A Determination Order, dated July 2, 1970, awarded claimant 96° for 30% unscheduled low back disability, 15° for 10% right leg and 8° for 5% left leg.

Claimant and his wife, who is also a barber, were operating their own barber shop in 1974 when claimant exacerbated his back, which required the third laminectomy. Claimant has not returned to work.

After his last surgery, claimant was referred to the

Portland Pain Center; he was found to have questionable motivation for rehabilitation and to have a passive dependent relationship with his wife who was overprotective and tended to reinforce and maintain claimant's pain behavior. The opinion of the doctors at the Pain Center, and of claimant's treating physician, is that claimant is able to perform some type of light work. Claimant's daily activities now consist of driving his wife to and from work, reading, watching T.V., playing his guitar and visiting friends and talking on his CB units.

A Second Determination Order, dated July 7, 1976, awarded claimant an additional 32° for 10% unscheduled low back disability.

Claimant has a high school level education. His work experience has been in heavy or moderate heavy laboring activities, including saw mill work, truck driving, auto mechanics and machine shop welding.

Claimant testified he has severe pain in his low back which radiates down both legs to his feet and that activity increases his back pain. He stated that he falls or partially falls because his legs go out from under him about a dozen times a week. Because of these problems, claimant feels he is unable to perform any of his previous occupations.

The Referee found claimant's emotional problems were not subject to his will and found the record as a whole described claimant as an "odd-lot" permanent total.

The Board, after de novo review, finds that the claimant is not permanently and totally disabled. The concensus of medical opinion is that claimant is capable of performing some type of light work on a regular basis; it does not support a finding of permanent total disability on an "odd-lot" basis.

The Board does not find that the claimant's emotions are beyond his control.

The Board does find that claimant has suffered a greater loss of wage earning capacity than that for which he was compensated by the two Determination Orders, and concludes claimant is entitled to an award of 224° for 70% unscheduled disability.

ORDER

The Referee's order, dated September 23, 1977, is modified.

Claimant is hereby granted an award of compensation equal to 224° for 70% unscheduled low back disability. This award 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
GEORGE CLARK, DECEASED
Flaxel, Todd & Nylander, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson, Moore and Phillips.

The beneficiaries of George Clark, deceased, hereinafter referred to as claimant, seek Board review of the Referee's order which affirmed the denial by the employer of claimant's claim.

The workman, George Clark, was a 24-year-old plywood manufacturing spreader man. He was killed in his employer's plant on September 25, 1976 at approximately 3 a.m. when he was crushed between a beam and the moving top member atop the charger on the number 1 press. The claim was first deferred by the carrier and, on November 24, 1976, it was denied on the grounds that the accident did not arise out of and in the course of the workman's employment.

The workman was killed shortly after he had commenced his lunch break which normally lasted approximately 20 minutes and for which he and the other employees were paid. He was killed when he was attempting to retrieve his lunch, that much is not disputed. However, there seems to be conflicting evidence of how claimant first placed his lunch on the ledge near the top of the number 1 press and how he retrieved it.

The Referee found no evidence to explain why the workman had climbed up the side and out on top of the charger to get his lunch rather than disconnecting the safety chain placed between the bottom part of the charger and the press with a sign which stated "Danger - Keep away", and climbing up the face of the charger as he did earlier, apparently assuming that claimant had chosen a different way of reaching the top of the charger when he attempted to get his lunch.

The Board finds no evidence that claimant did anything differently except on his second trip up, he forgot to unhook the safety chain which rendered the charger inoperable. It was often necessary for employees to get in between the charger and the press and climb up the face of the charger but it was never done without first unhooking the safety chain.

The Referee found that at the time of the accident there was no express prohibition by the employer against heating lunches on the press ledge but he found that the top of the charger was extremely dangerous, that the danger was obvious and that no em-

ployee had ever been known to have been atop a connected charger. He also found that there were safer places to heat lunches than on the ledge of the number 1 press.

The Referee found that the method which the workman had chosen to use to obtain personal comfort was abnormal, unusual and unreasonable as well as dangerous. He found no Oregon cases directly in point but he did rely upon rulings made in other states which held that unusual or unreasonable methods of obtaining personal comfort are not considered a compensable incident of the employment citing, 1 Larson, Workers' Compensation Law 5-51 Section 21.81 (1972).

The Referee concluded that in this case the method which had been used by the workman to retrieve his lunch was not only exceedingly dangerous but was unusual to the point of uniqueness. There was no apparent reason for the workman doing it and had the employer been able to anticipate anybody doing such a thing the act would have been prohibited. The Referee felt that to allow compensation such a case would require going well beyond any liberalizing of the "rising out of employment" test by the Oregon courts. Accordingly, he affirmed the denial.

The majority of the Board, on de novo review, finds that the claim was compensable. The Board finds that when the workman had come to work on his shift he had asked the press helper if he would put his lunch on a ledge near the top of the number 1 press to keep it warm. The helper told him he could do it just as well himself but to be sure and unhook the safety chain before he climbed the ladder. Claimant did so. There is no positive evidence as to precisely how claimant climbed up the charger on the second occasion, but the safety chain was not disconnected. Such failure represents negligence on the part of the workman, however, neither negligence of an injured workman, other than a wilful act committed for the purpose of sustaining an injury, nor assumption of risk by the injured workman, having knowledge of the danger involved, is a defense in workers' compensation cases. The Workers' Compensation Act makes no distinction between degrees of negligence.

It is true that in some jurisdictions the courts have held that seeking personal comfort is outside the course of employment if the manner chosen is unusual and unreasonable, however, the Oregon courts have not distinguished between reasonable and unreasonable methods of obtaining personal comfort. In this particular case the employer provided no facilities whatsoever for his employees to heat their lunches although it was a common practice for the employees to bring lunches which needed to be heated. In the past the employees have placed their lunches in various parts of the mill to heat and frequently placed them in the exact location that the workman had put his lunch. It was done so often that obviously the employer must have known of the practice, yet at the time of the fatal accident there was no express prohibition against such practice.

The evidence indicates that the employees were paid for their lunch time, therefore, there was no actual break in the period of employment from the beginning to the end of the shift.

There is no evidence that the workman had deliberately intended to kill himself; at the time of his death he was engaged in an activity of which the employer was, or should have been aware and had acquiesed in, he was on the employer's premises and he was on paid time. Unfortunately, and tragically, the workman neglected to disconnect the safety chain. His negligence resulted in his death, however, it will not bar the claimant's claim.

ORDER

The claimant's claim, which was denied by the employer's carrier on November 24, 1976, is hereby remanded to the employer and its carrier to be accepted and for the payment to claimant of benefits, as provided by law.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services before the Referee at hearing level a sum equal to $1,000, payable by the carrier.

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.

WCB CASE NO. 77-2852 APRIL 5, 1978

WESLEY O. CROSS, CLAIMANT
Phil H. Ringle, Jr., 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.

WCB CASE NO. 77-284 APRIL 5, 1978
WCB CASE NO. 77-615

ROMAN GARZA, CLAIMANT
Rodriguez, Neilson & Glenn, Claimant's Atty.
G. Howard Cliff, 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. The Fund contends that Industrial Indemnity is the responsible carrier.

Claimant, a 49-year-old Spanish speaking farm laborer who has no formal education and is unable to read and to write either Spanish or English, was employed to hoe in Mr. Ponsford's mint fields. On July 22, 1976 a plane, which was being used to spray fertilizer on the fields, accidentally sprayed ammonia sulphate fertilizer in pellet form over a wet field in which claimant was working. Claimant's hands came into contact with the fertilizer. A day or two after this incident, claimant's fingers began to burn but he continued to work. His fingers eventually began to crack and occasionally bleed. He did not tell his employer of this problem and continued to work for this employer until the job was completed. The Fund provided this employer with workers' compensation coverage.

Claimant worked for a short time for another employer before commencing a job with Kah-nee-ta Resort in August 1976 as a dishwasher and janitor. The washing of the dishes, after they were sprayed, was done automatically. Claimant manually washed the pots and pans and cleaned off the equipment; otherwise he did not have to immerse his hands in water. He continued to have problems with his hands, but did not inform this employer of his problems.

Dr. Thomas, in November 1976, diagnosed hand dermatitis. Dr. Thomas causally related claimant's condition to the field incident on July 22, 1976 and felt the condition was still present when claimant began work at Kah-nee-ta. He felt claimant's work at Kah-nee-ta irritated his condition.

Mr. Ponsford apparently filed a claim for claimant on or about November 17, 1976. This was denied by the Fund on June 19, 1977.

Claimant filed a claim with Kah-nee-ta on December 9, 1976 which was denied on February 1, 1977.

Both carriers contended the claims were untimely filed.

The Referee found that claimant had established good

cause why he had not filed his claims within 30 days; primarily because of claimant's illiteracy and lack of knowledge of the law. The Referee found that claimant had developed dermatitis while working for Mr. Ponsford, that it was compensable, and it was aggravated by his work at Kah-nee-ta. The Massachusetts-Michigan rule on successive injuries imposes liability on the employer at the time of the last injury unless the last injury is merely a recurrence of the first and does not contribute even slightly to the causation of the disabling condition. The Referee found the claimant had not recovered from his dermatitis problem at the time of his employment at Kah-nee-ta and, therefore, fell within the exception to the Massachusetts-Michigan rule.

The Referee concluded that the Fund was liable for claimant's present disability and remanded claimant's claim to it for payments of compensation and awarded penalties and attorney fees.

The Board, after de novo review, concurs with the Referee's findings and conclusions; however, the Board finds that although the claim filed against Industrial Indemnity was ultimately found to be non-compensable, Industrial Indemnity's failure to commence payment to claimant of temporary total disability within 14 days after December 9, 1976, the date it had knowledge of claimant's claim, requires Industrial Indemnity to pay claimant as a penalty for such failure a sum equal to 15% of the compensation for temporary total disability which it should have paid to claimant between December 9, 1976 and February 1, 1977, the date of its denial.

ORDER

The Referee's order, dated September 2, 1977, is modified.

Industrial Indemnity shall pay to claimant a sum equal to 15% of the compensation for temporary total disability due claimant from December 9, 1976 to February 1, 1977, the date it denied the claim, as a penalty under ORS 656.262(8), and shall pay claimant's attorney the sum of $100 as a reasonable attorney's fee for his services in behalf of claimant.

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

WCB CASE NO. 76-6098 APRIL 5, 1978

MARK H. GAYLORD, CLAIMANT
Franklin, Bennett, Ofelt & Jolles, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant requests review by the Board of the Referee's order which affirmed the employer's denial of responsibility for claimant's hospitalizations on June 5, 1976 and December 20, 1976.

Claimant, a cylinder assembler, became aware of continuing low back discomfort, commencing in February 1975. The diagnosis of Dr. Noall was chronic muscle and ligamentous sprain.

On the evening of June 5, 1976 claimant presented himself at Woodland Park Mental Health Center seeking admission for depression. Claimant gave a history of taking 12-15 Darvon 65 mg a day for his low back pain. Claimant further gave a history of homosexual fantasies which had resulted in a suicide gesture two weeks prior to this admission.

Dr. Pauly, claimant's psychiatrist who treated him during his June 1976 hospitalization, testified at the hearing. His specialty is sexual counseling and he stated that claimant had had pre-existing sexual thoughts before the injury and had been able to handle them. Claimant remained in the hospital for approximately one month.

Claimant was again admitted to the same hospital in December 1976. At this time claimant had marital problems, had been to custody court, had problems with both medication and alcohol and had run into a police car.

Dr. Pauly testified that five days of hospitalization alleviated claimant's drug addiction to Darvon. It was his opinion that claimant's depression led to the sexual problems and subsequent admission to the hospital.

Dr. Parvaresh testified at the hearing that he had read all of the medical reports and had interviewed the claimant for 1-1/2 hours on October 15, 1976. He found claimant was quite insecure and his diagnosis was a maladjusted homosexual whose guilt complex led to depression; his problems were not work-related.

The Referee gave the greatest weight to the testimony of Dr. Parvaresh.

The Board, on de novo review, finds that a close reading of the hospital reports indicates that the first five days

of claimant's hospitalization in June 1976 alleviated claimant's drug dependency. The Board finds that this drug dependency resulted from a prescription given to claimant to ease the low back pain he suffered from his industrial injury, therefore, the five days of hospitalization are compensable. The Board concludes that the remaining days of claimant's hospitalization in June 1976 and his hospitalization in December 1976 were not causally related to the claimant's injury.

ORDER

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

The employer is hereby ordered to pay claimant compensation for temporary total disability from June 5, 1976 to June 11, 1976 and to pay the hospital and medical expenses incurred during that period.

Except for the above directive, the Referee's order is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee before the Referee a sum of $300, payable by the employer.

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 granted claimant by this order, payable out of said compensation as paid, to a maximum of $500.

WCB CASE NO. 77-1228 APRIL 5, 1978

LOIS HICKS, CLAIMANT
Dye & Olson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's claim for aggravation to it for acceptance. The Fund contends claimant suffered a new injury.

Claimant, a 56-year-old cook, sustained a compensable injury to her back and right hip on November 11, 1974 when she slipped on a floor mat. Dr. Davis diagnosed an acute traumatic lumbosacral sprain with severe muscle spasms and right sciatic radiculitis with paresthesia.

A Determination Order, dated Febraury 10, 1975, awarded claimant temporary total disability benefits only.

Claimant terminated her employment in the summer of 1975 at her physician's recommendation and because of an angina problem.

On September 12, 1975 claimant bent over to move a garden hose and was unable to straighten up. She saw Dr. Davis the next day; he started treating claimant on September 22, 1975 and found objective findings, on October 26, 1975, which paralleled those of her November 11, 1974 injury. He believed claimant's present symptoms were a direct result of her November 1974 injury and that had she not had the residuals from that injury she would not have suffered this exacerbation; this September incident was not a new injury.

Dr. Balme, who examined claimant at the Fund's request, felt that claimant would need continuing care and evaluation of her back and that her history was consistent with the physical findings. He believed that her present problems were most likely related to her 1974 injury.

Claimant has had continuing pain and problems with her back between the 1974 injury and the 1975 episode and has not been able to do any heavy house work.

The Fund received the two reports from Dr. Davis, dated September 27, 1976 and October 26, 1976. The Fund advised Dr. Davis on January 31, 1977 that it was refusing to pay his medical bill. It advised claimant on June 1, 1977 that it was denying her aggravation claim.

The Referee found that claimant had proven she had suffered an aggravation and remanded her claim to the Fund for payment of compensation. He further assessed a penalty of 25% of any compensation provided by law between October 26, 1976 and June 3, 1977 and awarded claimant's attorney a $750 attorney fee.

The Board, after de novo review, concurs with the Referee's finding relating to her aggravation claim and his assessment of penalties and an attorney fee. However, Dr. Davis' medical bill has not been paid. The Board finds that the Fund is responsible for all medical bills attributable to claimant's aggravation claim. Its refusal to pay such medical bills constitutes unreasonable resistance to pay compensation and a penalty should be assessed against the Fund based on the amount of those bills.

ORDER

The Referee's order, dated October 7, 1977, is modified.

The State Accident Insurance Fund shall pay all of claimant's medical bills related to her aggravation claim.

The State Accident Insurance Fund shall pay to claimant an additional sum equal to 25% of the medical bills incurred by claimant which are related to her aggravation claim.

The Referee's order, in all other respects, is affirmed.

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

WCB CASE NO. 76-6650 APRIL 5, 1978

DONALD MacLEOD, CLAIMANT
Fulop & Gross, Claimant's Atty.
Cheney & Kelley, Defense Atty.
Request for Review by Claimant
Cross-appealed by the Employer

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which granted him 160° for 50% unscheduled low back disability. Claimant contends that he is permanently and totally disabled and the employer, on cross-appeal, contends that the award granted by the Referee 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 August 26, 1977, is affirmed.

WCB CASE NO. 76-4708 APRIL 5, 1978

MARILYN J. SCHRAMM, CLAIMANT
Robert 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 August 19, 1976 Determination Order granting time loss benefits only. Claimant contends that she is entitled to further temporary total disability compensation and that the Fund should be ordered to determine whether her

disability is psychogenic or physical and what treatment, if any, is needed. Further, claimant feels that a program of vocational rehabilitation should be considered or, in the alternative, she contends that she 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 September 12, 1977, is affirmed.

WCB CASE NO. 77-3519 APRIL 5, 1978

VIRGINIA E. SHULTZ, 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 found claimant's condition had become aggravated and awarded her an increase of 32° for 10% unscheduled disability for her low back injury. Claimant's last award of compensation was 192° for 60% unscheduled low back disability and 15° for 10% loss of use of the left leg granted on May 25, 1973. Claimant contends she is now permanently and totally disabled.

Claimant, now 55 years old, was originally injured on March 17, 1971. She was evaluated prior to claim closure by a panel of doctors, including Dr. Post. Dr. Post examined claimant again on April 21, 1977 and reported claimant had greater limitation of motion, persistent muscle spasm and tautness. He found this striking, considering claimant's sedentary way of life. He felt claimant had greater impairment now and would be incapable of even a sedentary occupation on an eight-hour basis, and believed that claimant was permanently and totally disabled.

Claimant filed her aggravation claim and her claim for additional medical services on May 9, 1977. This claim was denied on May 16, 1977 by the Fund.

The Referee found that claimant's condition had become aggravated and awarded her the additional compensation set forth above.

The Board, after de novo review, finds that claimant is permanently and totally disabled. Dr. Post has had the opportunity to examine claimant prior to the last closure of her claim on May 25, 1973 and again in April of 1977. His observations and opinion are persuasive that claimant is permanently and totally disabled. Therefore, the Board finds claimant permanently and totally disabled as of the date of this order.

ORDER

The Referee's order, dated October 18, 1977, is modified.

Claimant is hereby granted an award of permanent total disability effective the date of this order.

Claimant's counsel is granted as and for a reasonable attorney fee in this matter a sum equal to 25% of said increased compensation payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 76-4447 APRIL 5, 1978

DONALD R. SAWYER, 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 as of the date of the hearing, August 10, 1977.

Claimant, a 32-year-old timber faller, sustained a compensable injury on April 11, 1973 when a falling tree broke both his legs in numerous places. Dr. Caughran diagnosed compound comminuted fracture of the right lower leg and a transverse midfemoral fracture of the left leg. These injuries required numerous surgeries. Claimant had a pre-existing left hip fusion. The left leg healed without any complications but the right leg required use of a metal plate and, finally, a bone graft to correct its non-union.

Dr. Post felt claimant was medically stationary in May 1976. Claimant still had an aching discomfort with prolonged standing and activity in his right leg and had difficulty in going down stairs because of limitation of dorsiflexion of the right ankle. Dr. Post felt claimant lacked 50% of normal dorsi-

flexion of his ankle and would continue to have aching discomfort. He believed that claimant suffered permanent impairment in deformity in his right leg (mild) and mild limitation of motion of ankle in dorsiflexion.

A Determination Order, dated July 13, 1976, awarded claimant 45° for 30% loss of his right leg.

Dr. Samuel, who began treating claimant in 1973, reported in December 1976 that claimant had suffered an aggravation of a low back injury which he had sustained while working with this same employer in early 1973. He felt this impairment to claimant's low back was permanent in nature. Dr. Samuel stated that claimant needed to change to a sedentary occupation. Dr. Post concurs with Dr. Samuel's opinion that claimant cannot return to any heavy labor type work or any jobs requiring repetitive lifting, and that he also has limitations on standing and sitting.

Claimant has a tenth grade education plus 60 hours of college credits. Claimant's work experience has been in construction, logging, house painting, and fishing. He has been regularly employed.

Claimant, in 1974, began to work with the Division of Vocational Rehabilitation. In January 1976, with DVR assistance, claimant set up a commercial fishing boat operation, however, he was unable to move about on his boat as quickly as was required due to low back pain and right leg pain. Because of this he couldn't make it a profitable business and in 1977 he leased the boat in an effort to make it pay for itself. This also failed.

Dr. Potter, in November 1976, reported that claimant was not capable of returning to full unrestricted employment or to work either in the woods or as a commercial fisherman. He believed claimant was capable of doing "light duty" requiring the lifting of no more than 30 pounds and not involving excessive walking, sitting or standing.

The Referee found that claimant was permanently and totally disabled.

The Board, after de novo review, finds claimant has suffered a serious injury to his right leg and also an aggravation of his low back condition. Claimant is 36 years old, intelligent and has been a good worker. The consensus of the medical opinion is that claimant is not able to engage in his former occupations but is capable of performing light-sedentary work. There is no indication from any physician that claimant should be considered to be permanently and totally disabled.

The Board, based on the medical evidence, finds claimant has a greater loss of function of the right leg than an award of 30% represents; also, claimant has suffered a substantial loss

of wage earning capacity due to his inability to return to his former occupations.

ORDER

The Referee's order, dated October 28, 1977, is reversed.

Claimant is hereby awarded 75° for 50% scheduled disability for his right leg and 240° for 75% unscheduled low back disability. These awards are in lieu of the award of permanent total disability granted by the Referee's order.

WCB CASE NO. 77-2500 APRIL 7, 1978

OLIVIA AMAYA, CLAIMANT
Harold W. 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 April 6, 1977 Determination Order granting her 32° for 10% 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 November 1, 1977, is affirmed.

SAIF CLAIM NO. HB 159402 APRIL 7, 1978

CHARLES A. BROLLIAR, CLAIMANT
Charles Paulson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, on March 17, 1965, suffered a compensable injury when he was struck by a falling hog carcass at the Kenton Packing Plant. After conservative treatment, the claim was closed on May 19, 1966 with no permanent partial disability award. Claimant continued to receive conservative treatment from Dr. Davis through 1970.

In the fall of 1974 claimant underwent a myelogram and a bilateral facet rhizotomy at L4-5 and L5-S1. The Fund refused to reopen, but when claimant appealed, his claim was settled on December 12, 1974. As the original file in this case was destroyed, it is not certain what was accomplished through this settlement, although there is evidence that claimant still did not receive any permanent disability award.

On April 29, 1977 Dr. Misko indicated that claimant had been having increasing left leg and low back pain and, on May 5, 1977, the doctor requested a reopening for aggravation. After a myelogram and discogram, the diagnosis was a protruded disc at the lumbosacral level.

In August 1977 a laminectomy and disc removal were performed and by December 1977 it was reported that claimant was going quite well. Dr. Carr considered claimant's condition to be stationary on January 30, 1978 as did Dr. Misko.

Claimant, presently, cannot return to his former job with Kenton Packing Plant. He attempted janitorial work but could not tolerate it so he returned to the plant. At the present time he is not working and it is suggested that the Field Services Division of the Workers' Compensation Department attempt to provide him with vocational assistance.

On February 27, 1978 the State Accident Insurance Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted temporary total disability from August 15, 1977 through January 3, 1978. It further finds that claimant's loss of wage earning capacity is significant enough to entitle him to compensation for 40% unscheduled low back disability.

The Board concurs.

ORDER

Claimant is hereby granted temporary total disability compensation from August 15, 1977 through January 30, 1978, less time worked.

Claimant is also granted compensation equal to 128° for 40% unscheduled low back disability.

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 $2,000.

WCB CASE NO. 77-857 APRIL 7, 1978

CHESTER CLARK, CLAIMANT
Doblie, Bischoff & Murray, 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 reversed the decision of the Disability Prevention Division not to refer claimant for vocational rehabilitation and remanded it to the Disability Prevention Division for appropriate action, but found the claimant's claim was properly closed on February 4, 1977 and that claimant was not entitled to temporary total disability benefits after October 18, 1976. Claimant contends his claim was prematurely closed and he is entitled to temporary total disability from the time he was physically able to, and did, resume his vocational retraining program.

Claimant, a 35-year-old mill worker, sustained a compensable injury to his left hip on October 8, 1974 when he slipped on a piece of wood. He was not able to continue with heavy work and was placed in a GED vocational rehabilitation program on February 23, 1976 on referral from the Disability Prevention Division. In September 1976, while in this program, claimant was hospitalized for a condition not related to his industrial injury and his program was terminated on October 12, 1976.

Dr. Spady reported in December 1976 claimant had considerable disability relating to his industrial injury and would have difficulty walking or standing for any significant periods of time.

A Determination Order, dated February 4, 1977, closed claimant's claim with an award for time loss from February 3, 1975 through October 18, 1976 and 75° for 50% loss of the left leg. Claimant was found to be medically stationary on September 19, 1975.

Claimant, after his hospitalization, passed his GED test in December 1976 and after advising his counselor of this fact, requested retraining, but his request was denied. Mr. Parrall, a counselor, was contacted by claimant and he contacted the Disability Prevention Division regarding a plan for claimant. The DPD wanted a plan to be developed before making a formal referral, but Mr. Parrall was unable to do so because the DPD would not advise him about the financial arrangements. Mr. Parrall opined claimant was vocationally handicapped.

Claimant was denied re-referral by the Disability Prevention Division on February 17, 1977. Claimant reapplied in

March of 1977. The Referee found the non-referral by the DPD on February 17, 1977 was arbitrary, capricious and an abuse of discretion and reversed the DPD's decision. However, the Referee found claimant was medically stationary and was not in an authorized program of vocational rehabilitation when the Determination Order was issued, therefore, the claim closure was not premature and claimant was not entitled to any benefits for temporary total disability after October 18, 1976.

The Board, after de novo review, agrees with the Referee's reversal of the Disability Prevention Division's decision not to refer the claimant for vocational rehabilitation.

The Board, however, finds the Determination Order was premature and should be set aside. Claimant was found to be medically stationary on September 19, 1975 but he had not completed his authorized program of vocational rehabilitation when his claim was closed and benefits for temporary total disability were terminated. His initial authorized program of vocational rehabilitation had not been properly terminated. Claimant became ill, was hospitalized due to an unrelated condition, and as a result he couldn't continue in his program for a period of time. However, when he was physically able to so do he did attempt to resume his program. The DPD was unable to find a suitable program but this is not justification for refusing to re-refer claimant when he requested continued training.

On the date of the Determination Order, claimant should have been considered to still be in an authorized program as it had not been properly terminated; claimant still had a vocational handicap. The Determination Order of February 4, 1977 must be set aside and claimant paid compensation for temporary total disability from October 18, 1976 until his claim is closed under ORS 656.268.

The employer is allowed to offset any payments for permanent partial disability it has made pursuant to the Determination Order against the temporary total disability benefits. The employer is allowed reimbursement from the Vocational Rehabilitation Reserve for its payments of temporary total disability benefits made during claimant's participation in an authorized program of vocational rehabilitation.

ORDER

The Referee's order, dated August 4, 1977, is modified.

The Determination Order, dated February 4, 1977, is set aside and claimant is awarded temporary total disability benefits from October 18, 1976 and until his claim is closed pursuant to ORS 656.268.

Payments made for permanent partial disability pursuant to the Determination Order of February 4, 1977 may be used to

offset payment of temporary total disability benefits payable pursuant to this order and the employer is to be reimbursed from the Vocational Rehabilitation Reserve its payment of temporary total disability for the time claimant is in the authorized program of vocational rehabilitation.

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 $500.

WCB CASE NO. 76-5820 APRIL 7, 1978

In the Matter of the Compensation of
BECKY E. ERB, CLAIMANT
And the Complying Status of
TUBBY'S, INC., EMPLOYER
Stevensen, Rossi, Lesan & Johansen,
Claimant's Atty.
Carney, Probst, Levak & Cornelius,
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 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. 77-1839 APRIL 7, 1978

BILLIE LEWIS, CLAIMANT
Carney, Probst, Levak & Cornelius, Claimant's Atty.
Keith D. Skelton, 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. C 253262 APRIL 7, 1978

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

On February 2, 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 May 14, 1970, alleging he was in need of additional medical care and treatment and additional disability benefits. Claimant's claim has been closed and his aggravation rights have expired.

The claimant had requested the State Accident Insurance Fund to reopen his claim but it had refused to do so and claimant contends that this must be considered a rejection to provide further medical care and treatment pursuant to ORS 656.245.

The Fund, after being furnished a copy of claimant's request and the supporting medical reports, responded, stating it had provided claimant with all the treatment indicated.

The Board construed this response to be in opposition to claimant's request. Because the Board did not have sufficient medical evidence before it at that time upon which to make a determination on the merits of claimant's request it referred the matter to the Hearings Division with instructions to hold a hearing on the issue of whether claimant's present condition represented a worsening since the last arrangement or adjustment of compensation which was made on January 10, 1974, thereby justifying a reopening of the claim as requested by claimant; also, to make a determination on the issue of claimant's entitlement to additional medical care and treatment pursuant to ORS 656.245.

After a hearing on May 25, 1975, Joseph D. St. Martin, Administrative Law Judge (ALJ), caused a transcript of the proceeding to be prepared and submitted to the Board together with his recommendation.

The Board, after de novo review of the transcript and a study of the ALJ's recommendation, adopts as its own the ALJ's recommendation, a copy of which is attached hereto and, by this reference,made a part hereof.

ORDER

Claimant is found to be permanently and totally disabled and entitled to compensation therefor from the date of this order.

Claimant's attorney is awarded as a reasonable attorney's fee the sum of $1,150, payable out of the award for permanent total disability, payable as paid.

The State Accident Insurance Fund shall pay claimant's out-of-pocket expenses for prescriptions and medical care.

The State Accident Insurance Fund shall also pay claimant compensation equal to 25% of said expenses and pay claimant's attorney the sum of $750 because of its wrongful refusal to furnish medical care and treatment pursuant to the provisions of ORS 656.245.

WCB CASE NO. 77-33 APRIL 7, 1978

MICHAEL O'NIELL, CLAIMANT
James H. Nelson, Claimant's Atty.
Evohl Malagon, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which granted claimant compensation equal to 48° for 15% unscheduled low back disability. The employer contends that claimant is not entitled to any 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 September 14, 1977, is affirmed.

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

WCB CASE NO. 76-3535 APRIL 7, 1978

In the Matter of the Compensation
of the Beneficiaries of
MERRILL RAY, DECEASED
Lively & Wiswall, Claimant's Atty.
Brian Pocock, Defense Atty.
Stipulated Order on Review

COME NOW, John Svoboda of Lively & Wiswall, attorneys for beneficiaries in the above entitled matter, and Brian Pocock, attorney for the insurer, State Accident Insurance Fund, and stipulate to the following:

WHEREAS, the beneficiaries of Merrill Ray previously requested Board Review, and

WHEREAS, the Board on the 6th day of January, 1978, issue an Order on Review, and

WHEREAS, on the 19th day of January, 1978, the Board issued an Amended Order on Review, and

WHEREAS, on the 17th day of February, 1978, the Board entered its Order Abating Amended Order on Review, and

WHEREAS, counsel for the State Accident Insurance Fund, Brian Pocock, and counsel for the beneficiaries of Merrill Ray, John Svoboda of Lively & Wiswall, desire that the Board enter its Order resolving all issues,

NOW,THEREFORE, based upon the stipulation hereinafter set forth, it is hereby ordered as follows:

1. That the Referee's Order dated June 23, 1977, is modified as follows:

(a) That claimants/beneficiaries are granted death benefits under the Statute from February 18, 1976, until July 7, 1976. That in addition, a sum equal to 25 per cent of such compensation for death benefits under the statute is granted to claimants/beneficiaries.

(b) That claimant's attorney is awarded as reasonable attorney's fee for his services rendered in this matter in a sum of $600.00 to be paid by the State Accident Insurance Fund and not to be deducted from the proceeds payable to the beneficiaries of Merrill Ray.

IT IS SO STIPULATED.

WCB CASE NO. 76-3824 APRIL 7, 1978

MITCHELL A. ROSE, CLAIMANT
Joseph Gillham, 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 from the date of the hearing, May 9, 1977.

Claimant, a 44-year-old timber faller, sustained a compensable injury on May 9, 1969 when he fell, injuring his back and right knee. He had been walking on a partially rotted windfall which gave way causing him to fall and to land in a brush pile upside down, hanging by his right leg.

Claimant sought medical treatment from Drs. Gilbert and McKillop who diagnosed a damaged medial meniscus that could be treated without surgery. Claimant continued to work but his knee pain was constant and Dr. McKillop indicated need for a removal of the medial meniscus. This surgery was performed on July 11, 1969.

Claimant was released for light work in November 1969, with some pain and intermittent swelling of his knee.

Dr. McKillop, in February 1970, found claimant had paresthesias of his lower leg into the foot and complete paralysis of his right great toe extensor. Drs. McKillop and Smith both felt this condition was due to a compression neuropathy of the peroneal nerve on the right which was surgically corrected. Dr. McKillop noted claimant also had some low back difficulty. A myelogram in January 1971 revealed L4-5 defect, right.

Claimant was found medically stationary on November 19, 1971 and a Determination Order, dated December 17, 1971, awarded claimant 48° for 15% unscheduled low back disability and 30° for 20% loss of the right leg.

Claimant returned to work as a logger, rising to a foreman's position, but by November of 1974 he had returned to Dr. McKillop with complaints of lumbosacral pain with some radiation into the right thigh. Claimant was hospitalized. The Fund accepted claimant's aggravation claim and reopened the claim for further medical treatment and temporary total disability.

Drs. Smith and McKillop performed a laminectomy and a transverse process spinal fusion L4-5 and S1 on May 14, 1975. After the surgery claimant had back stiffness and aching. He was advised to wear a back brace.

Dr. McKillop found claimant medically stationary on May 26, 1976, but still having a good deal of pain. Dr. McKillop felt claimant was unable to return to his former employment and felt claimant needed a job change and training.

A Determination Order, dated July 1, 1976, awarded claimant an additional 80° for 25% unscheduled low back disability, making a total of 128° for 40% unscheduled disability and 30° for 20% loss of the right leg.

Claimant was referred to the Division of Vocational Rehabilitation on July 10, 1976. Claimant has a high school education and has worked as a logger all of his life. Claimant was declared ineligible by DVR in October 1976 because his physical problems were too severe. Claimant has developed an eye condition which is progressively worsening but not job related, but it was considered by DVR in finding claimant ineligible. Claimant also had been found to be ineligible previously.

The Referee found, based on claimant's age, education, and work experience, that claimant was entitled to compensation for permanent total disability. He found the eye symptoms did not predate the work injury, but they were not the major component of claimant's disability.

The Board, after de novo review, finds that claimant is no longer able to engage in his former employment as a logger or foreman of a crew nor can he engage in any heavy labor jobs; however, he has a high school education and is not an individual who has only his back to rely on for earning his livelihood. Claimant's ability to be retrained for other careers was greatly affected if not terminated by the subsequent development of his eye symptoms, which are not related to his on-the-job injury.

The Board concludes that claimant is not permanently and totally disabled as the result of his on-the-job injury of May 9, 1969, but claimant has suffered a greater loss of earning capacity than that for which he was previously awarded. The Board believes that an award of 256° for 80% unscheduled disability will adequately compensate claimant for his loss of wage earning capacity. The award of 30° for 20% loss of the right leg is adequate.

ORDER

The Referee's order, dated August 5, 1977, is modified.

Claimant is awarded 256° for 80% unscheduled low back disability and 30° for 20% loss of the right leg. This is in lieu of the award of permanent total disability made by the Referee's order, which in all other respects is affirmed.

SAIF CLAIM NO. A 641728 APRIL 7, 1978

CARBA SISK, CLAIMANT
Raymond Rees, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 20, 1977 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an injury suffered on October 28, 1957. The Fund responded to this request, stating that it doubted that claimant was totally disabled and, because he had already received awards totaling 60%, he had been adequately compensated.

The Board, by an order dated June 17, 1977, found that it did not have sufficient evidence to determine the merits of claimant's request and remanded the claim to the Hearings Division with instructions to hold a hearing and take evidence on the issue of whether or not claimant's present condition is the result of his 1957 injury and, if so, if claimant's present condition represents a worsening thereof since the date of his last award of compensation for the 1957 injury.

A hearing was held on July 28, 1977 before John D. McLeod, Administrative Law Judge (ALJ), who found, based on the medical evidence and the testimony of claimant at the hearing, that claimant is permanently and totally disabled.

The Board, after thorough consideration of the transcript, the medical evidence and the ALJ's recommendation, affirms the findings and conclusion of the ALJ contained in his recommendation, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

Claimant is hereby considered to be permanently and totally disabled 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 increased compensation granted by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-3121 APRIL 11, 1978

LEVEAR BROOKS, CLAIMANT
Davies, Brooks, Strayer, Stoel & Bcley, 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 160° for 50% unscheduled low back disability. Claimant contends this award is not sufficient. The State Accident Insurance Fund cross-appeals, contending the Referee's award is too high.

Claimant, a 64-year-old upholsterer, sustained a compensable injury to his back on August 16, 1976 while lifting and turning pieces of furniture. He was treated conservatively for the injury which was diagnosed as lumbosacral strain with bilateral radiculopathy with probable disc related disease. Claimant had suffered from degenerative arthritis of the lumbar spine and probable degenerative disc disease prior to this surgery.

Dr. Hardeman felt claimant had advanced degenerative osteoarthritic changes; he believed claimant was medically stable in April 1977 with mild residual symptoms manifested by back pain. He opined claimant was unable to return to his former employment because it required a considerable amount of lifting.

Dr. Pasquesi, after examining claimant in January 1977, reported claimant had tremors in his lower extremities. Claimant had lost approximately 30 pounds which Dr. Pasquesi was unable to explain but he felt the weight loss was unrelated to claimant's industrial injury. His diagnosis was a strain superimposed upon degenerative changes. Dr. Pasquesi said claimant had chronic minimal to mild pain and his impairment was equivalent to 5% of the whole man. He recommended claim closure.

Claimant denied ever having tremors.

A Determination Order, dated March 31, 1977, awarded 16° for 5% unscheduled low back disability.

Claimant has an eleventh grade education and has been employed as an upholsterer for more than 40 years. He has not undergone any surgical operations and is not using pain medications.

Claimant testified he was unable to bend or to stoop very long and unable to lift very much. He has given up his hobby of making cabinets, but still makes picture frames and flower boxes. He is able to use a saw for about 15 minutes before taking a rest.

The Referee found it difficult to reconcile the medical testimony of Dr. Pasquesi with the testimony of claimant whom he found to be credible, but claimant could have and would have continued working except for his injury. Claimant was forced into involuntary retirement and as a result had sustained a substantial loss of his wage earning capacity. He awarded claimant 160° for his low back injury.

The Board, after de novo review, finds the claimant's loss of wage earning capacity does not justify an award for 50% of the maximum allowed for unscheduled disability. Based on the medical evidence that claimant's residuals were minimal to mild, and considering all of the other evidence the Board concludes claimant would be sufficiently compensated with an award of 112° for 35% of the maximum for unscheduled disability.

ORDER

The Referee's order, dated September 19, 1977, is modified.

Claimant is hereby awarded 112° for 35% unscheduled low back disability. This is in lieu of the award made by the Referee's Opinion and Order which in all other respects is affirmed.

WCB CASE NO. 77-2073 APRIL 11, 1978

JAMES E. BUTLER, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order on Remand

On January 27, 1978 the Court of Appeals for the State of Oregon dismissed claimant's petition for judicial review and remanded the matter to the Workers' Compensation Board with directions for it to remand the above entitled matter to its Hearings Division to set for hearing on the issue of the extent of claimant's disability for his May 13, 1968 industrial injury.

IT IS SO ORDERED.

WCB CASE NO. 77-3253 APRIL 11, 1978

ORLANDO CHADA, CLAIMANT
Evohl F. Malagon, 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. 76-4148-B APRIL 11, 1978

LEROY D. COLLINS, CLAIMANT
Elden M. Rosenthal, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith, Defense Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which ordered that the State Accident Insurance Fund be dismissed as a party defendant in the above entitled matter. The employer contends that the injuries suffered under the State Accident Insurance Fund are important to the proper disposition of this case.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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 as a reasonable attorney's fee for his services in connection with this Board review a sum equal to $300, payable by the carrier.

SAIF CLAIM NO. FC 249676 APRIL 11, 1978

HELEN M. EWIN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, a 65-year-old substitute school teacher, fell and injured her left hip and left forearm on June 4, 1970 while conducting a class field trip. Dr. McGough removed her femoral pins on June 14, 1971 and, on October 7, 1971, performed a closing examination. Left hip findings revealed no limp, left forearm findings indicated a mild dorsal angulation at the fracture site with decreased left wrist ranges of extension and flexion with some left index finger residuals, and the doctor noted some low back complaints. On December 13, 1971, Dr. Pasquesi found essentially the same thing with additional left hand residuals.

A Determination Order, dated December 23, 1971, granted 45° for 30% loss of the left leg and 23° for approximately 15% loss of the left forearm. This Determination Order was affirmed by a hearings officer and by the Board; however, a circuit court judgment order, dated October 29, 1973, granted claimant additional compensation for 20% of the left leg and affirmed the left forearm award. Dr. Rusch performed a left hip total replacement on April 8, 1977.

On August 16, 1977 claimant requested own motion relief to reopen his June 4, 1970 claim. An Own Motion Order, issued September 28, 1977, directed that this claim be reopened with temporary total disability benefits to commence April 8, 1977.

Claimant was found to be medically stationary by Dr. Pasquesi on January 10, 1978. He noted that claimant was using a cane and had a left-sided limp. Range of motion in the left hip were found to be decreased and claimant complained of pain and fatigue. The doctor noted her low back complaints and attributed them to the change in her gait. Dr. Rusch was asked if he agreed with this evaluation; he did not respond.

On February 9, 1978 the State Accident Insurance Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted additional time loss benefits from April 8, 1977 through January 10, 1978 and granted compensation equal to 48° for 15% unscheduled low back disability.

The Board concurs with this recommendation.

ORDER

Claimant is granted temporary total disability from April 8, 1977 through January 10, 1978, less time worked, and compensation equal to 48° for 15% unscheduled low back disability.

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 $2,000.

WCB CASE NO. 77-3686 APRIL 11, 1978

GEORGE H. KNOETZEL, CLAIMANT
Ringle & Herndon, 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 denial by the Fund. Claimant contends his claim is compensable and also that he is entitled to penalties and attorney fees for the Fund's failure to pay compensation for temporary total disability within 14 days of the date of the claim.

Claimant, a 60-year-old bus driver, alleges he suffered a psychological injury. He last worked on March 4, 1977 and since then has been under psychiatric care. Claimant filed his claim on April 29, 1977, however, his employer had knowledge of his condition on April 13, 1977. The Fund did not pay any compensation until June 2, 1977 when it paid claimant compensation from March 1, 1977. The claim was denied on June 24, 1977.

Claimant's problem is a paranoid condition. His problem began in the fall of 1975, after a conversation with a co-worker. From this time on and until he quit his employment, claimant's condition worsened and he became increasingly sensitive and felt others were maligning him.

Claimant sought medical assistance from Dr. Davis, a clinical psychologist, and Dr. McCulloch, a psychiatrist. Both believed that claimant's condition, based on the history related to them by claimant, was work related.

Dr. Colbach, also a psychiatrist, who examined claimant at the request of the employer, felt that claimant's onset of symptoms at work was coincidental. He believed that claimant was a casualty of life, rather than of any particular job. Dr. Colbach's opinion was based on the fact that it didn't appear that claimant was submitted to any extraordinary stresses on his job. He felt claimant developed his serious mental illness at

this point of his life and he happened to be working at the time of the onset of his mental condition.

The Referee found claimant's perception of things was a product of his paranoia and that there was no solid evidence of any actual unusual personal stress placed on claimant at work. He did not find a causal relationship between claimant's work and his problem, and affirmed the Fund's denial.

The Referee stated that because the claim was not compensable he could not assess penalties or award attorney's fees under the ruling by the Court of Appeals in Jones v. Emanuel Hospital, 29 Or App 265, although he would have had the claim been compensable.

The Board, after de novo review, agrees with the Referee's affirmation of the Fund's denial of the claimant's claim. Dr. Colbach's evaluation of the claimant is more persuasive than that of either Dr. Davis or Dr. McCulloch. The Board finds, as did the Referee, that the claimant did not prove a causal relationship between his work and his mental illness.

On October 18, 1977 the Supreme Court reversed the ruling of the Court of Appeals in the Jones case and ruled that the payment of compensation must be made within 14 days after the employer has notice or knowledge of the claim regardless of whether the claim is ultimately found to be not compensable; if such payment is not made, then the employer is liable for penalties and for the payment of claimant's attorney's fee.

Inasmuch as the Supreme Court's ruling in Jones was made after the Referee's Opinion and Order, the Referee's ruling cannot be held in error but must be corrected to conform to the ruling of the Supreme Court. Therefore, the Board finds claimant is entitled to a penalty equal to 25% of the compensation he was paid for the period between March 3 and June 2, 1977, the date of the Fund's payment, payable by the Fund and also claimant's attorney is entitled to a reasonable attorney's fee to be paid by the Fund because of the Fund's unreasonable resistance to the payment of compensation.

ORDER

The Referee's order, dated August 18, 1977, is modified.

The State Accident Insurance Fund shall pay claimant a sum equal to 25% of the compensation it had paid claimant for temporary total disability for the period March 3, 1977 through June 2, 1977.

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 awarded claimant by this order, payable out of said compensation as paid, not to exceed $500.

The Referee's affirmance of the State Accident Insurance Fund's denial of claimant's claim on June 24, 1977 is affirmed.

WCB CASE NO. 77-1169 APRIL 11, 1978

GERTRUDE LYNCH, CLAIMANT
Samuel M. Suwol, Claimant's Atty.
Lindsay, Nahstoll, Hart & Krause,
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 her claim.

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

ORDER

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

WCB CASE NO. 77-376-IF APRIL 11, 1978

JAMES O. MEYERS, CLAIMANT
Knappenberger & Tish, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Order on Review

On March 31, 1978 an Order on Review was entered in the above entitled matter which reversed the Referee's order entered on September 8, 1977.

The Board, after reconsideration, concludes that the Referee's order should not have been reversed but merely modified.

Therefore, on page two of said order in the first paragraph under the "Order" portion the word "modified" is substituted for the word "reversed", and between the third and fourth paragraphs in the "Order" portion the following paragraph should be inserted:

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

Except for the above amendments, the Order on Review is reaffirmed and ratified.

SAIF CLAIM NO. A 872730 APRIL 11, 1978

JOHN D. MIZAR, CLAIMANT
Galton, Popick & Scott, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On October 10, 1977 claimant, by and through his attorney, had requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered on July 25, 1961. The claim had been accepted by the State Industrial Accident Commission, predecessor of the State Accident Insurance Fund, and claimant had been awarded 21.75° on or about January 8, 1973; his aggravation rights have now expired.

Claimant allegedly suffered an industrial injury on August 15, 1977 while employed by Portland Distributing Company and he filed a claim therefor which was denied on the basis that claimant had a pre-existing condition prior to that accident which his doctor said was an aggravation of his 1961 injury. Claimant requested a hearing on the denial.

The Board referred the matter to the Hearings Division to set for hearing on a consolidated basis on the issue of the propriety of the denial of the 1977 claim and on the issue of whether claimant's request for own motion relief with regard to his 1961 claim should be granted. After the matter had been remanded to the Hearings Division, the Administrative Law Judge (ALJ) to whom the matter had been assigned was directed to also include in his recommendation whether claimant's claim for a new injury on June 18, 1969, which had been denied, and the subsequent surgery necessitated thereby, and also the surgery required on June 17, 1974, were causally related to the 1961 industrial injury.

After a hearing, the ALJ found that claimant's present condition was a result of a new injury suffered on August 15, 1977 and was the responsibility of the carrier, EBI, to whom he remanded the claim.

In his recommendation to the Board on the claimant's petition for own motion relief, the ALJ, based upon the opinion expressed by claimant's treating physician, Dr. Nag, found there was a causal relationship between the 1969 episode and the 1961 injury and there was no question but that the 1974 surgery on the claimant's right leg was directly connected to the 1969 surgical procedure.

The ALJ found that the Fund had denied the 1969 claim on the grounds that claimant's back pain had existed prior to his employment with his then employer, Quality Brands. It was

his opinion that under those circumstances the Fund could not now deny that the 1969 episode was an aggravation of the 1961 injury because the denial in 1969 was based on the fact that the injury was an aggravation of a prior injury. He concluded that if the Fund was now directed to accept the claim for aggravation it would only be doing what it should have done in 1969 and again in 1974. The ALJ recommended that the Board assume own motion jurisdiction and remand claimant's 1961 claim to the Fund for processing.

The Board, after de novo review of the complete record, accepts the recommendation of the ALJ.

ORDER

Claimant's claim for an industrial injury suffered on July 25, 1961 is hereby remanded to the State Accident Insurance Fund for the payment of compensation, as provided by law, for the period claimant was incapacitated as a result of the 1969 injury and also the 1974 surgery and until his claim is closed pursuant to the provisions of ORS 656.278.

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

WCB CASE NO. 77-2229 APRIL 11, 1978

DOROTHY PENKAVA, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order on Remand

On January 27, 1978 the Court of Appeals for the State of Oregon dismissed claimant's petition for judicial review and remanded the matter to the Workers' Compensation Board with directions for it to remand the above entitled matter to its Hearings Division to set for hearing on the issue of the extent of claimant's permanent disability and entitlement to further "time loss benefits" for her May 10, 1966 injury to her right leg and back.

IT IS SO ORDERED.

WCB CASE NO. 77-5232 APRIL 11, 1978

BERTHA RADJENOVIC, CLAIMANT
Evohl Malagon, 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 she is entitled in addition to assessing penalties and attorney fees 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 November 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. 77-4550 APRIL 11, 1978

TERRY L. REID, CLAIMANT
Merten & Saltveit, Claimant's Atty.
Dezendorf, Spears, Lubersky & Campbell,
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 compensation equal to 64° for 20% unscheduled low back disability. Claimant contends that he should be placed in an authorized program of vocational rehabilitation or, in the alternative, that he is entitled to an increased permanent disability 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 January 16, 1978, is affirmed.

WCB CASE NO. 77-4855 APRIL 11, 1978

MOUIN SALLOUM, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order

On February 13, 1978 an Opinion and Order was entered in the above entitled matter and on February 25, 1978 the claimant advised the Board by letter that he would like to have it review the Referee's Opinion and Order.

On March 29, 1978 the Board received from the State Accident Insurance Fund a Motion to Dismiss claimant's Request for Review on the grounds that claimant had failed to serve his notice of appeal on the Fund as required by ORS 656.295(2).

The Board finds that the Motion to Dismiss was served upon the claimant by an attorney for the State Accident Insurance Fund on March 10, 1978. The claimant has not responded nor has the Board been furnished with any evidence that a copy of claimant's Request for Review was mailed to the State Accident Insurance Fund, a party to the proceeding before the Referee.

Therefore, the Motion to Dismiss claimant's Request for Review must be granted.

IT IS SO ORDERED.

WCB CASE NO. 76-5720 APRIL 11, 1978

KENNETH R. SAMPLES, CLAIMANT
Williams, Spooner & Graves, 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 to which he was 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 October 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 Fund.

WCB CASE NO. 76-6912 APRIL 11, 1978

EMMA RUTH TURPEN, CLAIMANT
Smith & Lee, Claimant's Atty.
Beddoe & Hamilton, 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 affirmed the November 20,1975 Determination Order, and the amendment thereto dated December 22, 1975, which granted her no permanent disability award. Claimant contends that she is permanently 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 November 8, 1977, is affirmed.

WCB CASE NO. 77-947 APRIL 12, 1978

JOHN B. RILEY, CLAIMANT
Blyth, Porcelli & Moomaw, Claimant's Atty.
Philip Mongrain, 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 Determination Order of January 13, 1977. Claimant contends he is permanently and totally disabled.

Claimant sustained a compensable injury on April 6, 1970 when a ladder he was on slipped, causing him to fall about five feet. His injury was diagnosed as a dorsal spine sprain. Claimant returned to work but experienced bad headaches and severe muscle spasms in his back. A myelogram performed in September 1970 was normal.

Claimant has had various psychological problems relating to injuries. In June of 1972, he was anxious to work but afraid he was not able to do so.

Dr. Hickman, who had seen claimant at various times from 1963 to 1976, felt claimant, after the 1963 injury, had very poor chance to be rehabilitated.

Claimant underwent a spinal fusion at L2-L3 in 1972; thereafter, he completed a program at the Portland Pain Center.

The Orthopaedic Consultants, who have seen claimant on various occasions from 1975 to 1977, concluded that loss of function of his back was severe and that his emotional status had worsened.

Claimant cannot do work which involves bending, twisting, lifting, carrying weights, pushing or pulling and no prolonged sitting or standing. Claimant's work experience has been in construction-maintenance work, sales work, and setting up mobile homes.

A Determination Order dated January 13, 1977 awarded claimant 112° for 35% unscheduled disability for his low back injury. Claimant had received 48° for 15% in 1972.

The Referee viewed the films which showed claimant engaged in various activities that were inconsistent with his testimony. The Referee concluded claimant was not credible and had failed to cooperate in various programs instituted to bring him to a place where he could respond constructively to vocational rehabilitation, and he affirmed the Determination Order dated January 13, 1977.

The Board, after de novo review, finds that claimant has undergone four spinal fusions and two laminectomies as a result of his various back injuries. The Orthopaedic Consultants had examined claimant on various occasions and each time found claimant's condition had worsened.

The Board does not find claimant to be permanently and totally disabled. The films indicated that claimant engaged in various activities, however, claimant, after admitting he engaged in these activities, stated he experienced problems afterwards.

The Board concludes that claimant has suffered a substantial loss of wage earning capacity and to be adequately compensated therefor claimant is entitled to an award of 256° for 80% unscheduled low back disability.

ORDER

The Referee's order, dated August 26, 1977, is modified.

Claimant is awarded 256° for 80% unscheduled low back disability. This is in lieu of 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 on Board review a sum equal to 25% of the increased compensation granted by this order, payable out of such compensation as piad, not to exceed $2,300.

WCB CASE NO. 76-2956 APRIL 12, 1978

C. A. RICKETTS, 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 awarded him 320° for 100% unscheduled low back disability. Claimant contends he is permanently and totally disabled.

Claimant was a 60-year-old self-employed rancher when he sustained a compensable injury to his back on April 18, 1975. He fell off a truck, landing flat on his back on a concrete slab. His injury was diagnosed as a severe back sprain superimposed on degenerative arthritis of his lumbar spine and for which claimant was treated conservatively.

Dr. Scheinberg stated in November of 1975 that claimant was completely disabled due to his degenerative arthritis, chronic lumbosacral and dorsal strain, which were superimposed on lower extremity muscle weakness secondary to multiple old injuries that required claimant to wear braces on both legs.

A Determination Order, dated January 9, 1976, awarded claimant 240° for 75% unscheduled low back disability.

Dr. Scheinberg and the physicians at Orthopaedic Consultants, who examined claimant on November 15, 1976 and rated his disability as moderately severe, concurred that due to claimant's age it was not practical to enroll claimant in a vocational rehabilitation program.

In June 1977 Dr. Scheinberg stated claimant was permanently and totally disabled and unable to return to any work.

Since the injury of April 18, 1975 claimant has developed coronary heart disease, which he controls by use of medication and also a condition which affects claimant's ability to void. Dr. Weber related this problem to claimant's back condition and felt it was aggravated by it.

Claimant also suffers from a pre-existing diabetes condition.

Claimant has a sixth grade education. His work experience consists of self-employment in building and development industry and operating cattle ranches.

Claimant currently has a limitation of motion of his back and chronic back pain and discomfort which is exacerbated by activities requiring bending, stooping, prolonged standing, sitting, lifting or driving.

The Referee found claimant was not permanently and totally disabled. He felt claimant had not made an effort to look for a job and intended to retire early.

The Referee concluded that if claimant was permanently and totally disabled it was due to both his industrial injury (his back) and his non-industrial conditions (heart and voiding problem) and the latter post-dated the former. However, the Referee concluded that claimant, to be adequately compensated for his loss of wage earning capacity, was entitled to 320° for 100% unscheduled low back disability.

The Board, after de novo review, finds that claimant is permanently and totally disabled. The medical evidence establishes the severity of claimant's condition, which coupled with his age, education and work experience, supports such an award. The Board finds claimant is not suited for Division of Vocational Rehabilitation assistance. Dr. Scheinberg reported in June 1977 that claimant was permanently and totally disabled and unable to perform even sedentary activities. Based on this evidence, the Board concludes claimant should be considered as permanently and totally disabled as of the date of this order.

ORDER

The Referee's order, dated Spetember 9, 1977, is modified.

Claimant shall be considered as permanently and totally disabled and entitled to compensation therefor as of the date of this order. This is in lieu of the award made 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 at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of such compensation as paid, not to exceed $2,300.

WCB CASE NO. 76-1729 APRIL 12, 1978

LLOYD WRIGHT, CLAIMANT
Dye & Olson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

On August 24, 1977 the Board received a request from the State Accident Insurance Fund to review the Opinion and Order of the Referee entered in the above entitled matter on August 5, 1977 which found claimant to be permanently and totally disabled as of the date of the Referee's Opinion and Order.

On August 11, 1977 claimant, by and through his attorney, had requested reconsideration of the date for commencement for claimant's permanent total disability. On September 1, 1977 the Administrative Law Judge (ALJ) entered an Interim Order directing that the matter continue under his jurisdiction until full consideration could be given to the request for reconsideration. On September 14, 1977 the ALJ entered his Amended Opinion and Order on Reconsideration whereby he directed that claimant be paid compensation for permanent total disability as of September 5, 1975, allowed the Fund to make the proper offset or adjustment for sums paid for permanent partial disability pursuant to the Determination Order, dated October 2, 1975, approved the attorney's fee agreement between claimant and his counsel and ordered that the Amended Opinion and Order on Reconsideration supersede and replace in all repsects the original Opinion and Order entered on August 5, 1977.

When the Fund requested Board review of the ALJ's Opinion and Order on August 24, 1977 the ALJ was divested of jurisdiction and the subsequent Interim Order and Amended Opinion and Order on Reconsideration have no force in effect. Therefore, the Board, in its de novo review, has considered only the findings, conclusions and order set forth in the Opinion and Order dated August 5, 1977.

After de novo review, the Board concludes that claimant should be considered as permanently and totally disabled as of October 2, 1975, the date of the first Determination Order.

ORDER

The Administrative Law Judge's order dated August 5, 1977 is modified.

Claimant is to be considered as permanently and totally disabled and entitled to compensation therefor as of October 2, 1975.

The State Accident Insurance Fund may make the proper offsets or adjustments for sums paid for permanent partial disability pursuant to the Determination Order, date October 2, 1975.

In all other respects the ALJ's order, dated August 5, 1977, 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 additional compensation awarded to claimant by this order, payable out of said compensation as paid, not to exceed $2,300.

SAIF CLAIM NO. EC 264488 APRIL 13, 1978

JOSEPH W. JONES, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On January 10, 1978 the claimant requested that his claim for an injury sustained in September 1970 while in the employ of Tube Forgings of America, whose workers' compensation coverage was furnished by the State Accident Insurance Fund, be reopened by the Board pursuant to the authority given to it under the provisions of ORS 656.278.

Claimant's claim was closed in February 1972 with an award for 45% permanent partial disability of the knee; claimant has continued to work, although with varying degrees of pain, for the same employer since the injury and up until November 28, 1977 when he was forced to quit.

In support of his request the claimant furnished a medical report from Dr. Sirounian, an orthopedic physician, based upon the examination of claimant by him on December 7, 1977 and also a report from the Orthopaedic Consultants, based upon an examination by them of claimant on March 17, 1978.

Both reports were sent directly to the Fund as was the original request for own motion relief. All of these documents have now been forwarded by the Fund to the Board for appropriate action.

The Board, after a study of both reports, concludes that claimant's present condition, which is basically disability of his right knee, is directly related to his knee strain and the subsequent medial meniscectomy of September 1970 and that the symptoms he is experiencing now are late results of an injury with an arthrotomy and removal of semilunar cartilage.

ORDER

Claimant's claim no. EC 264488 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on November 28, 1977 and until closed pursuant to the provision of ORS 656.278, less time worked.

WCB CASE NO. 77-4292 APRIL 14, 1978

VINCENT R. ALLEN, 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 granted him compensation equal to 3.45° for 5.75% loss of hearing in the left ear and 17.21° for 28.70% loss of hearing in the right ear. 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 November 9, 1977, is affirmed.

WCB CASE NO. 77-710 APRIL 14, 1978

TOMMY BAXTER, CLAIMANT
Bailey, Welch, Bruun & Green, Claimant's Atty.
Philip A. Mongrain, 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 aggravation to it for acceptance and payment of compensation, as provided by law, commencing March 4, 1977 and until closed pursuant to ORS 656.268.

Claimant originally injured his low back on September 22, 1971. This injury was diagnosed as a cervical dorsal strain and contusion to the dorsal area which aggravated a pre-existing back condition.

A Determination Order, dated November 28, 1972, awarded claimant 32° for 10% unscheduled low back disability. This award was increased to 64° by a stipulation approved on November 3, 1973.

Dr. Reid's report in July 1975 stated his opinion that claimant's condition had not worsened since September 1971. He repeated this opinion in July 1976, however, on September 20, 1976, he reported that claimant's condition had retrogressed. He felt claimant's prognosis was poor for returning to any form of gainful employment requiring much physical exertion.

Dr. Serbu, who had examined claimant in 1973, examined claimant in December 1976 and reported his condition was different, i.e., in addition to the low back discomfort, he had neck discomfort, headaches, diplopia, etc. Claimant still had severe functional overlay.

Dr. McCarthy reported claimant's cervical movements were restricted about 40% to 50% of normal and accompanied by pain. He diagnosed chronic dorsocervical sprain attended by bilateral occipital neuralgia.

Claimant's aggravation claim was denied on January 20, 1977.

Dr. Kuttner, a psychiatrist, reported on March 4, 1977 that claimant needed to be involved in activity toward rehabilitation to lessen the impact of combined physical and psychological situations. Dr. Kuttner felt that if claimant was able to involve himself, he had a fair prognosis for eventual return to employment. He felt, at the time of his report, that claimant's condition prohibited him from working.

Dr. Knox, in May 1977, stated that claimant had a probable traumatic-thoracic outlet syndrome with superimposed multiple mononeuropathics involving the upper extremities. He also found evidence of residual trauma, particularly to the right hand and acute and chronic cervicothoracic lumbar muscular strain. In June 1977, Dr. Knox reported claimant had multiple mild or early mononeuropathics of his left upper extremity. Dr. Knox indicated he was being treated with PEET regimen of exercises for his thoracic outlet syndrome and several medications.

The Referee found, even though films showed claimant was able to do things he testified he could not do, that the preponderance of the medical evidence indicated that claimant's condition had worsened since his last award and required further medical care and treatment. He concluded claimant's aggravation claim should be accepted as of March 4, 1977.

The Board, after de novo review, agrees with the Referee's findings and conclusion. There is some conflict in claimant's testimony and also some conflict in the medical evidence,

however, the greater weight of the evidence supports the finding that claimant's condition has worsened since his last award of compensation.

ORDER

The Referee's order, dated September 12, 1977, is affirmed.

Claimant's attorney is granted as a reasonable attorney's fee at Board review the sum of $350, payable by the employer.

WCB CASE NO. 76-4022 APRIL 14, 1978

KELLY HANER, CLAIMANT
Anderson, Fulton, Lavis & Van Thiel,
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 40.5° for 30% loss of the left foot. Claimant contends he is entitled to an award rated on loss of leg rather than foot and also is entitled to an award of permanent partial disability for his headaches.

Claimant, a 30-year-old truck driver, was injured on September 9, 1974 when he was thrown from his truck. His injuries were diagnosed as fracture of the left ankle, lacerations of scalp, left hip and multiple contusion and a bruising of his right ankle. Claimant's ankle was first treated by application of a short leg cast and traction in a hospital. In October of 1974 Dr. Cherry operated and placed two screws in the left ankle. Claimant first complained of headaches while in the emergency room. Claimant did not have a skull fracture and was conscious, displaying no signs of a concussion on his admission. Dr. Steinmann felt claimant's headaches were caused by the muscle spasm intention and healing process of his head wounds. Dr. Reimer reported in March of 1976 claimant suffered chronic muscle contraction headaches. He was uncertain if this condition was related to claimant's industrial injury. He noted claimant stated he did not suffer from headaches like this prior to his injury.

Claimant complained of pain in his knee but by May 19, 1975 this condition had improved. He was given an injection on one occasion for his knee problem.

Claimant was found to be medically stationary on May 21, 1976; his claim was closed by a Determination Order, dated July 1, 1976, which awarded him 27° for 20% loss of his left foot (ankle).

Claimant has now returned to work, driving a crew bus and performing various other tasks for his employer.

The Administrative Law Judge (ALJ) found that claimant's contention that he had permanent partial disability of his knee had not been proven. The only evidence of a problem with his left knee was references to soreness and the only evidence of disability was one cortisone injection.

The ALJ concluded that claimant had not established a causal relationship between his injury and his headaches, therefore, he did not award claimant any permanent partial disability for his headaches. The ALJ, however, increased claimant's award for loss of a leg to 40.5°.

The Board, after de novo review, finds claimant has established a causal relationship between his injury and his headaches and, therefore, finds the headaches are compensable. However, this is an unscheduled disability and the sole test to be applied is loss of wage earning capacity and the evidence fails to show that claimant has lost any of his wage earning capacity. Therefore, treatment provided for claimant's headaches under ORS 656.245 will be sufficient.

ORDER

The Administrative Law Judge's order, dated October 21, 1977, is modified.

The Fund shall furnish claimant the necessary medical care and treatment for his headaches, under the provisions of ORS 656.245.

In all other respects the order of the Administrative Law Judge is affirmed.

SAIF CLAIM NO. HC 183317 APRIL 14, 1978

M. NADINE HOLLOWAY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 22, 1978 the claimant wrote to the Workers' Compensation Board and requested that the Board, presumably exercising its own motion jurisdiction pursuant to ORS 656.278, reopen her claim for an industrial injury suffered in January 1969. Claimant's claim had been accepted, closed and her aggravation rights now have expired.

Claimant was hospitalized at Holladay Park Hospital in September 1977 to relieve pressure on her knee. In January 1978

she again was hospitalized for traction and further examination. As a result of this examination it was determined that claimant would require another operation. She had had corrective surgery for her knee in 1969 and in 1970; one for a medial cartilage and one for a lateral cartilage tear.

Dr. Cohen examined claimant on January 6, 1978 and performed an arthrogram which revealed degenerative arthritis of the knee with a rather large popliteal cyst. He recommended a posterior lateral tightening of the capsular structure in an effort to relieve the instability of the left knee. Dr. Cohen stated that claimant had not worked since December 26, 1977.

The Fund has had the opportunity to read claimant's request and also Dr. Cohen's two reports, one of January 31, 1978 and another of February 27, 1978 and it advised the Board verbally on April 5, 1978 that it would not oppose the reopening of claimant's claim at this time.

The Board, after due consideration, finds that the medical reports from Dr. Cohen indicate a causal relationship of claimant's present left knee condition to her injury of January 1969 and concludes that her request to reopen her claim should be granted.

ORDER

Claimant's claim no. HC 183317, which was filed for a compensable industrial injury suffered in January 1969, is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing September 1, 1977 and until her claim is closed pursuant to the provisions of ORS 656.278, less any time worked.

CLAIM NO. 144-69-362 APRIL 14, 1978

ROBERT L. INMAN, CLAIMANT
Own Motion Order

On January 9, 1978 claimant requested the Board to exercise its own motion jurisdiction pursuant to the provisions of ORS 656.278 and reopen his claim for an industrial injury suffered while working for Georgia-Pacific on November 6, 1969. Georgia-Pacific, self-insured, accepted the claim, it was closed and claimant's aggravation rights now have expired.

Georgia-Pacific was advised of the request for own motion relief and responded, stating that it had no opposition to the reopening of the claim pursuant to the Board's own motion jurisdiction.

ORDER

Claimant's claim for an industrial injury suffered on November 6, 1969 is hereby remanded to Georgia-Pacific, a self-insured, for the payment of compensation, as provided by law, commencing December 8, 1977 and until closed pursuant to the provisions of ORS 656.278, less time worked by claimant during that period.

WCB CASE NO. 76-6604 APRIL 14, 1978

BRUCE R. KEEP, CLAIMANT
Ragen & Roberts, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Jones, Lang, Klein, Wolf & Smith,
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 Administrative Law Judge's (ALJ) order which found that claimant's present condition was an aggravation of his 1972 injury and remanded his claim to the Fund.

Claimant was injured on June 14, 1972 while employed by Beaver Heat Treating Corporation, whose workers' compensation carrier was the Fund. Claimant suffered a fracture of his left foot and a crushed pelvis; he was off work 3 months.

On May 29, 1973, claimant went to work for Precision Cast Parts, whose workers' compensation carrier was Argonaut Insurance Company. In January 1976 claimant suffered an onset of increasing back pain and disability while lifting some castings, which required claimant to be hospitalized for one week in November 1976. Claimant was off work from September 1, 1976 to January of 1977.

Dr. Gambee, claimant's only treating physician, had advised the Fund on August 10, 1976 that claimant had acute exacerbation of his previous back trouble and his claim should be reopened.

Claimant filed his claim with his employer, Precision Cast Parts, on September 1, 1976. The Fund requested a medical report from Dr. Gambee on September 21, 1976 but claimant did not receive any assistance and he refiled his claim on October 7, 1976.

Claimant's counsel corresponded with the Fund requesting payment of all medical bills, temporary total disability and

acceptance or denial of the claim, but received no response.

The Fund, on October 29, 1976, indicated Argonaut Insurance had responsibility for claimant's claim.

Claimant's counsel then requested that the Board designate a paying agent pursuant to ORS 656.307. On December 16, 1976 the Board designated the Fund as the paying agent.

Claimant finally received temporary total disability benefits on December 28, 1976. The Fund indicated claimant's medical bills had been paid on March 7, 1977.

The ALJ found claimant had proven his present condition was an aggravation of his 1972 injury. He also found that the Fund's handling of claimant's claim was "somewhat callous" and that its actions amounted to unreasonable resistance to the payment of compensation and he assessed a penalty of 25% of the compensation due claimant from November 17, 1976 until the date of the .307 order.

The Board, after de novo review, agrees that claimant had aggravated his 1972 injury but the commencement date of temporary total disability benefits should have been the date claimant actually left his job which was September 1, 1976, and the penalties should have been assessed on the amount of temporary total disability benefits awarded from that date.

The Board also finds that the Fund, after the entry of the .307 order, did not pay all of claimant's medical bills. Therefore, the Board imposes against the Fund for failure to pay certain medical bills promptly a penalty equal to 25% of the amount of such medical bills.

ORDER

The Administrative Law Judge's order, dated June 28, 1977, is modified.

Claimant's claim for aggravation is hereby remanded to the State Accident Insurance Fund for acceptance and the payment of compensation, as provided by law, commencing on September 1, 1976, the date that claimant was forced to quit his job, and until the claim is closed pursuant to the provisions of ORS 656.268.

The State Accident Insurance Fund is directed to pay claimant additional compensation equal to 25% of the compensation for temporary total disability due claimant from September 1, 1976 until December 16, 1976, the date the Fund was designated as a paying agent by an order issued pursuant to ORS 656.307.

The State Accident Insurance Fund is also directed to pay claimant additional compensation equal to 25% of the medical bills which related to claimant's injury and were not promptly paid after the entry of the order designating the Fund as the paying agent.

In all other respects the ALJ's order is affirmed.

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

WCB CASE NO. 77-3644 APRIL 14, 1978

ETHEL B. LOVE, 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 her compensation equal to 112° for 35% unscheduled low back disability. Claimant contends that she was not medically stationary as of the date of the hearing and that her claim should be reopened with temporary total disability compensation to continue being paid until she is released for work. In the alternative, 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 October 25, 1977, is affirmed.

WCB CASE NO. 77-3770 APRIL 14, 1978

DONALD MARTIN, 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 his claim.

The Board, after de novo review, affirmes and adopts the Opinion and Order of the 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 13, 1977, is affirmed.

WCB CASE NO. 77-196 APRIL 14, 1978

WELDON McFARLAND, 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 Administrative Law Judge's order which assessed penalties and attorney fees against it for its failure to pay compensation in a timely manner in addition to certain medical bills.

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

ORDER

The order of the Administrative Law Judge, dated May 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 $150, payable by the Fund.

SAIF CLAIM NO. EC 214838 APRIL 14, 1978

WILBUR SLATER, CLAIMANT
Alan Scott, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order Remanding for Consolidated Hearing

On March 29, 1978 the claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278(1) and order the State Accident Insurance Fund to reopen his claim for a compensable industrial injury suffered on October 27, 1969. The injury was to claimant's left knee and occurred while he was employed by O'Neil Transfer Company. The claim was closed by Determination Order dated May 6, 1971; claimant's aggravation rights have expired.

Claimant alleges he continued to have problems with the left leg and knee and supports his request for own motion relief with medical reports from his current treating physician, Dr. Harris, dated March 13 and March 23, 1978.

Claimant had previously filed a claim for aggravation in the fall of 1977 which was denied; that denial along with the denial of compensability of the right knee problem have been consolidated for a hearing under WCB Case Nos. 77-5738 and 77-5739 to be heard before H. Don Fink, Administrative Law Judge (ALJ), on April 18, 1978.

At the present time the Board does not have sufficient evidence before it to judge the merits of claimant's request for own motion relief, therefore, it refers said request to its Hearings Division and, specifically, to H. Don Fink, ALJ, for the purpose of receiving evidence and making a determination on the merits of claimant's claim for own motion relief on his October 27, 1969 industrial injury.

After the hearing, the ALJ shall, in addition to entering an order on the matters entitled WCB Case Nos. 77-5738 and 77-5739, cause a copy of the transcript of the proceedings to be furnished to the Board together with his recommendation on claimant's request for own motion relief on his October 27, 1969 injury.

WCB CASE NO. 75-1827 APRIL 14, 1978

WENDALL P. WICK, CLAIMANT
Gary 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 his claim for an 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 October 21, 1977, is affirmed.

WCB CASE NO. 77-1670 APRIL 14, 1978

JUANITA WILLIAMS, 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 Fund's denial of her claim.

Claimant, a 65-year-old welfare assistant worker, had been employed for three years in interviewing, certifying food stamp applicants and doing investigative field work. Claimant was subjected to various forms of hostility and threats during the course of her employment. Claimant and her witness testified that the demands of her job increased in 1976 as did the hostilities. In October of 1976, claimant terminated her job because she was unable to cope with the demands of her job. She became upset, nervous and cried all the time.

Dr. Sanders had begun treating claimant in July 1976. He reported in October 1976 that claimant suffered chronic gastritis. He found claimant to be anxious and depressed.

Claimant filed her claim for accidental injury or occupational disease on October 14, 1976. The Fund originally deferred the claim and, on January 14, 1977, it denied it.

Dr. Sanders reported in February 1977 that he felt the pressures of claimant's job had aggravated claimant's gastritis.

The Referee found claimant had failed to meet her burden of proving her claim was compensable. He did not find any medical evidence to establish a causal relationship between claimant's job duties and her disabling gastric illness. He did not believe Dr. Sander's opinion relative to the pressures of claimant's job and the "threats" she received was sufficient to establish such a relationship.

The Board, after de novo review, finds claimant has proven a compensable claim. Dr. Sanders, in his February 25, 1977 report, related claimant's condition to her job duties and there was no medical evidence to the contrary. The Referee's inability to understand what Dr. Sanders means does not have the effect of contradicting or discrediting such opinion.

ORDER

The Referee's order, dated August 30, 1977, is reversed.

Claimant's claim is remanded to the State Accident Insurance Fund for acceptance and for payment of benefits as provided by law, commencing July 27, 1976 and until it is closed pursuant to ORS 656.268.

Claimant's attorney is awarded for his services before the Referee the sum of $100, payable by the State Accident Insurance Fund.

Claimant represented herself before the Board, therefore, although she prevailed an attorney fee cannot be granted to her.

WCB CASE NO. 77-5339 APRIL 18, 1978

DONALD ANDERSON, CLAIMANT
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 Administrative Law Judge's order which granted claimant compensation equal to 128° for 40% unscheduled permanent partial disability. The Fund contends that the August 17, 1977 Determination Order granting claimant 32° for 10% disability should be reinstated.

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

ORDER

The order of the Administrative Law Judge, dated December 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 $350, payable by the Fund.

WCB CASE NO. 76-6518 APRIL 18, 1978

MARK BLATTERBAUER, 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 Administrative Law Judge's order which affirmed the carriers denials of his claim for low back and left shoulder injuries.

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

ORDER

The order of the Administrative Law Judge, dated October 18, 1977, is affirmed.

WCB CASE NO. 76-6151 APRIL 18, 1978

WILLARD GALUSHA, CLAIMANT
Grant, Ferguson & Carter, Claimant's Atty.
Collins, Velure & Heysel, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Administrative Law Judge's order which remanded claimant's aggravation 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 Administrative Law Judge, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Administrative Law Judge, dated August 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 $350, payable by the carrier.

WCB CASE NO. 76-5504 APRIL 18, 1978

DENISE HOSTETLER, 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 Administrative Law Judge's order which affirmed the State Accident Insurance Fund's denial of claimant's aggravation claim.

Claimant, a meter maid, sustained an injury to her back on March 16, 1976 while reaching to lift a windshield wiper blade. Her claim was accepted as a non-disabling injury.

On June 1, 1976 claimant visited her obstetrician on a scheduled visit complaining of back ache and cramping. Claimant was approximately two months pregnant at that time. On June 3, 1976 she was involved in a car accident for which she sought a medical checkup at a hospital because she was shaken by the accident and concerned about her pregnancy. The hospital records reveal claimant suffered an abdominal contusion.

Claimant was assigned to a foot patrol, but her back continued to be painful. She missed work from June 21 to July 21, 1976. Dr. Grossenbacher felt this time off was related to her March 16, 1976 injury.

Dr. Zuelke, in June of 1977, believed that claimant's back problems were the result of her injury of March 1976, but possibly were aggravated by her pregnancy.

Claimant attempted to have the Fund reopen her claim but her "aggravation" claim was denied by the Fund on August 10, 1976 because of the intervening automobile accident on June 3, 1976.

At the hearing the Fund moved to dismiss, first, because no claim had been filed, and second, because the Administrative Law Judge had no jurisdiction to reclassify a non-disabling injury as a disabling injury.

The Administrative Law Judge agreed that he lacked jurisdiction to reclassify claimant's claim as disabling, but did have jurisdiction to hear claimant's aggravation claim. The Administrative Law Judge found expert medical opinion was necessary to show causal relationship because of the complicacy of claimant's claim, and the medical opinions received had been based on erroneous or incomplete histories. He concluded, based on all the evidence, that claimant had failed to meet her burden of proof to establish an aggravation claim.

The Board, after de novo review, finds that an Administrative Law Judge has jurisdiction to change the classification of an injury to disabling from non-disabling.

It is clear from the evidence, claimant's back condition has worsened since her last award of compensation. Claimant, on June 1, 1976, prior to her automobile accident, had worsening low back pain. After the automobile accident, she sought a medical checkup only because of her pregnancy and this checkup revealed only an abdominal contusion, no back conditions.

The Board concludes claimant has proven her aggravation claim.

ORDER

The Administrative Law Judge's order, dated August 31, 1977, is reversed.

Claimant's aggravation claim is hereby remanded to the State Accident Insurance Fund for payment of compensation, as provided by law, commencing June 21, 1976 and until it is closed pursuant to ORS 656.268.

The State Accident Insurance Fund shall pay claimant an additional sum equal to 25% of the compensation due and owing claimant from June 21, 1976 to August 10, 1976, pursuant to ORS 656.262(8).

Claimant's attorney is awarded as a reasonable attorney's fee for his representation of claimant at the hearing level the sum of $250, payable by the State Accident Insurance Fund.

Although claimant prevailed at Board review she represented herself, therefore no attorney fee can be awarded.

WCB CASE NO. 76-504 APRIL 18, 1978
WCB CASE NO. 77-1508

NORMA C. KEUTER, CLAIMANT
Dye & Olson, Claimant's Atty.
Tooze, Kerr, Peterson, Marshall & Shenker, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Administrative Law Judge's order which granted her 30° for 20% loss of function of both hands and 96° for 30% unscheduled pulmonary 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 Administrative Law Judge, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Administrative Law Judge, dated October 17, 1977, is affirmed.

WCB CASE NO. 77-3135 APRIL 18, 1978

EVELYN A. REEVES, CLAIMANT
J. Bradford Shiley, 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 Administrative Law Judge'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 Administrative Law Judge, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Administrative Law Judge, dated September 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 Fund.

WCB CASE NO. 77-4999 APRIL 18, 1978

HIRAM E. SMITH, CLAIMANT
Souther, Spaulding, Kinsey, Williamson & Schwabe, 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 Determination Order dated July 26, 1977 whereby claim-

ant was awarded 100° for 100% loss of vision in his left eye and 112° for 35% unscheduled head and neck disability. Claimant contends that he is permanently and totally disabled.

Claimant was 61 years old and employed as a mechanic when, on December 11, 1973, a 1500 pound compression spring slipped out of a vise striking him in the face. After several surgeries, the left eye was removed. In January 1974 claimant was referred to Dr. Groves because he was complaining of constant ringing in his left ear; he was also seen by Dr. Chenoweth for consultation on his eye.

During the past three years claimant has also been treated and/or examined by a multitude of doctors, all specialists in their field, a clinical psychologist and a certified rehabilitation counselor.

Both Dr. Wilson and Dr. Mettler found that claimant had some high frequency loss in either ear probably associated with noise-induced hearing as well as some physiologic change with age. Neither believed claimant had suffered any compensable loss of hearing in either ear.

Claimant, who was nearly 65 at the time of the hearing in November 1977, testified that the accident injured his left eye, his lip and pushed the left side of his head back; he stated that he had not worked since the injury. Claimant has not finished the eighth grade and the vision in his remaining eye is not as good as it should be; he is only able to read for 10 or 15 minutes before getting a headache. He testified that the reading material must be held about 10 inches from his eye or his eye goes blurry.

Claimant is only able to drive locally and not in heavy traffic because his vision and coordination are impaired. He stated that he is also unable to do good work with his hands because of his poor coordination; he took up leather carving as a hobby but is able to work at it for not more than 30 minutes before his vision blurs.

Claimant testified that he has almost constant headaches although he did not have headaches prior to his injury. He is not able to bend over and if he attempts to do so while doing yard work he loses his balance and tends to fall to the left.

The Referee found that the award of 100° for loss of vision in claimant's left eye was proper inasmuch as the left eye has been surgically removed but, after reviewing all of the medical reports, concluded that claimant was permanently and totally disabled primarily because of his age rather than because of any physical or psychological impairment resulting from the injury. He relied on Dr. Raaf's opinion that claimant's age would be a deterring factor to the employment of claimant even though he might be employable.

The Referee concluded that the awards made by the Determin-

ation Order of July 26, 1977 were adequate to compensate claimant both for his loss of vision in the left eye and his loss of wage earning capacity resulting from his unscheduled head and neck disability.

The Board, on de novo review, finds adequate evidence, both vocational, psychological and medical, which clearly reveals that claimant is permanently and totally disabled.

Claimant has been hospitalized nine times and has undergone several major surgeries including the removal of his left eye. His education was terminated at the end of the eighth grade and his work experience during his entire life consists of extremely heavy duty work. Claimant has no other specialized skills or training.

The evidence is uncontradicted that since the injury claimant has almost constant headaches. He takes a pain medication with codeine for these headaches and is forced to lie down frequently during the day because of them. Claimant is very limited insofar as his driving is concerned; so limited, in fact, that he is not even capable of driving to a prospective place of employment. Although the doctors do not feel that claimant has a compensable loss of hearing in either ear, nevertheless, claimant has problems when he attempts to go into crowds or be around sharp noises. He bumps into people and becomes confused because of the vision problems resulting from the industrial injury and also has problems with his balance and loss of equilibrium. The Board finds that none of the activities in which claimant engaged prior to his injury can now be done by claimant as a result of that injury. The residual problems experienced by claimant demand constant medical attention.

For 20 years prior to the industrial injury claimant had been able to work full time as a heavy duty mechanic and over a 45-year period to his injury in December 1973 claimant had lost two brief periods of time from work. The employer attempts to show that claimant has some ability to do light housekeeping and, therefore, he has not lost all of his wage earning capacity. The Board finds this argument untenable.

The Board agrees with the Referee's statement that at age 64 it is unrealistic to expect claimant to be retrained for a suitable and gainful job. This is borne out by the appraisal made by Mr. Rode, a certified rehabilitation counselor.

The Board concludes that the psychological report standing alone would be sufficient to justify a finding of permanent total disability and this evidence is unrebutted. However, in addition to the psychological evidence, there is an abundance of medical evidence which indicates that claimant can no longer engage in any suitable and gainful employment on a regular basis. Only Dr. Raaf's report indicates that claimant has some highly remote option of being employed. This report is outweighed by all of the other medical and lay evidence.

The Board concludes that claimant must be considered as permanently and totally disabled as a result of his industrial injury and should be entitled to receive compensation for such permanent total disability from the date of this order.

ORDER

The order of the Referee, dated November 29, 1977, is modified.

Claimant shall be considered as permanently and totally disability and entitled to compensation therefor as of the date of this order. This is in lieu of the awards made by the Determination Order dated July 26, 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 additional compensation awarded claimant by this order, payable out of such compensation as paid, not to exceed the maximum of $2,300.

WCB CASE NO. 77-314 APRIL 19, 1978

MOSES BUCKNER, CLAIMANT
Emmons, Kyle, Kropp & Kryger, 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 Administrative Law Judge's order which remanded claimant's aggravation 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 Administrative Law Judge, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Administrative Law Judge, dated October 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 $100, payable by the Fund.

WCB CASE NO. 76=6308 APRIL 19, 1978

FREDERICK M. CHAMBERS, CLAIMANT
Robert H. Fraser, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Moore.

The State Accident Insurance Fund requests Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's claim for aggravation to it to be accepted and for the payment of compensation, as provided by law, commencing May 1, 1976, the date of the injury, and until the claim is closed pursuant to ORS 656.268, ordered it to pay claimant an additional amount of 25% of the amounts due him for compensation benefits from May 1, 1976 to January 31, 1977, pursuant to the provisions of ORS 656.262(8), and awarded claimant's attorney an attorney's fee of $1,500 payable by the Fund.

The Board, on de novo review, concurs in the findings and conclusions reached by the ALJ in his Opinion and Order, a copy of which is attached hereto. However, the ALJ erred in ordering the Fund to pay claimant a penalty from May 1, 1976 to January 31, 1977. The Fund denied the claim on November 9, 1976 and no penalties shall be assessed beyond the date of the denial.

ORDER

The order of the Administrative Law Judge, dated August 31, 1977, a copy of which is attached hereto, is modified by deleting from the third line in the third paragraph on page 5, "January 31, 1977",and inserting in lieu thereof, "November 9, 1976".

In all other respects the ALJ's Opinion and Order is affirmed.

WCB CASE NO. 76-6390 APRIL 19, 1978

JOE HOLMES, JR., CLAIMANT
Bloom, Ruben, Marandas, Berg, Sly
& Barnett, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On April 7, 1978 the Board received from claimant, by and through his attorney, a Motion to Reconsider its Order on Review entered in the above entitled matter on March 28, 1978.

The Board, after due consideration of the facts set

forth in the affidavit supporting the motion, concludes that they are not sufficient to justify a reconsideration of the Order on Review; however, the evidence offered in support of the motion might be sufficient basis for a claim for aggravation.

ORDER

The claimant's Motion to Reconsider the Order on Review entered in the above entitled matter on March 28, 1978 is hereby denied.

WCB CASE NO. 77-3097 APRIL 19, 1978

JOSEPH JACOBSON, 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 requests Board review of the Administrative Law Judge's (ALJ) order which remanded claimant's claim for aggravation to it to be accepted and for the payment of compensation as provided by law.

Claimant suffered a compensable injury to his low back in November 1973 while employed as a cook in a restaurant. A lumbar laminectomy was performed in December 1973 and in October 1974 a Determination Order awarded claimant 96° for 30% unscheduled low back disability. On March 7, 1975 a stipulation was approved whereby claimant was awarded an additional 56°; this was the last award or arrangement of compensation received by claimant for his November 1973 injury.

Claimant obtained his GED at a local community college in 1975. During the academic year 1975-1976 claimant, who lived in Salem, attended a community college in Portland. Claimant drove round trip five days a week; the drive one way would take approximately one hour and claimant alleges his back bothered him occasionally and sometimes prevented him from studying. After claimant completed the academic year, he obtained a job in the summer at Dammasch Hospital at Wilsonville serving food and cleaning up tables. He worked five days a week, eight hours a day, driving between Salem and Wilsonville daily. Again claimant stated he experienced left leg and low back symptoms. The job was completed in September and claimant intended to return to school, however, due to inadequate grades he did not do so.

It was at this time that claimant indicated his back and leg symptoms were such that he was not able to work, drive back and forth to school, or attend classes. In November 1976

claimant was seen by Dr. Buza, an orthopedic physician, who prescribed Valium and referred claimant to Dr. Reilly, a neurologist. Dr. Reilly found no neurological abnormality, a myelogram was performed and the results were interpreted as normal with no evidence of change since the pre-surgical myelogram in November 1973. A stimulator was prescribed which was of some help in reducing the "chronic" pain and of course physical therapy was attempted but resulted in no significant benefits. Surgery was not recommended.

It was stipulated that claimant received time loss compensation from November 23, 1976 through March 17, 1977 at which time claimant's claim for aggravation was denied by the Fund.

The ALJ found that claimant now has leg and back discomfort much as he did in March 1975; he also has muscle spasms similar to those he had before. He is required to lie down approximately three hours a day and he testified that his back is now, particularly since March 1975, sometimes more painful than prior to his surgery. Claimant thought on an overall basis his condition had worsened because of his reduced activity level. This was supported by testimony offered by claimant's brother.

The ALJ found both claimant and his brother were credible witnesses. He found no expert medical opinion to show claimant's condition had become aggravated since the last arrangement or award of compensation, however, the ALJ concluded that the need for such expert medical evidence was on a case by case basis.

In this case, the Fund, by paying for claimant's medical services, treated the claim as one for ORS 656.245 benefits and the ALJ found that in order for claimant to receive those benefits a relationship had to exist between the industrial injury and the needed medical services. The ALJ found that claimant's testimony, the similar pathological processes involved and the Fund's characterization of the claim all indicated that a sufficient connection had been made between claimant's condition requiring treatment and the industrial injury.

With respect to whether or not claimant's condition was worse than it was on March 7, 1975, the ALJ found that the worsening was primarily related to pain which was not scientifically measurable. The ALJ concluded, because of this and claimant's credible testimony regarding the disabling effects of the pain and the lack of evidence of an intervening injury and the fact that the treatment provided under .245 was in part curative, that claimant had established sufficient causal relationship.

The Board, on de novo review, finds, as did the ALJ, no medical support for claimant's claim for aggravation, only lay evidence. Uris v. Compensation Department, 247 Or 420, which the ALJ refers to in his opinion, states that the claimant can

meet his burden of proof regarding causation without expert medical evidence only in "uncomplicated situations". The Board finds that claimant's back injury was certainly not uncomplicated.

The burden of proof is upon claimant to show that he has aggravated his condition since the last award of compensation. In this case, the lay evidence tends to indicate that possibility; however, there is no medical evidence offered in support thereof. Dr. Reilly found no neurological abnormality, the myelogram performed was interpreted as normal with no evidence of change since the pre-surgical myelogram in November 1973.

The Board concludes that claimant has failed to prove that his condition has aggravated since March 7, 1975 and, therefore, his claim for aggravation was properly denied.

ORDER

The order of the Administrative Law Judge, dated November 22, 1977, is reversed.

The denial of claimant's claim for aggravation dated March 17, 1977 is approved.

WCB CASE NO. 76-2032 APRIL 19, 1978

In the Matter of the Compensation
of the Beneficiaries of
GEORGE W. KENYON, SR., DECEASED
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the Beneficiaries

Reviewed by Board Members Wilson and Moore.

The beneficiaries of George Kenyon, deceased workman, seek Board review of the Referee's order which affirmed the carrier's denial of their claim for 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 April 12, 1977, is affirmed.

WCB CASE NO. 77-1461 APRIL 19, 1978

KIRIL KUTSEV, CLAIMANT
D. Richard Hammersley, 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, dated June 17, 1977, which found claimant had sustained a new injury to his back on February 27, 1976 and remanded the claim therefor to it for payment of benefits.

The Board, on August 30, 1976, entered an Own Motion Determination which, based on a finding that claimant had aggravated a 1969 injury, had awarded claimant compensation.

The Fund contends that claimant suffered an aggravation of his 1969 injury and that it has paid compensation therefor pursuant to the Own Motion Determination; that the Board should either vacate its prior Own Motion Determination and credit the Fund for payments it has made pursuant thereto or vacate the Referee's order on the grounds he was without authority to try the matter after the Own Motion Determination had been entered.

Claimant, a foam rubber cutter, originally sustained a compensable injury to his back on February 27, 1969 while employed by Leonetti Furniture Company, whose carrier was the Fund. Claimant received conservative treatment and his claim was closed with no award for permanent disability.

Claimant left this job after the 1969 accident and went to work for GMB as a tree planter and thinner. GMB is also covered by the Fund. This work is strenuous and heavy. On February 27, 1976 claimant slipped on a steep hill and experienced low back and right leg pain. Claimant had had these same symptoms after his 1969 injury.

Dr. Paluska reported in June 1971 that claimant suffered sub-acute lumbosacral strain with right side sciatic. He felt these problems were related to claimant's 1969 injury. Dr. Paluska reported in October 1974 that claimant continued to have the same symptoms and felt claimant had a ruptured disc L5-S1 right side caused by the 1969 injury. He recommended a myelogram and laminectomy.

Dr. Heusch, in April 1976, performed a hemi-laminectomy L4-L5, right with excision of bulging nucleus pulposus L4-L5, right. After this surgery claimant had minor exacerbations, but was found to be medically stationary on July 28, 1976 by Dr. Heusch who believed claimant had permanent partial disability due to his low back injury and was unable to lift objects weighing more than 10 pounds.

On August 30, 1976 the Own Motion Determination granted claimant temporary total disability benefits and 48° for 15% unscheduled back disability.

Dr. Heusch reported in December of 1976 that claimant was working as a tree planter and thinner, but had continuing pain in the low back and right leg.

On January 27, 1977 the Fund denied claimant's claim for the February 1976 incident and claimant requested a hearing.

Claimant, in April 1977, was employed to do light carpentry work. Dr. Heusch reported in May 1977 that it was possible claimant had suffered a new injury in February 1976, based on claimant's increased symptoms at that time.

The Referee found that claimant had been doing very strenuous and heavy work after the 1969 accident and until his February 1976 incident. He found claimant's back symptoms were now more severe. He concluded the February 1976 incident was a new injury and the responsibility of GMB Planting Company.

The Board, after de novo review, finds its Own Motion Determination was in error and should be set aside. The Referee correctly determined that the claimant had sustained a new injury on February 27, 1976. The Board finds no basis for vacating the Referee's order.

Any adjustment to be made in the two accounts involved is a decision for the Fund to make.

ORDER

The Referee's order, dated June 17, 1977, is affirmed.

The Board's Own Motion Determination, dated August 30, 1976, is set aside in its entirety.

Claimant's attorney is awarded as a reasonable attorney fee for his services at Board review the sum of $300, payable by the Fund.

Board Member George A. Moore specially concurring:

I agree with the Order on Review but would grant the Fund the right to offset any and all payments it has previously made pursuant to the Board's Own Motion Determination dated August 30, 1976 against the payments directed to be made pursuant to the Referee's order dated June 17, 1977.

/s/ George A. Moore, Board Member

WCB CASE NO. 77-3363 APRIL 19, 1978

JACK L. PARVIN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
Cosgrave & Kester, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the Administrative Law Judge's (ALJ) order which granted claimant 192° for 60% permanent low back disability.

Claimant, a 39-year-old steel mill utility man, sustained a compensable injury to his low back on August 7, 1975 when he lifted a box of shear blades. Dr. Kiest, who examined claimant in October 1975, found claimant, who had missed five weeks of work after his injury, was experiencing low back pain with radiation down his left leg, but was still working at his employer's mill. Claimant was laid off in November 1975 and Dr. Kiest recommended the Disability Prevention Division attempt to find a lighter job for claimant.

In February 1976 claimant was examined at the Disability Prevention Division. The diagnosis was chronic lumbosacral strain, degenerative disc disease with radiculopathy left and allergic dermatitis. Claimant was found to have moderate anxiety and tension due to his injury.

Dr. Kiest performed a lumbar myelogram which revealed mild encroachment at the L4-5 level; it was not deemed surgically treatable. His final diagnosis was chronic lumbar strain. Dr. Kiest had claimant use a transcutaneous stimulator in April 1977.

Claimant had worked with Vocational Rehabilitation from April 1976 to April 1977; he was terminated because Vocational Rehabilitation was unable to assist him.

Claimant, on his own, entered a truck driving school which he completed after a four-week program. He has held two truck driving jobs since his completion of the school.

A Determination Order, dated May 6, 1977, awarded claimant 48° for 15% unscheduled low back disability. Claimant had been found to be medically stationary on January 13, 1976.

The Administrative Law Judge found the medical evidence was sufficient to support the finding that claimant was entitled to an award of 192° for 60% unscheduled low back disability.

The Board, after de novo review, finds that claimant, after his injury, continued to work for his employer and had testified that he could still do his old job if it had not been eliminated. Claimant's failure at Vocational Rehabilitation was partially due to his dislike for the type of training he was receiving. Claimant is currently working as a truck driver at a higher rate of pay than with his old employer.

The Board concludes, based on all the evidence, claimant is entitled to a greater award than that given by the Determination Order, but the increase should be less than that awarded by the ALJ. The Board finds claimant will be adequately compensated for his loss of wage earning capacity by an award of 80° for 25% unscheduled disability.

The Board suggests that the Division of Vocational Rehabilitation give consideration to the payment of $1195 to claimant to reimburse him for his costs incurred in taking the retraining program as a truck driver under the private program.

ORDER

The Administrative Law Judge's order, dated September 30, 1977, is modified.

Claimant is hereby granted 80° for 25% unscheduled low back disability. This is in lieu of the award granted by the ALJ's order, which in all other respects is affirmed.

WCB CASE NO. 77-3885 APRIL 20, 1978

NANCY S. BARKLEY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, 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 Administrative Law Judge's order which affirmed the April 12, 1977 Determination Order whereby she was granted 32° for 10% 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 Administrative Law Judge, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Administrative Law Judge, dated September 16, 1977, is affirmed.

WCB CASE NO. 77-3266 APRIL 20, 1978

ROBERT L. HEIDT, CLAIMANT
Thompson, Mumford & Anderson, Claimant's Atty.
Merten & Saltveit, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of the Administrative Law Judge's order which granted claimant compensation for permanent total disability.

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

ORDER

The order of the Administrative Law Judge, dated November 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 carrier.

WCB CASE NO. 77-949 APRIL 20, 1978

HERSHEL A. SHAMBLIN, 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 96° for 30% unscheduled back disability and affirmed that portion of the April 7, 1977 Determination Order which awarded claimant 67.5° for loss of his right foot and 47.25° for the loss of his left foot.

Claimant contends that he is permanently and totally disabled or, in the alternative, that he is entitled to greater awards for his back and feet than those granted by the Referee.

Claimant, a 42-year-old lather,sustained a compensable injury to both of his feet and to his back on August 8, 1974 when he fell 10 feet from a scaffolding. His injuries were diagnosed

as severely comminuted fractures of both heel bones, worse on the right; a mildly displaced cortical fracture of the lateral tip of the right lateral malleolus, and a mild compression deformity of the body of T7 with possible micro-fractures from T7 through T12. Claimant has received various forms of treatment for these problems, including the Portland Pain Center.

Vocational rehabilitation was suggested, but claimant resided in Idaho and the coordination for vocational rehabilitation between Oregon and Idaho was somewhat confused, resulting in claimant not being vocationally retrained.

Claimant is now required to wear special boots because of his heel problems. He continues to have constant pain in both feet and in his low back.

Claimant, now 45 years old, has an eighth grade education and has worked his entire life in heavy labor occupations. There is no evidence claimant suffered from any disability prior to the August 18, 1974 injury.

The consensus of medical opinion is that claimant is able, physically, to engage in various forms of employment.

The Referee found that the evidence clearly indicated claimant was not planning to return to work. He noted claimant did not even begin to seek employment until his attorney advised him to do so. The Referee concluded the Determination Order awards for claimant's foot problems were adequate, but that claimant had suffered a greater loss of earning capacity because of his back disability than was indicated by the Determination Order's award of 32°. He increased the award to 64° for 20% of the maximum for unscheduled disability.

The Board, after de novo review, finds that the evidence reveals that the loss claimant suffered to his right foot is greater than that for which he has been previously compensated and he is entitled to an increased award for that disability. The award of 47.25° for loss of his left foot is adequate.

The Board finds that claimant's back condition does prevent him from returning to some of his previous types of employment but claimant could do some type of work if he was so motivated. However, the Board concludes that claimant has suffered a greater loss of wage earning capacity due to his back injury than that for which he was previously awarded.

ORDER

The Referee's order, dated October 18, 1977, is modified.

Claimant is hereby granted 81° for 60% loss of his right foot and 192° for 60% unscheduled low back disability. These awards are in lieu of the awards made by the Referee's order, which in all other respects is affirmed.

Claimant's counsel is awarded 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. 77-4600 APRIL 20, 1978

LESLIE A. TOMPKINS, CLAIMANT
Harold W. Adams, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks Board review of the Administrative Law Judge's order which affirmed the Determination Order dated July 8, 1977 whereby claimant was granted 16° for 5% unscheduled neck disability.

The Board, after de novo review, affirms and adopts, with the exception of the first paragraph on page four thereof, the Opinion and Order of the Administrative Law Judge, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

The order of the Administrative Law Judge, dated November 17, 1977, with the exception of the first paragraph on page four thereof, is affirmed.

WCB CASE NO. 76-4873 APRIL 20, 1978

CLARENCE R. WILLIAMS, CLAIMANT
Emily Lynn Knupp, 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 awarded him 80° for 25% unscheduled low back disability. Claimant contends this award is not adequate.

Claimant, a 54-year-old pipe fitter, sustained a compensable back injury on May 21, 1975. The diagnoses were a fracture of the first lumbar vertebra, bruises of his right hand, a laceration to his left thigh and an abrasion of his right tibia.

Dr. Smith performed a myelogram of both the lumbar and cervical areas in December 1975. The lumbar myelogram was normal and the cervical myelogram was normal except for small asymmetrical defects at C5-C6 which he felt were not of any pathological significance.

Claimant had had back strains in 1967, 1969 and 1974. Dr. Case had treated claimant in 1974 and had wanted to fuse the lower part of claimant's back after that injury, but this was not done.

In March 1976 claimant was referred to the Disability Prevention Division, complaining of midline low back pain without radiation and other numerous complaints of aches, pains and stiffness. He was using Tylenol and sleeping pills. Dr. Halferty found claimant to have normal range of motion of cervical spine, shoulder girdle and upper extremity. He found claimant did not have any tenderness along the middle of the lumbar spine or in the thoracic or cervical area. He felt claimant had a healed compressed fracture body of L-1 and degenerative arthritis of cervical and lumbar areas.

Claimant's psychological evaluation revealed claimant had a 5th-6th grade education and his work experience consisted of pipe fitting for approximately 25 years, some mill work and assembly work. Dr. Munsey noted claimant had a serious reading deficiency and was experiencing depression and anxiety and recommended psychological counseling.

Claimant went to work as a salesman on March 14, 1976 and worked in that capacity until August 15, 1976 when he returned to pipe fitting. At the time of his injury claimant held a supervisory position, earning $11.45 an hour. Claimant earned $6.75 an hour as a salesman.

Dr. Case reported on June 2, 1976 that claimant was medically stationary and claimant's claim was closed by a Determination Order, dated July 8, 1976, which awarded claimant temporary total disability from May 21, 1975 through March 14, 1976 and 32° for 10% unscheduled low back disability.

The Orthopaedic Consultants, in November 1976, concluded claimant had minimal disability in his neck and mild disability in his dorsal lumbar back. They felt claimant was capable of continuing with his former employment. No additional surgery or treatment was recommended.

The Referee found claimant was entitled to an award of

48° for 15% unscheduled disability, based on all of the evidence. He did not feel claimant was entitled to compensation for temporary partial disability for the period March 15, 1976 to June 2, 1976 because claimant's disability was not temporary after he returned to work.

The Board, after de novo review, agrees with the award of 48° for claimant's permanent partial disability, but finds that claimant also is entitled to temporary partial disability for the period of March 15, 1976 to June 2, 1976, the date claimant was found to be medically stationary by Dr. Case. When claimant began work as a salesman, he had not been found to be medically stationary nor had he been released to regular work.

ORDER

The Referee's order, dated October 7, 1977, is modified.

Claimant is hereby granted compensation for temporary partial disability for the period from March 15, 1976 through June 2, 1976.

The Referee's order is affirmed in all other respects.

Claimant's attorney is awarded as an attorney's fee for her services at Board review a sum equal to 25% of the increased compensation granted by this order, payable out of such compensation as paid, not to exceed $500.

WCB CASE NO. 77-1261 APRIL 24, 1978

ROY D. CLEVENGER, CLAIMANT
McNutt, Gant & Ormsbee, Claimant's Atty
Jaqua & Wheatley, 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 aggravation 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 November 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. 77-1730 APRIL 24, 1978

LOLA COLEMAN, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Atty.
Collins, Velure & Heysell, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

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

Claimant, 38 years old, allegedly sustained an injury to her back on December 16, 1976 while pulling veneer off the dry chain. Dr. Bert reported on December 29, 1976 that claimant complained of pain in her upper mid back. He diagnosed interthoracic ligamentous strain. Claimant filed her claim on January 25, 1977 and it was denied on February 23, 1977.

Claimant had suffered a low back injury in a car accident on January 24, 1976. The medical records reveal that claimant had complained of pain in her lower back and in the area of scapula. She had been treated in the emergency room and then in May 1976 was seen by Dr. Bert, who diagnosed a lumbar sprain. Claimant continued to experience recurrent and persistent back pain. Dr. Bert last saw claimant on August 30, 1976.

The Referee found there was no evidence of a new injury on December 16. He found Dr. Bert's testimony evasive, but reflecting that claimant had the same pains before and after her alleged industrial injury. The Referee stated that if claimant's car accident had been an "industrial injury" the issue would be aggravation versus new injury and in this case the second injury would be considered an aggravation. Therefore, since there was no first industrial injury nor a new injury, he affirmed the denial.

The Board, after de novo review, finds claimant's claim to be compensable. Dr. Bert opined in April 1977 that claimant's preexisting chronic interligamentous strain of the lumbar spine was aggravated by her injury of December 16, 1976. Her complaints in December 1976 were related to, if not caused by, her December 16, 1976 injury.

The Massachusetts-Michigan rule, adopted by our courts, also supports the compensability of this claim. The facts here indicate claimant's second incident, in December 1976, was not

merely a recurrence of the injury of January 1976 but contributed independently to her present condition. She experienced pain in her upper mid back area as a result of the December 1976 injury whereas, after the first incident of January 1976, she complained of pain in her low back area and in the area of the scapula.

The Board concludes claimant suffered a compensable injury on December 16, 1976.

ORDER

The Referee's order, dated November 9, 1977, is reversed.

Claimant's claim is hereby remanded to Roseburg Lumber Company and its carrier, Industrial Indemnity Company, for processing and payment of benefits, commencing December 16, 1976 and until it is closed pursuant to ORS 656.268.

Claimant's attorney is granted the sum of $800 as and for a reasonable attorney's fee for his services before the Referee at hearing, to be paid by the employer and its carrier.

Claimant's attorney is granted the sum of $350 as a reasonable attorney's fee for his services at Board review, to be paid by the employer and its carrier.

WCB CASE NO. 76-2774 APRIL 24, 1978

CHARLES J. COUEY, CLAIMANT
Coons & Anderson, 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 compensation for permanent total disability.

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

ORDER

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

WCB CASE NO. 77-4725 APRIL 24, 1978

DUANE CRAWFORD, 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 11, 1977 Determination Order granting no permanent partial disability to which he contends 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 November 30, 1977, is affirmed.

WCB CASE NO. 77-3187 APRIL 24, 1978

GEORGE GEORGES, 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 compensation for permanent total disability.

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

ORDER

The order of the Referee, dated October 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 carrier.

WCB CASE NO. 76-6792 APRIL 24, 1978

WALTER HACKNEY, CLAIMANT
John D. Ryan, Claimant's Atty.
Gearin, Landis & Aebi, 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.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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 1, 1977, is affirmed.

WCB CASE NO. 77-2344 APRIL 25, 1978

LESTER BROWN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which granted claimant 80° for 25% unscheduled disability for his low back injury. Claimant contends this award is too low.

Claimant, a 32-year-old warehouseman, sustained a compensable injury to his back on April 15, 1975 while attempting to catch a falling case of merchandise. As a result of his injury, claimant underwent a laminectomy for a herniated nucleus pulposus at L5-S1 in June of 1975.

Claimant returned to work on September 2, 1975. Dr. Waldram noted claimant was unable to do heavy lifting or repetitive bending due to his injury and recommended claimant seek lighter work. Claimant had been driving a forklift and working as an order filler at that time. Dr. Waldram felt job retraining would probably be required.

Claimant was found medically stationary on December 1, 1975

by Dr. Waldram. He noted claimant continued to have low back pain and had permanent disability.

Claimant completed his Vocational Rehabilitation program in February 1977. He had been trained as an accountant and was awarded a certificate.

A Determination Order, dated April 5, 1977, awarded claimant temporary total disability compensation and 32° for 10% unscheduled disability for his low back injury.

Claimant has a high school education plus his accounting certificate. He is married and has three children. Currently, claimant has not been able to obtain employment and states he continues to have low back and leg pains on a daily basis which have required him to curtail various activities.

The Referee found claimant had suffered a 25% loss of wage earning capacity based on various court decisions which generally held that an award of 25% was about right where the work person had undergone a laminectomy.

The Board, after de novo review, concurs with the Referee's assessment of the claimant's loss of wage earning capacity. However, they disagree with the Referee's basis for arriving at it. The Board finds claimant is barred from any employment requiring heavy lifting or repetitive bending and thus is prevented from returning to his former employment.

The Board concludes that such disability represents a loss of wage earning capacity which would be compensated for in this case by the 80° awarded by the Referee.

The Board notes that claimant, in September 1975, had returned to a modified job for his employer and was doing it adequately until EBI advised the employer that claimant could not work without a full release, which claimant had not yet obtained. This caused claimant to be terminated from his job and to return to Vocational Rehabilitation. Claimant, after completion of this program, still has not obtained employment. The Board feels this action is contrary to the intent of the Workers' Compensation system to return a worker as soon as possible to employment and should be discouraged.

ORDER

The Referee's order, dated October 21, 1977, is affirmed.

WCB CASE NO. 77-4513 APRIL 25, 1978

ELOISE COPELAND, CLAIMANT
Dye & Olson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-appealed by the SAIF

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which granted her 48° for a total award of 80° for 25% unscheduled low back disability. The order was cross-appealed by the Fund who contended that the June 30, 1977 Determination Order granting no permanent disability should be 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 November 23, 1977, is affirmed.

WCB CASE NO. 77-4448 APRIL 25, 1978

OSA KOEHLER, 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 affirming the Determination Order, dated July 7, 1977, which awarded claimant 48° for 15% unscheduled neck and low back disability.

Claimant, at age 55, while employed as a custodian on June 28, 1974, suffered a compensable injury to her back and neck when a rope on some heavy drapes broke, causing claimant to fall against a pile of books. Dr. Goodwin diagnosed strain of the cervical spine, strain of the lumbar spine, osteoporesis, fracture of the pubic ramus on the left and pre-existing degenerative changes of the cervical spine at L5-S1. A myelogram done October 22, 1974 revealed cervical spondylosis at C5-C6 and C6-C7 and a defect at L4-L5 on the left. After conservative treatment proved to be unsuccessful, Dr. Goodwin performed a laminectomy L4-5 on October 25, 1974.

Dr. Goodwin reported in his closing examination of July 10, 1975 that claimant still complained of intermittent pain in her neck, with some radiation into her shoulder girdles and low back pain after a long day of excessive bending, stooping or lifting. He felt claimant's disability due to her cervical spine injury was mild; her low back disability mildly moderate.

A Determination Order, dated August 1, 1975, awarded claimant 48°.

Dr. Goodwin reported in April 1976 that claimant had changed jobs and had been doing hard janitorial work which caused her pain in her back and right leg. His examination revealed muscle spasms and some tenderness of her low back; he recommended physical therapy. He felt claimant was not permanently and totally disabled but should refrain from heavy lifting.

Claimant was examined at the Disability Prevention Center on March 8, 1977 by Dr. Halferty who diagnosed degenerative joint disease, cervical and lumbar spine, post L4-5 laminectomy and chronic postural strain, upper thoracic and parascapular area. Claimant was found to be unable to return to her former occupation because of her physical limitations. She was found to be ineligible for vocational rehabilitation in June 1977 because of her age, education and severity of disability.

A Second Determination Order, dated July 7, 1977, awarded claimant temporary total disability compensation only. Claimant was found to be medically stationary on April 25, 1977.

Claimant has a seventh grade education and has worked as a woodcutter, salad maker, waitress, off bearer in a box factory, egg plant worker and motel maid. She has tried, unsuccessfully, to return to her former occupation as a custodian.

The Referee found claimant's ability to obtain and hold gainful employment had not changed between the issuance of the first Determination Order and the issuance of the Second Determination Order. Therefore, he concluded the award of 48° was sufficient and affirmed the Second Determination Order.

The Board, after de novo review, finds that the claimant has sought vocational rehabilitation and has tried returning to her former occupation, but has been unsuccessful in both. The Division of Vocational Rehabilitation was unable to assist claimant because of her age, education level and physical disability. The consensus of the medical evidence is that claimant cannot do any work which requires heavy lifting or overhead work. This excludes a large segment of the labor market from claimant and the Board concludes she is entitled to an increased award to compensate for this loss.

ORDER

The Referee's order, dated November 1, 1977, is modified.

Claimant is hereby granted 160° for 50% unscheduled disability for her injury to her neck and back. This is in lieu of 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.

WCB CASE NO. 76-4484 APRIL 25, 1978

JOHNNY C. PHILLIPS, CLAIMANT
Jerry G. Kleen, 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 affirmed the February 10, 1977 Determination Order granting no additional permanent partial disability in excess of that awarded earlier in the amount of 64° for 20% unscheduled neck and left shoulder disability and 9.6° for 5% loss of the left 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 November 3, 1977, is affirmed.

WCB CASE NO. 77-4923 APRIL 25, 1978

CHRIS RYE, 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 claim to it for ac-

ceptance and payment of compensation to which he was 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 November 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 $350, payable by the Fund.

WCB CASE NO. 77-4412 APRIL 25, 1978

IVAN L. WELTY, CLAIMANT
Don G. Swink, 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.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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 19, 1977, is affirmed.

WCB CASE NO. 75-3816 APRIL 26, 1978

VIRGIL N. LAGGE, CLAIMANT
Galton, Popick & Scott, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance as an Oregon compensable 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. The adequacy of attorney fees should be determined by the ciruit court under ORS 656.288. Therefore, that issue was not considered by the Board in its review.

ORDER

The order of the Referee, dated October 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 the Fund.

WCB CASE NO. 77-3355 APRIL 26, 1978

MARTIN H. McGILL, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Atty.
Collins, Velure & Heysell, 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 37.5° for 25% loss of the left forearm. It contends that the Determination Order's award of 10% should be reinstated.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, as amended on November 8, 1977, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated October 28, 1977, and the November 8, 1977 amendment thereto, 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. 77-75 APRIL 26, 1978

JOHN M. REED, CLAIMANT
Thwing, Atherly & Butler, Defense Atty.
Request for Review by Employer

The employer and its carrier seek review by the Board of the Administrative Law Judge's (ALJ) order which directed them to accept claimant's present low back condition as a compensable condition resulting from his original injury of March 10, 1970, to process said claim and pay compensation, as provided by law, beginning November 27, 1976 and until the claim is closed pursuant to ORS 656.268, to pay claimant additional compensation equal to 10% of the time loss benefits due claimant from November 27, 1976 to July 29, 1977, and to pay for the medical services provided claimant by Dr. Thompsen in Medford, Oregon on May 24, 1977 as well as actual reasonable travel expenses incurred in connection with such services. They further requested the Board to determine whether the ALJ had erred in admitting into the evidence the report of Dr. Harold Peterson and refusing to continue the hearing for an independent medical report.

The claimant cross-requested Board review of the ALJ's order, contending that although the ALJ awarded him penalties on unreasonable withheld compensation for temporary total disability and faulted the carrier for use of sight drafts, it was not clear whether the ALJ had awarded claimant penalties on medical payments paid to claimant by sight drafts. Claimant also requested an award pro se attorney's fees of $1,500, cost and disbursements, pursuant to ORS 656.268(8) and 656.382, be awarded him by the ALJ. Claimant asserts that the ALJ should have ordered the employer and its carrier to, retroactively from November 27, 1976, pay claimant the aforesaid compensation for temporary total disability at the rate of $290.36 bi-weekly rather than the $288.22 bi-weekly paid to claimant by the carrier. Claimant's final request was for additional penalties, pursuant to ORS 656.262(8), for the carrier's unreasonable delay and/or resistance to make prompt payments of temporary total disability before claimant had been required to make two formal demands and for the carrier's unreasonable delay and/or resistance to make penalty payments to claimant as set forth in the ALJ's order.

Claimant, at that time a 37-year-old salesman for the employer, sustained a compensable injury to his low back on March 10, 1970 while lifting sales products from his car. After extensive litigation claimant's award of 160° for 50% unscheduled low back disability was upheld by the Court of Appeals of the State of Oregon on September 13, 1976. This is the date of claimant's last award or arrangement of compensation.

Claimant now alleges that he sustained an aggravation of his 1970 back injury when, on November 27, 1976, while at home moving furniture, he lifted and moved a sizeable trunk and immediately exper-

ienced chronic back pain and intense discomfort which radiated down and throughout his left leg, causing numbness of his left leg and foot. On that day he complained to a friend, Mr. Wright, that his back "had gone out".

On December 10, 1976 claimant filed his claim for aggravation and on December 14, 1976 the carrier denied the claim for aggravation but did accept responsibility for any medical treatment which could be provided under ORS 656.245. Thereafter, claimant made successive demands that his claim be accepted but met with no success. At the hearing, the ALJ found it was clear that the responsibility for medical benefits under ORS 656.245 was being denied, even though some medical benefits had been paid on claimant's behalf.

The ALJ found that since November 27, 1976 claimant has required medical treatment for his back condition, which has included increased use of pain medication and increased use of hot baths. Claimant has been examined by Drs. Jefferson and Shay of Eugene, Dr. Peterscn of San Diego, California, and Dr. Thompsen of Medford. At the request of the employer and its carrier, after the proceedings before the ALJ had been postponed, arrangements were made for claimant to be examined by Dr. Rockey on May 20, 1977 at the Eugene Medical Center; however, no examination was made because of conflict with claimant's previously scheduled medical evaluations or illness.

Dr. Jefferson, who examined claimant on December 10, 1976, after being informed of the November 27, 1976 injury and having been provided medical reports of Dr. Fitchett and Dr. Tsai, diagnosed acute chronic disc disease which claimant has had over a period of several years with an acute exacerbation, by history, from November 27, 1976. In his report, he stated that claimant has an aggravation of a back injury stemming from March 10, 1970 which he incurred on November 27, 1976 and he is currently unable to work. The incident on November 27, 1976, of course, is the lifting of the trunk at home.

Dr. Shay examined claimant twice in January 1977 for complaints of low back pain with radiation down the left leg. In his report of February 1, 1977 Dr. Shay stated that claimant's back problems stemmed from an occupational injury in July 1965 followed by a laminectomy, that his condition was intensified by another injury in 1970 and pain and discomfort have apparently been persistent and intermittent since that time. It was his opinion that claimant's condition is of a chronic nature, prone to episodes of exacerbation.

Evidently claimant did not feel he was getting sufficient medical attention in Eugene, so he went to San Diego where he was examined by Dr. Peterson on March 21, 1977. Dr. Peterson was of the belief that claimant's pain and range of motion limitations had increased by 100% from that reported as of his last claim closure; that he certainly was unable to work and had been since his November 27, 1976 injury which Dr. Peterson directly related to claimant's March 10, 1970 job injury. Dr. Peterson was apparently of the belief that claimant's physical condition permanently incapacitated

him from regularly performing any work at a gainful and suitable occupation and it would be unlikely that claimant's "permanent total disability impairments" would change.

On May 24, 1974 claimant was examined in Medford by Dr. Thompsen. The claimant related to Dr. Thompsen the history of his injury and also the incident of November 26, 1976 which precipitated the onset of acute low back pain. Dr. Thompsen felt claimant was continuing to have low back disability, with total disability due to the injury and reinjury to his back; it was his impression that claimant had nerve impingement, especially on the left side, at the lumbosacral joint space. X-rays taken before claim closure on November 1972 and again on February 12, 1974 had revealed only slight narrowing of the lumbosacral disc space, however, x-rays taken on May 24, 1977 revealed nearly a total loss of the disc at the lumbosacral joint.

Before the claim was closed in 1972, Drs. Golden, Bryson and Fitchett all reported, in effect, that claimant would experience chronic back difficulty and could anticipate recurrent symptomatology and future back problems.

The ALJ found that although claimant resided in Eugene he contacted Dr. Thompsen in Medford and Dr. Peterson in San Diego for what the ALJ characterizes as "personal convenience", i.e., notoriety of his case in Eugene, less delay in obtaining medical appointments, and more faith in the medical expertise of California doctors than Oregon doctors. The ALJ found that other than the initial acknowledgement in general by the carrier that it would accept responsibility for medical services under ORS 656.245, claimant had had no prior authorization to seek medical services in California. The initial acceptance of responsibility for medical benefits under ORS 656.245(1), when considered together with ORS 656.245(2), does not authorize or entitle an injured workman out-of-state medical services. He denied claimant's claim for medical services, including medical expenses in connection therewith, incurred in the state of California.

With respect to the claim for aggravation, the ALJ found all the lay testimony to be credible. The test applied to establish an aggravation claim is: ". . . If the evidence as a whole shows a worsening of the claimant's condition the claim shall be allowed" ORS 656.273(7). The burden of proof is on the claimant to prove such an aggravation claim.

The ALJ found that claimant had proven, by a preponderance of the evidence, a compensable aggravation claim. He found that medical evidence clearly established a worsening of claimant's condition. It appeared to the ALJ that all of the doctors considered claimant's pre-existing weakened back condition, which resulted from his industrial injury on March 10, 1970, to be a material factor in his present condition, irrespective of the non-job related trunk lifting accident. Although the doctors did not use legal terms of art such as "causal relationship", their reports in context import a causal relationship between the original injury and claimant's present condition.

The ALJ found that claimant was entitled to payment, or reimbursement, for all medical services received from a doctor of his choice, including travel expenses in connection herewith, which were incurred within the State of Oregon. Apparently, there was no issue with respect to medical services claimant received from Drs. Ianora, Jefferson or Shay; claimant has, in fact, been reimbursed for these services. However, the medical services provided by Dr. Thompsen which were not paid were, in the opinion of the ALJ, compensable. The employer and its carrier, initially, accepted responsibility for medical benefits under ORS 656.245 without limitation or restriction.

The ALJ found that claimant was entitled to penalties because of the conduct of the carrier in processing the aggravation claim. He believed that the evidence indicated that the carrier, within two or three days after the receipt of the aggravation claim, issued a denial based on the fact of no worsening from medical information in its possession which reasonably indicated a valid aggravation claim. Based on the record, the carrier could not have been aware of a probable non-job related accident until after February 5, 1977 when claimant filed his request for a hearing and furnished the report of Dr. Shay which would then have indicated a probable intervening incident. During the period December 14, 1976 to early February 1977 the carrier did nothing, in fact, no apparent inquiry or investigation was made until the attorney for the employer and carrier filed a motion to postpone the first hearing.

The ALJ found that, on June 10, 1977, when the carrier reimbursed claimant for payment of medical services provided by Dr. Ianora, Jefferson, Shay and Petterson, payment was made by what the ALJ characterized as a "sight draft" and payment by such manner is contrary to the policy of the Workers' Compensation Board. The ALJ concluded that such conduct on the part of the carrier was unreasonable under the facts of this case and, therefore, he allowed claimant's request for penalties.

With respect to rating claimant's extent of permanent disability, the ALJ deferred such rating until it could be ultimately undertaken by the Evaluation Division of the Workers' Compensation Department. Rating of extent of permanent disability in a denied aggravation claim is discretionary with the ALJ. The ALJ questioned whether the evidence in the record was sufficient to determine if claimant's condition was medically stationary which is a necessary prerequisite to rating permanent disability. Also, there was a possibility that vocational rehabilitation services might be considered. The ALJ further found that because of inaction by the employer and its carrier and the unavailability of claimant there has been no opportunity to submit claimant for a medical examination or evaluation under ORS 656.325. For these reasons the ALJ felt deferral was proper. He denied claimant's request for a rating of extent of permanent disability by him.

The Board, after de novo review, finds that claimant suf-

fered a new intervening, independent injury on November 27, 1976 and inasmuch as this injury was incurred by claimant at home, it represents an off-the-job injury which is not compensable.

Claimant was initially injured on March 10, 1970, although there is some medical evidence that claimant had an industrial injury in July 1965 which required a laminectomy and that this injury was exacerbated by the 1970 injury. While the medical evidence indicates that there has been pain and discomfort since 1970, nevertheless, there is neither medical nor lay evidence which indicates that claimant has not been able to work regularly between March 10, 1970 and November 27, 1976. Had the incident of November 27, 1976 occurred on the job there is no question in the Board's mind but that it would have been considered as a new industrial injury rather than an aggravation of the March 10, 1970 injury. Unfortunately, the incident occurred at home.

The Board concludes that the denial of claimant's claim made on December 14, 1976 was proper and the Board finds no evidence of unreasonable delay or unreasonable resistance to pay compensation on the part of the employer and its carrier. The claim was filed on the 10th of December, 1976 and denied four days later. The ALJ apparently believes that the carrier had no right to deny when it had medical information in its possession which reasonably indicated a valid aggravation claim; this is not necessarily true, the carrier has a right to disagree with such medical information.

Although the Board agrees with the ALJ's finding that claimant is not entitled to be reimbursed for unauthorized out-of-state medical services, including travel expenses incurred in connection therewith and with his finding that payment by use of sight drafts is not an acceptable method of paying compensation, having made the above findings, the Board concludes it is not necessary to consider these issues or any of the other issues raised by either party.

ORDER

The order of the Administrative Law Judge, dated July 29, 1977, is reversed.

The denial by the employer and its carrier on December 14, 1977 of claimant's aggravation claim is approved.

WCB CASE NO. 75-3872 APRIL 26, 1978

HARLEY SHORT, CLAIMANT
Starr & Vinson, Claimant's Atty.
SAIF, Legal Services, Defense Atty
Richard Butler, 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 that he had not sustained a new injury in 1975 and, therefore, affirmed the Fund's denial of December 19, 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 September 16, 1976, is affirmed.

WCB CASE NO. 77-1677 APRIL 26, 1978

In the Matter of the Compensation of
JAMES A. SNYDER, CLAIMANT
And the Complying Status of
LESTER B. SIMMONS, EMPLOYER
Merten & Saltveit, Claimant's Atty.
Robert P. Johnson, Defense Atty.
Order of Dismissal

On March 30, 1978 the Workers' Compensation Board received from the employer a request for review of the Referee's order entered in the above entitled case on February 23, 1978.

The postmark on the envelope is March 29, 1978; also, the certificate of service states it was mailed March 28, 1978. Both dates are beyond 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 the employer is dismissed.

WCB CASE NO. 77-1670 APRIL 26, 1978

JUANITA WILLIAMS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Order

On April 20, 1978 the Board received from the State Accident Insurance Fund a request that it reconsider its Order on Review entered in the above entitled matter on April 14, 1978.

The Board, after due consideration of the letter request from the Fund, concludes that said request should be denied.

ORDER

The State Accident Insurance Fund's request to reconsider the Order on Review entered in the above entitled matter on April 14, 1978 is hereby denied.

WCB CASE NO. 77-710 APRIL 27, 1978

TOMMY BAXTER, CLAIMANT
Larry K. Bruun, Claimant's Atty.
Philip A. Mongrain, Defense Atty.
Stipulation and Disputed Claim Settlement

Come now the claimant, Tommy Baxter, personally and through his attorney, Larry K. Bruun, and Willamette Industries and its insurance carrier, Employers Insurance of Wausau, through their attorney, Philip A. Mongrain, and state as follows:

That on September 22, 1971, the claimant sustained an industrial injury in the course of his employer with the subject employer, Willamette Industries, and made claim therefore. Said claim was accepted by the employer through its insurance carrier, Employers Insurance of Wausau, and benefits were thereafter paid. A Determination Order of the Workers' Compensation Board was entered on November 28, 1972, awarding the claimant certain temporary total disability benefits, all of which have been paid, and an award of permanent disability equal to 32 degrees for 10% unscheduled disability to the low back. The claimant filed a request for hearing and by stipulation dated November 6, 1973 the claimant was awarded an additional 64 degrees for unscheduled low back disability, making a total award of 96 degrees for 30% unscheduled low back disability.

On October 5, 1976 the claimant requested the employer, through its insurance carrier, to reopen his claim for additional medical services and an additional disability award and compensation. Following the investigation the claimant's claim was denied,

through the employer's insurance carrier, on the basis that the claimant's condition resulting from his compensable injury had not become aggravated. The claimant thereafter requested a hearing and following a hearing Referee William J. Foster concluded that the claimant's aggravation claim should be accepted. The employer then appealed to the Workers' Compensation Board.

CONTENTIONS OF CLAIMANT

Claimant contends that he stands in need of further medical care and treatment and further benefits as a result of an industrially caused condition, and that he has been rendered substantially, permanently and partially disabled or even permanently totally disabled by a combination of disability resulting from his compensable injury of September 22, 1971.

CONTENTIONS OF EMPLOYER

The employer, through its insurance carrier, contends that the claimant's condition resulting from his compensable injury has not worsened since the stipulation of November 6, 1973. The employer contends that the claimant is not credible, as demonstrated by the motion picture evidence presented at hearing, and that based on this lack of credibility it must be concluded the claimant has not proved his disability resulting from the compensable injury has worsened to any extent beyond that determined by the stipulation of November 6, 1973, and in fact his disability resulting from the compensable injury is probably less than that.

The employer contends that claimant's alleged increased symptoms are in significant part a manifestation of a "compensation neurosis" as reflected in an April 18, 1972 report of clinical psychologist J. Mark Ackerman.

The employer contends that the claimant's present physical condition, if worse than at the time of the stipulation of November 6, 1973, is a result of a fall he experienced sometime in 1976, as documented by Dr. John Serbu, neurosurgeon, when he tripped walking out of his door and fell. Also, that any worsened physical condition is significantly related to a fall in approximately January, 1977 as documented by Dr. George Knox, neurologist.

The employer contends that the claimant's allegedly worsened condition since November 6, 1973, including complaints of increased low back pain, interscapular discomfort, neck discomfort, shoulder discomfort, bilateral upper extremities pain and numbness, and diplopia, is either not infact present and represent malinger

and diplopia, is either not in fact present and represents malingering and compensation neurosis, or if present is due to a combination of the falls mentioned above. Also, if present, that a significant part of the claimant's present complaints represent a psychological reaction to severe domestic strife including the claimant's daughter and wife, as documented by various medical reports.

The employer contends that no further responsibility is owed the claimant for his present disabilities or any combination thereof, that claimant's loss of earning capacity has been adequately and fairly measured by the Determination Order dated November 28, 1972 and the stipulation dated November 6, 1973, and if the claimant does not suffer a greater loss of wage earning capacity, said loss is not related to his industrial injury but to the unrelated conditions and incidents cited above.

DISPUTE

The parties hereto realize that their contentions and positions involve a disputed and bona fide conflict and, thus, a disputed claim. The claimant realizes that further pursuit of this claim might involve the lack of further benefits to himself and, therefore, both parties desire to compromise and settle the claim and all contentions and controversies involved in this claim for further benefits and that an Order in this matter should be entered as follows:

1. Willamette Industries, through its insurance carrier, Employers Insurance of Wausau, shall pay to claimant the additional sum of $13,000 as full, complete and final settlement for all time of all claims which the claimant has made or may hereafter make involving the matters in dispute as cited above, said amount to be in addition to any amounts already paid by the employer through its insurance carrier.

2. The employer and insurance carrier shall be entitled to a credit against the above-stated amount of any amounts paid to the claimant subsequent to April 13, 1978.

3. The claimant's attorney, Larry K. Bruun, shall be paid the sum of $2,500.00 as and for legal services rendered herein. Said fee is to be payable out of and from the lump sum payable to the claimant and not in addition thereto.

It is understood and agreed that the claimant has entered into this agreement on a disputed claim basis after due consultation with his attorney and that he desires to have this matter dismissed subject to the approval of this settlement and agreement by the Workers' Compensation Board, and that his claim shall be closed and he shall be forever barred from asserting any further claim for compensation under the Workers' Compensation Law of the State of Oregon based on the matters herein in dispute as cited above. This, however, is not intended to be and should not in any way be construed as a compromise and release contrary to the provisions of ORS 656.236.

SAIF CLAIM NO. B60770 APRIL 27, 1978

DOROTHY BUSH, CLAIMANT
Coons & Anderson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 4, 1978 the Board received from claimant, by and through her attorney, a request to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen her claim for an industrial injury suffered on May 11, 1964 while in the employ of Town and Country Animal Clinic, whose workers' compensation coverage was furnished by the State Industrial Accident Commission, the predecessor to the State Accident Insurance Fund. Claimant's aggravation rights have expired. The request for own motion relief was accompanied by proposed exhibits which claimant's attorney stated he would offer in support of claimant's request.

The Fund was furnished a copy of the request and all of the proposed exhibits and, on April 14, 1978, responded, stating that it did not believe the medical reports submitted by claimant's attorney indicated that claimant's conditions resulting from her injury of May 11, 1964 have worsened. The Fund agreed to furnish claimant any medical treatment she required under the provisions of ORS 656.245 but opposed reopening of the claim.

The Board, after due consideration of the exhibits submitted which were primarily medical reports, concludes that there is no justification for granting claimant's request for own motion relief.

ORDER

The claimant's request that her claim for an industrial injury suffered on May 11, 1964 be reopened pursuant to the Board's own motion jurisdiction granted by ORS 656.278 is hereby denied.

CLAIM NO. 133-CB-2906996 APRIL 27, 1978

LOUISE H. CHYTKA, CLAIMANT
Coons & Anderson,Claimant's Atty.
Own Motion Order Referring for Hearing

On April 12, 1978 the Board received from claimant, by and through her attorney, a request to exercise its own motion jurisdiction pursuant to the provisions of ORS 656.278 and reopen her claim for an injury suffered on November 3, 1970 while working as a checker for Safeway Stores, Inc., whose workers' compensation coverage was furnished by The Travelers Insurance. Claimant's claim was originally closed by an order dated May 5, 1971 and her aggravation rights have expired.

In March 1978 claimant filed a claim for aggravation which was denied by the carrier on March 22, 1978 because the five-year aggravation period for applying for additional benefits had expired on May 5, 1976, it felt that claimant's application did not support a work-related condition and it believed claimant had been adequately compensated for her 1970 injury.

In support of the claimant's request for own motion relief, claimant's attorney attached 37 proposed exhibits which he stated he would offer in support of claimant's request; most of these were medical reports.

The carrier was furnished a copy of the request for own motion relief and copies of the proposed exhibits. On April 14, 1978 the carrier responded, stating that its position remained the same as recited in its denial letter of March 22, 1978 and asking the Board to deny claimant's request for own motion relief.

The Board, after full consideration of this matter, concludes that it should be referred to its Hearings Division and set for hearing before an Administrative Law Judge who will receive evidence on the merits of claimant's request for own motion relief. After the hearing, the Administrative Law Judge shall cause to be prepared a transcript of the proceeding which will be submitted to the Board together with his recommendation.

CLAIM NO. 65-68675 APRIL 27, 1978

CHARLES R. DAMON, CLAIMANT
Alan B. Holmes, Claimant's Atty.
James H. Gidley, Defense Atty.
Own Motion Determination

Claimant sustained a compensable low back injury on May 27, 1970; his claim was closed July 29, 1970 with no award for permanent partial disability. His claim was reopened in February 1972. On June 26, 1972 claimant underwent a laminectomy and fusion of the L5-S1 level. He was released for light work on June 4, 1974 and thereafter became involved in motorcycle mechanics and electronics under a vocational rehabilitation program. On July 24, 1974 claimant's claim was again closed with an award of 96° for 30% unscheduled low back disability.

Claimant's claim was again reopened on January 9, 1975 and claimant had more surgery on June 20, 1975. He was considered to be medically stationary by Dr. Wilson on April 27, 1976 and released for light work. The claim was closed on August 18, 1976 with no additional award for permanent disability.

The carrier, in November 1976, reopened the claim. Dr. Wilson's closing report, dated February 23, 1978, indicates that

claimant continued to have back pain but he was engaged in a vocational rehabilitation program of bar and restaurant management. The diagnosis at that time was pseudoarthrosis of the spinal fusion at the L4-5 level.

On November 10, 1977 the carrier requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommended that, based on claimant's disability, age, and work experience, he should be granted an additional 64° for 20% unscheduled disability. In addition, claimant should be granted time loss benefits from November 2, 1976 through February 23, 1978.

The Board concurs with this recommendation.

ORDER

Claimant is awarded 64° for 20% unscheduled disability. This is in addition to all previous awards received by claimant for his May 27, 1970 injury.

Claimant is granted temporary total disability compensation from November 2, 1976 through February 23, 1978.

Claimant's attorney is awarded 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.

SAIF CLAIM NO. A492210 APRIL 27, 1978

RAY A. DRAYTON, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant seeks to have the Board reopen his claim for an injury suffered on August 5, 1955 under its own motion jurisdiction granted by ORS 656.278.

The Board has been furnished a report from Dr. Becker, an orthopedic surgeon, dated February 24, 1978, which stated that claimant had had a low back fusion in early 1956 which was performed by Dr. Anderson, that claimant continued to have problems and was seen by several doctors and in 1957 had an exploration of his surgery and lysis of adhesions. Claimant progressively improved and in 1961 returned to work at a service station but continued having trouble with his right hip.

As a result of the 1978 examination and based upon a history related to him by claimant that he had had no right hip pain prior to his 1955 injury and felt his condition was solely related

to that injury because he had had trouble immediately following it which had continued over the years, Dr. Becker found indications for a total hip replacement arthroplasty. Dr. Becker noted that as claimant loses more motion in his right hip, he will demand more motion in his low back, therefore, he probably should have the replacement arthroplasty in the hip before his prior low back condition is aggravated. Dr. Becker asked the Board to consider reopening claimant's claim for the proposed surgery.

The Fund, having been fully informed of Dr. Becker's report, indicated it had no opposition to reopening the claim for the proposed surgery.

ORDER

Claimant's claim for an industrial injury suffered on August 5, 1955 is hereby remanded to the State Accident Insurance Fund for the payment of compensation, as provided by law, commencing on the date the claimant enters the hospital for the proposed total hip replacement arthroplasty recommended by Dr. Becker and until his claim is again closed pursuant to the provisions of ORS 656.278.

SAIF CLAIM NO. FC249676 APRIL 27, 1978

HELEN M. EWIN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On April 11, 1978 the Board entered an Own Motion Determination in the above entitled matter which granted claimant additional compensation and awarded claimant's attorney, as a reasonable attorney's fee, a sum equal to 25% of this increased compensation.

On April 12, 1978 the Board received a letter from claimant's attorney stating that he had previously been paid $500 for his work in reopening claimant's claim and did not feel he was entitled to any additional fee for the award made by the Own Motion Determination.

Based upon this generous gesture by claimant's attorney, the Board concludes that the Own Motion Determination should be amended by deleting therefrom the second paragraph under the "Order" portion thereof and reaffirming and ratifying the remainder of said Own Motion Determination.

IT IS SO ORDERED.

WCB CASE NO. 76-4888 APRIL 27, 1978

ROGER E. JUSTROM, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation to which he was entitled in addition to assessing penalties and attorney fees 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. However, the Referee's comment that medical bills are not payable until the claim is either accepted or denied is incorrect. Medical bills are considered to be compensation and payment must be made within 14 days after notice or knowledge thereof.

ORDER

The order of the Referee, dated April 5, 1977, is affirmed.

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

CLAIM NO. B104C348987 APRIL 27, 1978

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

Claimant, a 53-year-old saw operator, cut his right hand on April 25, 1969 while feeding lumber into a rip saw. His right index finger was amputated and Dr. Eckhardt, on December 30, 1969, found decreased metacarpophalangeal range of motion of that finger, stump hypersensitivity, and reduced sensation on the distal radial side of the right middle finger.

A Determination Order, entered February 4, 1970, granted temporary total disability benefits up to December 3, 1969 and 16° for 67% loss of the right index finger, 4° for 18% loss of the right middle finger and 10° for 21% loss of the right thumb opposition.

Claimant underwent a partial ray amputation of the right index finger metacarpal on July 14, 1970. A Second Determination Order, entered on December 14, 1971, granted claimant further tem-

porary total disability compensation and additional awards of 8° of the right index finger and 4° of the loss of the thumb opposition. By Stipulation of Compromise, dated March 13, 1972, claimant was granted an additional 8° for his right middle finger.

After the expiration of claimant's aggravation period, his claim was reopened by a Board's Own Motion Order, dated July 25, 1977, with temporary total disability benefits to commence June 30, 1977.

On July 1, 1977 claimant underwent excision of neuromas from the dorsum of the right hand and from the web space between his right thumb and right middle finger. He was released to regular work by Dr. Eckhardt on October 10, 1977, although claimant's condition was not medically stationary at that time. Dr. Button, on January 20, 1978, indicated findings similar to those reported before the entry of the Second Determination Order. He felt claimant's condition was stationary. Dr. Eckhardt, on March 14, 1978, concurred.

On March 24, 1978 the carrier requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be given no additional compensation for his permanent disability, but recommends that claimant be awarded additional compensation for temporary total disability from June 30, 1977 through March 14, 1978.

The Board concurs.

ORDER

Claimant is hereby awarded compensation for temporary total disability from June 30, 1977 through March 14, 1978.

WCB CASE NO. 76-1771 APRIL 27, 1978

GARRY MURPHY, CLAIMANT
Coons & Anderson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant, by and through his attorney, had requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and direct the reopening of his claim for an industrial injury suffered on May 23, 1969. Claimant had also asked for a hearing on the propriety of the April 13, 1976 State Accident Insurance Fund's denial of his aggravation claim.

The Board did not have sufficient evidence to make a determination on the claimant's request for own motion relief and therefore, on December 23, 1976, referred the matter to its Hearings Division with instructions to set for hearing on a consolidated basis said

request for own motion relief and the propriety of the Fund's denial of claimant's claim for aggravation. The Referee was instructed to cause a transcript of the proceeding to be prepared and furnished to the Board together with his recommendation with respect to the request for own motion relief and also to issue an appealable Opinion and Order on the Fund's denial of claimant's claim for aggravation.

On December 27, 1977 the Board was furnished a transcript of the proceedings together with the Referee's recommendation that it find claimant had suffered a compensable aggravation of his 1969 injury.

The Board, after de novo review, finds that the history related by claimant to the various doctors who treated and/or examined him was not reliable. The record is replete with incidents in which the claimant has been involved since his 1969 injury all indicating that claimant has substantial social, psychological and physical problems, however, none of these incidents nor the problems which brought them about are, according to the evidence, work related. The Referee relied heavily on the opinion expressed by Dr. Redfield in his deposition, dated September 27, 1977. A doctor's opinion based upon a history related to him by the claimant cannot be accorded any greater weight than the testimony of the claimant which, in this case, was most unreliable.

The Board concludes that it cannot accept the recommendation of the Referee and grant claimant the requested own motion relief.

ORDER

Claimant's request that the Board exercise its own motion jurisdiction, pursuant to ORS 656.278, and reopen his claim for an industrial injury suffered on May 23, 1969 is hereby denied.

SAIF CLAIM NO. FC 173323 APRIL 27, 1978

LEROY R. PANKEY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 8, 1977 the Board received a request from the claimant to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered in March 1969. No medical reports were submitted in support of the request at that time and claimant was advised by the Board that it would be necessary to furnish a current medical report establishing that his condition had worsened since January 19, 1971, the date of the last award of compensation and that such worsening was attributable to the industrial injury of March 7, 1969.

Subsequently, the Board was furnished a medical report from Dr. Barton, dated June 6, 1977, which stated that it was quite possible that the accident that claimant had had in the past might have aggravated his condition but suggested that a more up-to-date evaluation of claimant was needed. Dr. Barton stated he was no longer in private practice.

On June 23, 1977 the Board requested additional medical information from the claimant, based upon Dr. Barton's suggestion. On February 24, 1978 the claimant submitted a report from Dr. Tsai directed to the Fund under date of February 24, 1978. On April 12, 1978 the Board requested the Fund to respond to claimant's request for own motion relief. On April 14, 1978 the Fund responded, stating that Dr. Tsai's report dated February 24, 1978 and Dr. LaFrance's report of December 5, 1977 revealed no real aggravation with respect to claimant's condition. Dr. Tsai made no recommendation of further treatment, however, the Fund would furnish claimant any medical care and treatment of related conditions under the provisions of ORS 656.245 but would oppose a reopening of the claim.

The Board, after considering the reports of Dr. Tsai and Dr. LaFrance, concludes that there is no basis, at this time, for reopening claimant's claim for his injury suffered on March 7, 1969; claimant will be able to receive all of the medical care and treatment required by his present condition under the provisions of ORS 656.245.

ORDER

Claimant's request that the Board reopen his claim for an industrial injury suffered on March 7, 1969 through the exercise of its own motion jurisdiction granted by ORS 656.278 is hereby denied.

WCB CASE NO. 77-3796 APRIL 27, 1978

MITCHELL J. PATTEN, CLAIMANT
Evohl Malagon, 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 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.

CLAIM NO. C177316 APRIL 27, 1978
CLAIM NO. C149013

ELBERT E. PIETROK, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 14, 1978 the Board received a request from claimant to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim which he identified as ZC 177316. Claimant stated in that letter that he had earlier requested such relief from the Board and had had no response.

On March 20, 1978 the Board wrote claimant stating it had no record of any earlier correspondence from him concerning his claim nor did it know who had advised claimant to wait six weeks before getting in touch with the Board. The Board's records indicated that claimant had had two claims for back injury, one was closed on March 5, 1969 and the other on July 28, 1969. Claimant's aggravation rights for both claims have expired.

The Board advised claimant that it would be necessary for him to support his request for reopening with a medical report indicating whether the claimant's physical condition had worsened since the last closure which was in 1969 and the extent of such worsening, if any, and whether the worsened condition was attributable to the industrial injury. In response to this letter, the claimant furnished to the Board medical reports from Dr. Poulson, an orthopedic surgeon, and hospital reports indicating that a laminotomy and decompression of L3-4, L4-5, and L5-S1 were performed by Dr. Poulson on February 21, 1978. There was also additional correspondence between Dr. Poulson and the Board between December 1974 and February 17, 1978.

On March 20, 1978 the Board had forwarded to the Fund a copy of claimant's request for own motion relief and on March 29,1978 the Board forwarded to the Fund the copies of Dr. Poulson's reports and correspondence, asking the Fund to respond with respect to their position with regard to claimant's request.

On April 17, 1978 the Fund responded, stating, based upon Dr. Poulson's letter of April 12, 1978 which stated his opinion that the surgery performed by him in February 1978 was necessitated by claimant's original injury of March 24, 1969, that it would not resist reopening claimant's claim.

ORDER

Claimant's claim for industrial injury suffered on March 24, 1969 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on February 20, 1978, the date claimant was admitted to the hospital for the surgery performed by Dr. Poulson, and until the claim is again closed pursuant to the provisions of ORS 656.278.

SAIF CLAIM NO. A828486 APRIL 27, 1978

RAY F. SOWARD, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On September 12, 1977 Dr. James W. Brooke advised the State Accident Insurance Fund that he was treating claimant for a condition described as chronic osteomyelitis. Claimant had suffered an industrial injury on October 11, 1969 and the evidence indicates that claimant's current condition is directly related to that injury. On March 8, 1978 the Fund furnished Dr. Brooke's report to the Board and stated that it would assume responsibility for Dr. Brooke's treatment under the provisions of ORS 656.245.

On March 29, 1978 the Board wrote to Dr. Brooke, explaining the provisions and limitations contained in ORS 656.245 and asking Dr. Brooke if, in his opinion, it would be necessary to reopen the claim. On April 11, 1978, Dr. Brooke responded, stating that as of that date no time loss had occurred and he would doubt that there would be any alteration in any permanent partial disability state of the claimant.

ORDER

The State Accident Insurance Fund is hereby directed to pay for all medical care and treatment furnished claimant by Dr. Brooke for any conditions he may have which are related to his injury of October 11, 1960 under the provisions of ORS 656.245.

WCB CASE NO. 77-4355 APRIL 27, 1978

BETTY M. WHITE, CLAIMANT
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. 76-4873 APRIL 27, 1978

CLARENCE R. WILLIAMS, CLAIMANT
Emily Lynn Knupp, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Order on Review

On April 20, 1978 an Order on Review was entered in the above entitled matter. In the second line of the fifth paragraph on page 2 the order erroneously states "48° for 15%"; it should state "80° for 25%". On line two of the sixth paragraph on page 2 the order erronerously states "48°"; it should state "80°".

The Order on Review entered April 20, 1978 in the above entitled matter is corrected as stated above. In all other respects the Order on Review is ratified and reaffirmed.

WCB CASE NO. 77-424 APRIL 27, 1978

GLENN L. WOODRASKA, CLAIMANT
Williver & Forcum, 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 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. Since the date of the Referee's order the Jones case has been reversed by the Supreme Court. Jones v. Emanuel Hospital, 280 Or 147 (October 18, 1977). However, because there was no delay in the payment of time loss benefits, the Referee's refusal to assess penalties is not erroneous.

ORDER

The order of the Referee, dated September 29, 1977, is affirmed.

CLAIM NO. 585427 APRIL 27, 1978

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

On April 21, 1977 claimant, by and through his attorney, had requested the Board to reopen his January 21, 1937 claim pursuant to ORS 656.278. On April 26, 1977 the Board informed the State Accident Insurance Fund of claimant's request which was supported by medical reports from Dr. Collis dated February 28, 1977 and March 30, 1976. The Fund responded, stating it refused to reopen the claim.

The evidence before the Board at the time was insufficient to enable it to make a determination on the merits of claimant's request, therefore, the matter was referred to the Hearings Division with instructions to hold a hearing and take evidence on the issue whether claimant's present problems were related to his industrial injury of January 21, 1937 and, if so, whether claimant's condition has worsened since the last award of compensation for that injury.

In accordance with the Board's directive, a hearing was held on March 21, 1978 (it had been originally set for hearing in July 1977 but was postponed at the request of claimant for further medical information).

At the conclusion of the hearing, Referee J. Wallace Fitzgerald submitted to the Board a transcript of the proceedings and the medical exhibits received. Based upon these medical exhibits and the opening statements made by the parties, Referee Fitzgerald recommended that the Board exercise its own motion jurisdiction and reopen the claim.

The Referee found claimant had suffered a compensable left knee injury on January 21, 1937 for which he underwent certain medical treatments including surgery. Claimant later received an award for permanent partial disability on August 15, 1937.

On March 30, 1976 claimant saw Dr. Collis complaining chiefly of left knee pain which he had suffered during the previous year and a half. Dr. Collis diagnosed degenerative arthritis and placed claimant under treatment. On March 11, 1977 Dr. Collis performed a high tibial osteotomy of claimant's left knee. On February 28, 1977 Dr. Collis had advised the State Accident Insurance Fund that he felt claimant's present condition was secondary to his industrial injury and the resulting prior meniscectomy of January 1, 1937.

Dr. Endicott, who first saw claimant for a painful left knee in October 1968, also felt claimant's present condition was

secondary to his 1937 injury. Only Dr. Parcher, who prior to his recent retirement was medical consultant for the State Accident Insurance Fund, was of the opinion that claimant's condition had not become aggravated; however, Dr. Parcher did think that, to the extent of a reasonable medical probability, the surgery claimant underwent in 1977 was a proximate of claimant's industrial injury.

The Board, after de novo review of the transcript proceedings, the medical exhibits and the memorandum of findings made by Referee Fitzgerald, concludes that claimant's request to reopen his claim for an industrial injury suffered on April 15, 1937 should be granted.

ORDER

Claimant's claim for an industrial injury suffered on January 21, 1937 is hereby remanded to the State Accident Insurance Fund for acceptance and for the payment of compensation, as provided by law, commencing on March 11, 1977, the date Dr. Collis performed the surgery, and until the claim is again closed pursuant to the provisions of ORS 656.278.

Claimant's attorney is granted as a reasonable attorney's fee for his services in behalf of claimant a sum equal to 25% of the compensation which claimant shall receive as a result of this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 76-1116 MAY 2, 1978

HARLEY O. LOUGHMILLER, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Atty.
Keith D. Skelton, 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. NC332608 MAY 2, 1978

TERRY L. TOUREEN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant has requested that his claim for an industrial injury suffered on October 14, 1971 be reopened by the Board pursuant to its own motion jurisdiction granted by ORS 656.278. In support of the request was a medical report from Dr. Fax, dated April 4, 1978 which stated his opinion that claimant's present condition represented a recurrent flare-up of his old work injury.

The Fund has a copy of Dr. Fax's report and, inasmuch as Claimant's aggravation rights have expired, the Fund advised the Board that it would not resist reopening claimant's claim.

ORDER

Claimant's claim for an industrial injury suffered on October 14, 1971 is hereby remanded to the State Accident Insurance Fund for acceptance and for the payment of compensation, as provided by law, commencing on April 4, 1978 and until closed pursuant to the provisions of ORS 656.278, less any time worked.

WCB CASE NO. 77-2440 MAY 3, 1978

DALE ARNSPIGER, CLAIMANT
Robertson & Hilts, Claimant's Atty.
William G. Purdy, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks Board review of the Referee's order which affirmed a Determination Order dated January 20, 1977 whereby claimant was awarded no compensation for permanent partial disability.

Claimant, who is a 41-year-old auto mechanic, suffered a compensable injury to his right wrist on February 27, 1975 while overhauling an automobile differential. He was first seen by Dr. Weinman and was examined by Dr. Wilson on November 4, 1975. Claimant told Dr. Wilson that his right wrist had remained painful since the injury; he also had complaints of numbness of the middle and index finger and weakness of grip in the right hand. Examination revealed tenderness over the carpal tunnel area and crepitus on flexion and extension of the fingers.

Claimant underwent a decompression of his carpal tunnel syndrome on November 10, 1975 and had excellent recovery, however, the carpometacarpal arthritis of the thumb continued moderately symp-

tomatic. Dr. Peterson examined claimant on December 2, 1976 and found claimant had obtained excellent relief of his carpal tunnel syndrome with no recurrence of symptoms. He felt the wrist injury was stationary without any permanent residuals in regard to the carpal tunnel syndrome, however, claimant did have complaints of pain in the carpometacarpal joint of his thumb.

The claim was closed by a Determination Order of January 20, 1977 which awarded claimant compensation for temporary total disability only.

Dr. Matthews, an orthopedic surgeon, examined claimant on July 20, 1977 because claimant was still complaining of right hand pain, especially at the base of his thumb. Dr. Matthews concluded that the traumatic aggravation of degenerative symptoms of the right hand could be due to the industrial injury as described; however, the persistent symptoms seemed primarily related to degenerative problems. He said he would not be surprised if there were some mild progression of degenerative changes but he would not consider these any evidence necessarily that the industrial injury caused the degenerative change to progress.

The Referee found the claimant had no problems with his right hand before the industrial injury and at the time of the injury he thought he had only bruised his hand. It was later that he developed problems with his grip and at the present time his main problem is with the flexibility of his right thumb which oftentimes locks in joint and becomes disjointed. When this happens the thumb also becomes inflamed and claimant experiences loss of grip and numbness and sharp movements of his wrist are painful.

The Referee, as he had done in WCB Case No. 77-2439 which was held in tandem with this case, stated that it was necessary that competent medical evidence be produced to establish a medical-causal relationship between the employment and the resultant disability. He concluded the medical evidence in this case indicated that claimant's present disability was caused by degenerative changes unrelated to his industrial injury, therefore, he affirmed the Determination Order.

The Board, on de novo review, finds that claimant still has problems with his thumb locking in joint and becoming disjointed. Obviously, this results in instability in claimant's gripping power and represents a residual disability from the industrial injury. Claimant has had a very successful recovery from his carpal tunnel surgery except for this problem with his thumb. This problem causes claimant to have less function in his right hand than in his left hand and, therefore, he should be compensated for that loss of function.

ORDER

The order of the Referee, dated September 27, 1977, is reversed.

Claimant is awarded 6.75° for 5% loss of his right hand. This is in addition to the compensation for temporary total disability awarded claimant by the Determination Order dated January 20, 1977.

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 granted claimant by this order, payable out of such compensation as paid, not to exceed a maximum of $2,300.

WCB CASE NO. 77-2439 MAY 3, 1978

DALE ARNSPIGER, CLAIMANT
Robertson & Hilts, Claimant's Atty.
William G. Purdy, 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 a Determination Order dated April 7, 1977 whereby claimant was awarded 7.5° for 5% loss of a leg.

Claimant suffered an injury to his right knee on October 29, 1975 while performing mechanical repairs on an automobile. Dr. Wilson found a probable popliteal cyst on January 7, 1976. A subsequent examination found claimant could move his knee well and was not symptomatic. Nevertheless, on March 1, 1976, claimant underwent an arthrotomy of his right knee and the findings were compatible with a status post-medial meniscectomy with moderate roughening and thinning of the articular cartilage of the medial femoral condyle and the medial tibial plateau (claimant had had prior knee surgery).

On May 11, 1976 Dr. Peterson examined claimant and noticed inflammatory changes secondary to increased activity; claimant was released to return to work on May 17, 1976.

On January 14, 1977 claimant was examined and found to have only minimal discomfort in his knee; he had good quadriceps strength, no evidence of inflammation, minimal crepitation and no tenderness. Thereafter, a Determination Order awarded claimant 7.5° for 5% loss of his right leg.

The Referee found that compensation could not be awarded unless there was competent medical evidence that a medical-causal relationship existed between the employment and any resultant disability. The possibility that there was such a relationship was not enough; the medical evidence must show with reasonable certainty that they are related.

The Referee found that following the arthrotomy of the right knee claimant had pain in his knee, however, when he was examined by Dr. Peterson in January 1977, the doctor felt that he had made a good recovery and would have no knee problems. However, x-rays note degenerative changes occuring secondary to arthritis in the right knee.

The Referee concluded the medical evidence failed to establish a medical-causal relationship between claimant's present condition and the industrial injury and did not prove by a preponderance of the evidence that the claimant suffered greater disability to his right knee than that for which he had been awarded by the Determination Order of April 7, 1977.

The Board, on de novo review, finds that claimant has suffered considerable loss of function of his leg; the evidence indicates that claimant cannot bend at the knee without severe pain, he is unable to walk long distances and can only exercise on a limited basis. There is a very good possibility that he has lost some circulation in his feet. The evidence also indicates that there has been a limitation placed on claimant's ability to work; he is no longer able to perform any heavy lifting which he could do prior to the injury and he cannot perform front end alignments of automobiles and trucks because that type of repair requires much bending and stooping which, in turn, causes severe pain in the knee. This evidence supports loss of function only; loss of wage earning capacity cannot be considered in evaluating a scheduled injury.

Dr. Matthews' report of July 20, 1977 states that the degenerative arthritic condition in claimant's right knee, which claimant stated to him had become worse since the injury, could well be related to the traumatic aggravation of a pre-existing degenerative arthritic condition.

The Board concludes that such evidence indicates that claimant has lost more than 5% use of his leg. It finds that an award for 15% loss of the leg is justified.

ORDER

Claimant is awarded 22.5° for 15% loss of his right leg. This is in lieu of the award made by the Determination Order dated April 7, 1977.

Claimant's attorney is awarded as a reasonable attorney's fee for his services on 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.

WCB CASE NO. 76-6738 MAY 3, 1978
WCB CASE NO. 76-6739

FERRIL COLLINS, 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 requests Board review of the Referee's order which, after reclassifying the injury as disabling, remanded the claim for it to the Fund for the payment of compensation for temporary total disability, commencing on September 3, 1976; assessed a penalty of 25% of the compensation due claimant for temporary total disability from May 1, 1977, to the date of the Referee's order, August 18, 1977, pursuant to the provisions of ORS 656.262(8); directed the Fund to pay claimant's attorney $250 as a reasonable attorney's fee in connection with the Fund's delay in furnishing medical reports and other documentation to claimant's attorney as provided in OAR 546-83-460, and further directed the Fund to pay claimant's attorney the sum of $1,200 as a reasonable attorney's fee for his services in behalf of claimant at the hearing.

The Board affirms all the findings and conclusions of the Referee except his conclusion that payment of temporary total disability should commence September 3, 1976. The Board finds that claimant should commence receiving payments for temporary total disability as of July 1, 1976, the date she was forced to retire as a teacher, rather than September 3, 1976, the terminal date of her employment contract with the Lincoln County School District. Except for this additional award for temporary total disability, the Referee's order, a copy of which is attached hereto, is affirmed.

ORDER

The order of the Referee, dated August 18, 1977, is affirmed in all respects except that the State Accident Insurance Fund is hereby directed to pay claimant compensation for temporary total disability on her claim of April 20, 1976, effective July 1, 1976 rather than September 3, 1976.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum of $200, payable by the State Accident Insurance Fund.

WCB CASE NO: 77-2754 MAY 3, 1978

WALTER EDMISON, CLAIMANT
Ringo, Walton & Eves, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks review by the Board of the Referee's order which granted claimant 112° for 35% unscheduled permanent partial disability. The employer contends that the award was excessive, that it should be entitled to reimbursement for overpayment of temporary total disability benefits and that it should be entitled to offset temporary total disability.

The Board, after de novo review, affirms the Referee's Opinion and Order, a copy of which is attached hereto. The Board finds that the employer and its carrier may have paid temporary total disability benefits beyond the date such benefits were terminated by the Determination Order; if so, they have the right, administratively, to adjust such overpayments. The Board finds no basis for reimbursing the employer or its carrier from the Rehabilitation Reserve.

ORDER

The order of the Referee, dated October 20, 1977, a copy of which is attached hereto, is affirmed.

Claimant's counsel is awarded as a reasonable attorney's fee for his services at Board review the sum of $350, payable by the employer and its carrier.

WCB CASE NO. 77-961 MAY 3, 1978

INA FINLEY, CLAIMANT
Frank J. Susak, Claimant's Atty.
Tooze, Kerr, Peterson, Marshall & Shenker,
Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks review by the Board of the Referee's order which granted claimant an award for permanent total disability effective the date of his order, September 16, 1977.

The Board, after de novo review, concurs in the findings and conclusions reached by the Referee in his Opinion and Order, a copy of which is attached hereto. However, claimant is entitled

to choose any physician licensed to practice within the State of Oregon and is further entitled to be reimbursed for any and all reasonable transportation expenses incurred by claimant in traveling between her home and the office of the physician or physicians she may choose to treat her in connection with her disability.

ORDER

The order of the Referee, dated September 16, 1977, is affirmed in all respects except that the employer and its carrier shall be obligated to reimburse claimant for all reasonable transportation expenses incurred by claimant in traveling between her home and the office of any physician or physicians located in Oregon whom she shall choose to treat her in connection with her disability.

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. C64534 MAY 3, 1978

DAVID L. GOODRIDGE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 14, 1978 Dr. Pennington advised the Fund in a "To Whom It May Concern" letter that he had examined claimant on April 4, 1978 and found an inflammed and swollen distal stump and an infected cyst posterior of the leg at buttock. He stated that claimant would be off work indefinitely and asked what steps should be taken to reopen the claim.

On April 21, 1978 the Fund provided the Board with Dr. Pennington's letter and indicated that the claimant's initial industrial injury was suffered on March 21, 1967 and claimant's aggravation rights have expired. The Fund stated that it would not resist a directive from the Board to reopen claimant's claim.

ORDER

Claimant's claim for an industrial injury suffered on March 21, 1967 is hereby remanded to the State Accident Insurance Fund for acceptance and payment of compensation, as provided by law, commencing on April 4, 1978, the date he was examined by Dr. Pennington, and until the claim is closed pursuant to ORS 656.278.

WCB CASE NO. 77-2085 MAY 3, 1978

CARL NELSON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
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 affirming the Determination Order, dated September 10, 1976, which awarded him an additional 32° for his unscheduled low back disability. Claimant previously had been awarded 32° for 10% unscheduled disability.

Claimant, a 35-year-old mill worker, sustained a compensable injury to his low back on December 19, 1971 when he pushed some trash from under a dryer. He received conservative treatment and continued to work until February 16, 1972 when he was forced to discontinue his work because of back pain.

A myelogram performed in March 1972 revealed a defect at L4-L5 level of a protruded nucleus. Based on this, Dr. Serbu performed a lumbar laminectomy on claimant on March 14, 1972.

Claimant was released for work by Dr. Serbu on May 1, 1972. However, in August 1972, claimant returned to Dr. Serbu, complaining of acute right lumbar discomfort and was missing time from work. Dr. Serbu felt this was directly related to claimant's March 1972 treatment.

Dr. Serbu found claimant to be medically stationary on November 15, 1972, with minimal to moderate permanent partial disability.

The claim was closed with an award of 32° for 10% unscheduled low back disability on January 5, 1973.

Claimant returned periodically to Dr. Serbu. On November 24, 1975, Dr. Serbu reported claimant continued to suffer right leg pain. A myelogram on January 5, 1976 revealed an irregular shallow defect at L5-S1 on the right. On January 6, 1976, Dr. Serbu performed a second lumbar laminectomy on claimant. Claimant was released for work on March 15, 1976 and returned to work full time, pulling on the greenchain.

Dr. Serbu, in June 1976, found claimant medically stationary with additional minimal to moderate permanent partial disability. He suggested claimant should seek lighter employment.

A Second Determination Order, dated September 10, 1976,

granted claimant an additional 32° for a total of 64° for 20% unscheduled low back disability.

Claimant had begun an accounting program at a community college prior to his second operation. He has continued with this training under the GI Bill and Vocational Rehabilitation, and is now working at a grading job and continuing his education. He needs 25 additional credits for a degree.

Claimant has worked for this employer for 16 years and has previously worked in other heavy labor occupations. He has a high school education plus his additional college training and diesel training in the Navy.

The Referee found claimant had returned to work for his employer and that the evidence did not support an award for greater unscheduled disability than he has been previously awarded. He affirmed the Determination Order, dated September 10, 1976, and referred claimant's claim to the Disability Prevention Division for vocational rehabilitation consideration.

The Board, after de novo review, finds claimant has suffered a greater loss of earning capacity than the total awards of 64° indicate. Claimant has undergone two laminectomies and is limited to lifting no more than 30 pounds, cannot tolerate prolonged standing and cannot do any heavy equipment operations. Although claimant has returned to work for his employer his injury has required that he change to lighter work and has restricted the types of work he can perform. The Board concludes that claimant has not been adequately compensated for his loss of wage earning capacity by awards of 64°.

ORDER

The Referee's order, dated September 27, 1977, is modified.

Claimant is hereby granted 112° for 35% unscheduled low back disability. This award is in lieu of any previous awards received by claimant for his injury of December 19, 1971. In all other respects the Referee's order is affirmed.

Claimant's attorney is granted a sum equal to 25% of the increased compensation granted by this order payable out of said compensation as paid, as a reasonable attorney fee for his services at Board review.

SAIF CLAIM NO. A737168 MAY 3, 1978

JOHN T. RAWLS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant, at age 26, was run over by a backing earth grader while working in construction during the summer of 1959. As a result, his right leg was amputated and a hemipelvectomy was performed on the right. He subsequently developed pelvic osteomyelitis which is now quiescent, he has a right inguinal hernia, he dilates his urethral stricture frequently and he has low back degenerative problems.

Claimant, at the time of this accident, was working at a summer job. He is a school teacher and, therefore, his inability to return to road construction work is not the primary issue in this instance.

Claimant's earnings in 1976 were approximately $19,000; however, as a result of his injury, he is precluded from being a principal (which he had been at one time) and he is unable to continue coaching.

Claimant had been granted an award for permanent total disability. On March 15, 1978 the Fund requested that this award be re-examined and then reduced.

The Evaluation Division of the Workers' Compensation Department does not find claimant to be permanently and totally disabled. Claimant is well educated and experienced and, although he is precluded from a large portion of the labor market, he can still do many occupations such as teaching, in which he is currently involved. It is their recommendation that claimant be granted compensation for 100% loss by separation of the right leg. In considering his loss of wage earning capacity in the unscheduled area, they find that if he terminates his present occupation, his potential in the labor market is markedly handicapped. Based on this premise, the Evaluation Division recommends that claimant be granted 75% loss of an arm for unscheduled disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for 100% loss by separation of the right leg and compensation for 75% loss of an arm for unscheduled disability. This is in lieu of the former award for permanent total disability.

WCB CASE NO. 77-4071 MAY 3, 1978

LONELLA ROOT, CLAIMANT
Bailey, Welch, Bruun & Green,
Claimant's Atty.
Cheney & Kelley, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of the Referee's order which found claimant to be permanently and totally disabled. The employer contends this award is excessive.

Claimant, now 50 years old,while employed as a laborer in a lumber mill sustained a compensable injury to her back on August 4, 1976 when she stepped down 1 to 1-1/2 feet off a chain and experienced low back pain and right leg pain immediately. Her injury was diagnosed as a lumbosacral strain with sciatic neuralgia. Claimant received conservative treatment for her injury.

A Determination Order, dated December 8, 1976, awarded claimant 32° for 10% unscheduled low back disability.

Claimant is overweight and suffers from hypertension and asthma.

Dr. Crosby reported in December 1976 that claimant complained of pain across her back and down her right leg which prevented her from working at her job as a sorter. He noted claimant was suffering from depression which he related to claimant's industrial injury.

Claimant was scheduled for a myelogram on March 16, 1977, but canceled her appointment.

In April 1977 Dr. White felt claimant would be unable to perform any hard, physical work due to her industrial injury and respiratory disease. He was of the opinion that claimant, because of her age and physical disabilities, could not find any employment in the area in which she lives even if she was retrained. Dr. Voiss, in May 1977, concurred with Dr. White's opinions.

The Orthopaedic Consultants examined claimant in May of 1977 and diagnosed chronic lumbar sprain, extensive degenerative disease of the spine, functional overlay, obesity and hypertension. They found her condition to be medically stationary; claimant was unable to return to her former employment but she could do other types of work, e.g., domestic work which claimant has done in the past. They said she did not need the Division of Vocational Rehabilitation's services. It was their opinion that claimant's residual disability as a result of her August 1976 injury was mild.

A Second Determination Order, dated June 17, 1977, awarded claimant an additional 16° for 5% unscheduled low back disability.

Dr. Renwick reported in September 1977 claimant could not resume the type of strenuous work she previously had been doing. He felt she could perform a lighter type of work as long as she was not required to be on her feet for long periods of time.

Claimant has an eighth grade education with no additional specialized training. Her work experience has been working on a farm, in a restaurant, in grocery stores as a butcher and at the lunch counter and in a lumber mill.

Claimant has a constant pain in her low back and each leg for which she takes medication, which dulls her pain. She can remain in one position for only about 15 minutes without needing to change positions. She has not worked since her injury and has not sought work.

The Referee found claimant to be permanently and totally disabled because the totality of the evidence showed claimant suffered both physical and emotional disability and had no hope of successfully obtaining vocational rehabilitation. He concluded claimant was unable to gain and to hold suitable gainful employment in the general labor market on a regular basis and was therefore an "odd-lot" permanent total.

The Board, after de novo review, finds claimant is not permanently and totally disabled. The doctors who have treated claimant agree that she is unable to return to her former occupation; however, the weight of the medical evidence shows that claimant is able to perform lighter and less physically demanding occupations and has the work experience in these areas. Additionally, claimant has turned down lighter jobs simply because she did not feel she could perform them. There is no evidence that she could not perform these jobs satisfactorily other than claimant's own feelings.

The Board concludes that although claimant is not permanently and totally disabled, she has suffered a greater loss of wage earning capacity than that for which she has been previously awarded.

ORDER

The Referee's order, dated November 16, 1977, is modified.

Claimant is hereby granted an award of compensation equal to 208° for 65% unscheduled low back 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.

SAIF CLAIM NO. GA 710939 MAY 3, 1978

MELVIN VEELLE, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered an industrial injury to his left leg and ankle in 1958 and was off work for a period of about a year and a half to two years before returning to the logging occupation. Claimant's claim was closed, his aggravation rights have expired, and he now seeks own motion relief from the Board pursuant to its own motion jurisdiction granted by ORS 656.278.

The State Accident Insurance Fund has been furnished all of the medicals which are available; the records are incomplete, many of the old records having been destroyed.

Claimant has been treated by several doctors and at the present time is being treated by Dr. Hardiman, an orthopedic surgeon. On April 3, 1978 Dr. Hardiman stated that it would be necessary to perform surgery to remove a hypertrophic bone spur on the talus which has been present for some time and is painful and has interfered with claimant's ability to work as a logger. Claimant was to be admitted to the hospital for removal of the exostosis.

On January 10, 1978, Dr. Hardiman had advised the Fund that the x-rays confirmed that the pain on the dorsal aspect of claimant's ankle was caused by this bony prominence and should be removed. He thought this accounted for a large amount of claimant's symptoms; claimant had a history of having had an injury to his leg which required considerable treatment including planing and bone grafting. This present condition developed subsequent to that and probably is the true etiology. Dr. Hardiman expressed his opinion that inasmuch as the former problem was covered, the present problem also should be.

The Fund responded on April 13, 1978, saying they had no objection to reopening claimant's claim for the left leg injury of 1958.

The Board concludes, after reading the medical reports, that claimant's present problem is related directly to his 1958 industrial injury and that there is justification for the reopening of his claim for the surgery proposed to be done by Dr. Hardiman.

ORDER

Claimant's claim for an industrial injury, identified as Claim No. GA 710939, is hereby remanded to the State Accident Insurance Fund for acceptance and for the payment of compensation, as provided by law, commencing on the date claimant enters the hospi-

tal for the surgery proposed by Dr. Hardiman and until the claim is again closed pursuant to the provisions of ORS 656.278.

WCB CASE NO. 77-4928 MAY 4, 1978

BURNICE L. BROWN, CLAIMANT
Ringle & Herndon, 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 review by the Board of the Referee's order affirming the Determination Order dated July 27, 1977 which had granted claimant compensation for temporary total disability from September 9, 1976 through June 27, 1977 but no compensation for permanent partial disability in addition to that granted by the first Determination Order dated April 4, 1974 whereby claimant received 48° for 15% unscheduled low back disability and 7.5° for 5% loss of his right leg.

Claimant is a 39-year-old workman who has less than a full high school education. He sustained a compensable injury on June 4, 1973 while employed as a warehouseman at a wheat storage elevator. The ladder he was on slipped and he fell 8 to 10 feet to the floor striking his head on a steel brace on the way down and landing flat on his back on the cement floor. The initial diagnosis was "possible concussion". Subsequently, he was hospitalized for a myelogram which was negative. Dr. Raaf, a neurosurgeon, stated all of the diagnostic procedures were essentially negative for objective pathology.

In November 1973 claimant was evaluated at the Disability Prevention Center where it was concluded that claimant had recovered entirely from any post-concussion syndrome and no evidence of brain damage was found.

The psychological evaluation revealed claimant was within an average intellectual level and was experiencing moderate anxiety with moderate depression, but claimant would not have any serious permanent psychological disability if he could be successfully rehabilitated vocationally.

The Back Evaluation Clinic concluded claimant had a chronic lumbosacral strain with residual neuropathy involving his right leg; a lighter job was recommended.

Claimant's claim was initially closed by the Determination Order of April 4, 1974 and was reopened in October 1974, after an examination by Dr. Berselli, an orthopedic physician.

In November 1974 claimant was examined by Dr. Stainsby, a neurosurgeon. A repeat myelogram was negative. In February 1975 claimant consulted Dr. Hazel, another orthopedic physician, who, in April 1975, performed an exploratory surgery involving L3-4, L4-5, and L5-S1. The final diagnosis was "sciatica, etiology of which is unknown". Dr. Hazel thought that despite the normal myelograms claimant had enough back symptomatology to warrant exploration of the spinal canal and in late April 1975 he performed a three-level exploration on the right. At first claimant showed marked improvement, however, later he had increasing back and leg symptoms and was almost as uncomfortable as he had been prior to the surgery.

Dr. Hazel recommended that claimant be evaluated at the Portland Pain Center. Their initial impression included mechanical low back pain with no evidence of nerve root compression, poor body mechanics, and a questionable motivation for rehabilitation. Claimant had full range of motion of his neck, his back and both upper and lower extremities. He terminated his enrollment at Portland Pain Center before he had completed the entire course. His claim was again closed by Determination Order dated July 7, 1976 with an award of compensation for temporary total disability from October 18, 1974 through April 29, 1976.

In the fall of 1976 claimant was examined by Dr. Danielson, a neurosurgeon, who suspected a cervical disc and performed another myelogram covering the cervical and lumbar areas. It was essentially negative and Dr. Danielson was unable to explain from a medical examination and diagnostic standpoint claimant's complaints; he concluded that claimant was in need of psychological support and direction in becoming vocationally re-established.

In November 1976 claimant was examined by Dr. Quan, a psychiatrist. Dr. Quan felt that claimant's psychopathology did not preclude his ability to work; the anxiety portion of the psychopathology was thought to be secondary to the industrial injury but would not be permanent if claimant should have physical recovery or be able to resume fulfilling employment. Dr. Quan felt it was doubtful that psychotherapy could help claimant.

In December 1976 claimant was evaluated by Dr. Robinson who diagnosed a chronic lumbar strain, cervical sprain and strain, by history, with recent exacerbation, cause unknown. He noted a conversion reaction and tension state and concluded that some of the testing results were unreliable. He felt claimant could return to certain types of work or to his schooling if he were so motivated.

In May 1977 claimant was again seen at the Portland Pain Clinic by Dr. Seres who felt that some of the testing procedures indicated that claimant had not been following through with his exercise program and that he continued to demonstrate decreased sensitivity in the legs without a clear-cut dermatomal pattern. Dr. Seres was doubtful that claimant would continue to work for a

long period of time at any type of work based on his lack of willingness to deal with his problem on a more constructive basis.

On July 27, 1977 the claim was again closed by the Determination Order upon which claimant requested the hearing.

The Referee found that during the course of claimant's claim, he had been worked with by the Disability Prevention Division, the Vocational Rehabilitation Division and the International Rehabilitation Associates, Inc. In March 1974 he had started a four-month course of small engine repair which he discontinued in June. In July 1974 he started a course to teach him to be an auto parts counter man; after a period of time he also discontinued this. Claimant worked as a security guard during the summer of 1976, a job which involved riding about in an automobile 8-10 hours a day but discontinued that job because it caused increased pain in his back. He went to work as a security guard for G.I. Joe's on a job which required standing on his feet 8 hours a day and he had to quit because it aggravated his back pain. Claimant testifies that he has constant pain in his low back which radiates down into both legs and he has frequent headaches.

The Referee found that claimant was not a credible witness; he had a very poor recollection of dates, times, places, etc. He found that some of the medical examiners reported claimant was a poor historian and it was difficult to determine the truth of what claimant said because of the inconsistencies. He found that claimant was not credible and therefore, much of the medical evidence, based upon history related by claimant, also must be considered not credible.

The Referee found that claimant didn't do much of anything and spent most of his time at home lying down or sitting watching television. The Referee also noted that with the exception of about 11 months claimant received compensation for temporary total disability from the date of his injury to June 27, 1977 and such compensation was not much less than his take-home pay at the time of the injury.

The Referee's opinion was that claimant didn't have much of a wage earning capacity prior to his industrial injury; claimant thought a job paying $3 an hour was a high paid job. The Referee also found that at the time of the injury claimant had been employed for about four or five weeks doing general labor; he wondered why, if claimant had so much experience as an auto mechanic, he hadn't been working in that capacity at a much higher wage.

The Referee stated that if he was to increase claimant's permanent partial disability award, he would be rewarding claimant for his almost complete lack of motivation. He found claimant was a great starter but a poor finisher, that he had manipulative abilities and that he had been utilizing that talent in seeking to get a greater award.

The Referee concluded that claimant had made little effort, in spite of a great deal of opportunity, to improve either his physical situation or his educational level, that claimant had been adequately compensated for his disability by the awards for permanent disability made by the first Determination Order and the additional awards for time loss made by the second and third Determination Orders.

The Board, on de novo review, finds substantial medical evidence that claimant has suffered a greater physical impairment than the Referee concluded that he had. Additionally, it is evident that there are many jobs which claimant could have performed before his injury that he cannot now do. It is difficult to believe that a man could fall 8 to 10 feet striking his head on a steel brace on the way and landing flat on his back on a cement floor and not suffer substantial physical impairment. Dr. Hazel reported that in spite of the fact that the myelograms had been normal claimant had enough back symptomatology to warrant exploration of this spinal canal and he performed a three-level exploration. The disc spaces were noted to be intact and none of the angular ligaments were incised nor was any disc materially extracted; the only possible explanation is that claimant was extremely lucky. After the surgery claimant had initial improvement but within the passage of a few months his back and leg symptoms were as severe as prior to the surgery.

The Back Evaluation Clinic recommended a lighter type job for claimant. Most of the doctors who examined and/or treated claimant found a chronic lumbosacral strain which was job related and obviously will curtail to some extent claimant's wage earning capacity.

The Board does not quite understand the Referee's statement that claimant didn't have much of a wage earning capacity prior to the industrial injury. This should not be considered in the evaluation of claimant's loss of potential wage earning capacity. At the time of the injury claimant was not working as an auto mechanic which possibly would have paid him a higher wage than manual labor; however, it is quite possible that there was no employment available to claimant as an auto mechanic at the time he was injured, therefore, he was doing all he could to earn a livelihood at that time.

There is no evidence that an increase in claimant's award for permanent partial disability would be, in effect, a reward for his complete lack of motivation. To the contrary, the evidence indicates that claimant has tried several types of employment. True, he has not lasted very long at any of them, however, there is nothing to indicate that claimant quit these jobs simply because he was tired of working; there is no evidence that he was giving false testimony when he stated that he had to quit because these jobs exacerbated his back pain.

Claimant contends that he has frequent headaches. That is not an unusual result of his industrial injury; claimant struck his head on a steel brace at the time he fell from the ladder. Claimant also has problems bending, stooping and twisting, all activities required by the jobs which he was able to do prior to his industrial injury.

Based on the foregoing findings, the Board concludes that claimant is entitled to an award of 96° for 30% unscheduled low back disability to adequately compensate him for this loss of wage earning capacity. The Board further concludes that the award of 5% for loss of the right leg truly represents the loss of function of that leg.

ORDER

The order of the Referee, dated November 22, 1977, is modified.

Claimant is awarded 48° for 15% unscheduled low back disability. This award shall be in addition to the awards of compensation granted to claimant by the Determination Orders dated April 4, 1974, July 7, 1976 and July 27, 1977.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum equal to 25% of the additional compensation awarded claimant by this order, payable out of such increased compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-2281 MAY 4, 1978

LOUIS R. BRUNO, CLAIMANT
Flinn, Lake & Brown, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which granted claimant compensation for permanent total disability.

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

ORDER

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

Claimant's attorney is hereby granted a reasonable attorney's fee for his services in connection with this Board review in the amount of $350, payable by the carrier.

WCB CASE NO. 77-2316 MAY 4, 1978

VERNON A. BRYSON, CLAIMANT
Coons & Anderson, 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 compensation for permanent total disability.

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

ORDER

The order of the Referee, dated December 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 $350, payable by the Fund.

WCB CASE NO. 77-3715 MAY 4, 1978

DONALD BURLESON, CLAIMANT
Benton Flaxel, 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 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 December 2, 1977, is affirmed.

WCB CASE NO. 77-571-B MAY 4, 1978

CLARENCE CARROLL, CLAIMANT
Dye & Olson, Claimant's Atty.
Cheney & Kelley, Defense Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer, K-Mart Corporation, and its carrier, requested Board review of the Referee's order which: (1) affirmed the State Accident Insurance Fund's denial on January 24, 1977 of claimant's claim; (2) set aside the Determination Order dated February 2, 1977 because claimant's condition was not at that time medically stationary and stated said Determination Order did not qualify as an initiating event for claimant's aggravation rights; (3) remanded claimant's claim for his back condition as of December 10, 1976 and following to the employer and its carrier for payment of compensation, as provided by law, until the claim is closed pursuant to ORS 656.268; (4) ordered the employer and its carrier to make such necessary monetary adjustments with the Fund to reimburse it for any compensation it has paid claimant pursuant to a .307 order issued on February 1, 1977; (5) ordered the employer and its carrier to pay claimant as additional compensation, by way of a penalty, an amount equal to 25% of $36; (6) ordered the employer and its carrier to pay claimant's attorney the sum of $9, pursuant to ORS 656.262(8) and 656.382; and (7) ordered the employer and its carrier to pay claimant's attorney as a reasonable fee the sum of $1,000, pursuant to ORS 656.386.

The sole issue is whether the claimant's claim for an incident which occurred on December 10, 1976 is the responsibility of K-Mart and its carrier or the responsibility of Oregon Institute of Technology and its carrier, the State Accident Insurance Fund.

Claimant first suffered an industrial injury on August 15, 1975 while employed for K-Mart. This claim was accepted and was closed by a Determination Order entered on February 2, 1977 whereby claimant was awarded compensation for temporary total disability from August 18, 1975 through September 26, 1976, less time worked, and 16° for 5% unscheduled low back disability. Subsequently, claimant filed a claim for an alleged accident occurring on December 10, 1976 when claimant was employed by OIT.

Claimant was 51 years old at the time he suffered the compensable injury to his low back in August 1975; he was destroying furniture by throwing it overhead against a dumpster. The injury was diagnosed as an acute traumatic thoracolumbar, lumbar, lumbosacral sprain, with myofascitis and paravertebral muscle splinting. On July 23, 1976, Dr. Laubengayer felt claimant was improving and he expected an eventual full recovery. On September 14, 1976 the doctor noted that claimant was experiencing occasional back pain

which was associated with bending or attempting to do heavy work. He released claimant to work as of September 27, 1976, recommending some type of work that required no heavy lifting or repetitive bending or stooping which he felt were permanent work restrictions.

On October 28, 1976, claimant was seen by Dr. Scheer who felt claimant's progress was satisfactory, although claimant continued to experience pain in the lumbosacral junction on activity which restricted motion due to the increased pain. He felt the conservative treatment was affording claimant relief.

On November 23, 1976 Dr. Klump examined claimant and found no evidence of spasms of the paravertebral muscle in the lumbar area. Claimant had full range of motion in the lumbar spine on forward flexion, but on extension in the left lateral flexion he was limited by about 50%. From a neurological standpoint, Dr. Klump could find no evidence of impairment. Dr. Laubengayer concurred in these findings.

In September 1976 claimant had secured an emergency appointment as a Patrolman II; it was terminated effective December 18, 1976. The job required security patrol on campus and involved driving, riding and walking while claimant checked the buildings on campus.

Claimant testified that on December 10, 1976 he slipped and fell while on a security patrol and this caused increased symptomatology of his back condition. He contacted Dr. Laubengayer by telephone on December 14, 1976. The doctor recommended claimant not work but have bed rest; he prescribed medication for him. He did not examine the claimant but observed symptoms of stiffness, soreness, and difficulty getting in and out of a chair and difficulty sitting down at a table. It was his opinion that claimant's condition was very similar to what he had seen a number of times before and he felt that claimant had strained his back again. He believed that the back strain was related, by history, to the incident of December 10, 1976, stating that the reported incident was of the kind that could cause, or was capable of causing, a flare-up of a chronic low back condition such as claimant had had prior to that date. He felt that claimant's condition was considerably worse on December 21, 1976 than it had been on September 14, 1976, the date he had last examined claimant.

Dr. Laubengayer's deposition indicated claimant's description of his problem was identical to the problem for which Dr. Laubengayer had seen him many times previously and that the doctor had not conducted an examination of claimant on December 21, 1976 because he did not feel anything new would be revealed thereby; it further revealed that claimant was experiencing right leg and foot pain prior to December 10, 1976 and claimant's work limitations at the time the deposition was taken were not changed from what they were prior to December 10, 1976.

The Referee found that on August 30, 1976 Dr. Scheer had submitted a bill in the amount of $36 for medical services provided claimant which had not been paid until after the third billing was received from the doctor. No explanation was given for such delay.

Based on the evidence the Referee concluded that claimant's condition as of December 10, 1976 was the reponsibility of his first employer, K-Mart, and its carrier. He found that no new injury had occurred, it was undisputed that claimant had slipped and fallen, but he was not persuaded that such incident was a material fact in claimant's condition as it existed on that date. In the Referee's opinion claimant had not fully recovered from the effects of his 1975 injury at the time of the December 1976 incident. He found that claimant's testimony as well as the medical evidence indicated that claimant was symptomatic preceding December 10, 1976. He concluded that claimant's request to classify his claim as a new injury suffered on December 10, 1976 should be denied.

The Referee found that technically claimant's claim against K-Mart could not be classified as an aggravation claim because the events on which he based his claim preceded the claim closure and that, in fact, claimant was not medically stationary but was still under active medical treatment at the time his claim was closed on February 2, 1977. The Referee, therefore, concluded the claim was closed prematurely and he set aside the Determination Order entered on that date and remanded the claim for claimant's back condition as it existed on December 10, 1976 to K-Mart and its carrier for the payment of compensation, as provided by law, until the claim properly was closed pursuant to ORS 656.268.

The Referee further concluded that claimant was entitled to penalties and attorney fees because of the carrier's failure to timely pay the statement presented by Dr. Scheer. In his opinion, this constituted unreasonable delay in the payment of compensation. Because the penalty of 25% of $36 amounted only to $9, the Referee also limited the attorney's fee to $9.

Having found that the incident of December 10, 1976 was not a new injury, the Referee affirmed the denial by the Fund for that incident.

Pursuant to ORS 656.307 the Fund had been designated as the paying agent, therefore, the Referee ordered the carrier for K-Mart to reimburse the Fund for any sum it had paid to claimant pursuant to that order.

The Board, on de novo review, finds that the medical evidence clearly shows that claimant's condition was medically stationary at the time the Determination Order was entered on February 2, 1977; therefore, the Determination Order should not be set aside and claimant's aggravation rights should commence as of the date of that Determination Order.

The Board further finds that the incident of December 10, 1976 was not a new injury but was an aggravation of claimant's injury of August 15, 1975; therefore, claimant's claim for aggravation should be remanded to K-Mart and its carrier to be accepted for the payment of compensation, as provided by law, commencing December 10, 1976 and until the claim is again closed pursuant to the provisions of ORS 656.268. In all other respects the Board agrees with the orders of the Referee.

ORDER

The order of the Referee, dated October 14, 1977, is modified.

Claimant's claim for aggravation of his August 15, 1975 injury is remanded to K-Mart and its carrier to be accepted and for the payment of compensation, as provided by law, commencing December 10, 1976 and until the claim is again closed pursuant to the provisions of ORS 656.268.

The Determination Order entered on February 2, 1977 is affirmed.

In all other respects the Referee's order 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 employer, K-Mart, and its carrier.

WCB CASE NO. 77-2725 MAY 4, 1978

ROBERT COONROD, CLAIMANT
Richard E. Kingsley, 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 directed it to pay the medical bills of Dr. Hews for treatment provided to claimant from October 18, 1976 to July 27, 1977 in addition to a $500 attorney fee.

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

ORDER

The order of the Referee, dated November 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 $100, payable by the Fund.

WCB CASE NO. 77-3978 MAY 4, 1978

RAY O. DAY, CLAIMANT
A. C. Roll, 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 September 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 $350, payable by the carrier.

WCB CASE NO. 77-4212 MAY 4, 1978

DAVID L. EHLINGER, 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.

The claimant seeks Board review of the Referee's order which approved the Determination Order dated June 17, 1977 whereby claimant was awarded 32° for 10% unscheduled low back disability.

The claimant is presently 46 years old and has completed the 10th grade. He testified that he had worked for Publishers Paper in Oregon City for several years and was the only one who could troubleshoot the processing-procedure computer; he repaired

electrical and mechanical machinery.

On June 28, 1974 claimant suffered his first injury while trying to reach a 30 horse power motor behind a running conveyor; he was struck to the floor. His second injury occurred during November 1974; at that time claimant was attempting to remove a motor housing from attaching studs and wrenched his back.

Claimant was first seen by Dr. Hebert, a chiropractor, after he had suffered the November 1974 injury. Dr. Hebert diagnosed right side sacroiliac sprain, lumbar radiculitis and right leg numbness. Claimant was also seen by Dr. Clarke, an orthopedist who became one of his treating physicians, and later was seen by several other doctors. The medical evidence indicates that Dr. Holmes surgically repaired a right inguinal hernia and also that claimant received treatment for epilepsy at the VA Hospital from Dr. Garcia.

The Referee found that Dr. Clarke indicated claimant had a congenitally unstable back with a strain not severe enough for a fusion or immobilization. Dr. Clarke approved Dr. Hebert's chiropractic treatment and claimant stayed on the job until his examination at the Disability Prevention Center on June 1, 1976. This examination revealed hernias, epilepsy and hepatitis, among other things. The doctor's impression was chronic lumbosacral strain, blackouts, moderate obesity, moderate severe anxiety reaction tension coupled with extreme preoccupation with physical symptoms. Thereafter, the Determination Order was entered awarding claimant 10% of the maximum allowable for unscheduled disability.

During August 1976, Dr. Hebert reported that claimant still was suffering from minor symptomatology which would not affect rehabilitation. Dr. Clarke was advised by claimant in December that he was told to look for a job, that "DVR told him that he had too much education to train". Claimant said that he could not do any excessive walking, driving or lifting. According to Dr. Clarke, claimant could not work; however, he did send claimant to be examined by Dr. Dennis who doubted that claimant had a lumbar disc protrusion to account for the leg pain nor did he feel there were sufficient findings to warrant a myelogram.

The Referee found that claimant appeared to be motivated if his conditions were met, however, as stated by the counselor, claimant was limiting himself by stating that he was unable to commute more than 26 miles one way to work. Although several jobs had been open claimant did not accept any of them because he felt he was unable to drive the distance required from the area in which he preferred to live, an area which has few, if any, jobs for which claimant is qualified.

The Referee found that if, in fact, little physically could be found wrong with claimant and claimant does have emotional problems, many symptoms could be psychosomatic or psychophysiologic and such behavior would predate the accident. Claimant had not undergone any surgery and he is retrainable.

The Referee concluded that he probably could not require claimant to move to an area closer to job opportunities, however, claimant should not be rewarded for his insistence on staying where he prefers to live. He affirmed the Determination Order.

The Board, on de novo review, finds that while claimant may be considered unreasonable in his preference to live in the area in which he now resides and in which there are few job opportunities for which he is qualified, nevertheless, as a result of his industrial injury, he has suffered a greater loss of wage earning capacity than the award of 10% indicates.

The Board finds substantial medical evidence of limitations placed upon claimant's lifting, walking or driving. Claimant has an acute lumbosacral strain, a weakened lumbopelvis and lumbosacral para-articular structure, due to a spinal anomaly and reflex mechanism from an abdominal hernia. Both Dr. Hebert and Dr. Clarke concluded that claimant's work was causing exacerbation of these conditions.

The Board concludes that to adequately compensate claimant for his loss of wage earning capacity caused by the industrial injury, after giving consideration to claimant's education, age, work background and potential for retraining, an award equal to 25% of the maximum is justified.

ORDER

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

Claimant is awarded 80° for 25% unscheduled low back disability. This award is in lieu of the award granted by the Referee's order.

The claimant's counsel is awarded as a reasonable attorney's fee for his services before the Board a sum equal to 25% of the increased compensation granted claimant by this order, payable out of such increased compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-881 MAY 4, 1978

GERALD HAUGEN, CLAIMANT
Kennedy & King, 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 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 October 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 $350, payable by the Fund.

WCB CASE NO. 77-5278 MAY 4, 1978

CHARLES T. LACOMBE, CLAIMANT
David W. James, Jr., 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 18, 1977 Determination Order granting him compensation equal to 4.8° for 20% loss of the right index finger and 3.3° for 15% loss of the right long finger. 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 December 20, 1977, is affirmed.

WCB CASE NO. 77-4257 MAY 4, 1978

RONALD G. MATHIASON, 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 May 2, 1977 Determination Order granting him compensation equal to 22.5° for 15% 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 31, 1977, is affirmed.

WCB CASE NO. 77-1977 MAY 4, 1978

SUSAN K. NICHOLSON, CLAIMANT
Dye & Olson, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense 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 her claim.

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

ORDER

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

CAROLE P. NUGENT, CLAIMANT
Alan H. Tuhy & Joel E. Grayson,
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 Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which remanded claimant's aggravation claim to it for payment of compensation and ordered reimbursement to Crown Zellerbach for compensation it had paid to claimant pursuant to an order issued under ORS 656.307. The Fund contends claimant suffered a new injury and not an aggravation of her low back injury.

Claimant sustained compensable injuries to her back on October 17 and October 21, 1975. The first diagnosis was acute back strain for which claimant was treated conservatively. Dr. Ackerson reported in February 1976 that claimant suffered from traumatic lumbosacral and lumbar myalgia and neuralgia with synovitis. However, claimant did return to work and worked until September of 1976.

A Determination Order, dated June 23, 1976, awarded claimant compensation for temporary total disability only.

The Fund provided claimant's employer workers' compensation coverage until July 1, 1976 when the employer became a self-insurer.

Claimant continued to have lower back pain until September 13, 1976 when, while she was walking in the mill, she felt a sharp pain in the same lower lumbar area. She has been unable to work since this incident. Dr. Tesar stated in October 1976 that this injury was probably an exacerbation of her previous low back problems.

Claimant underwent two myelograms. Dr. Danielson, based on the results of the myelogram, felt claimant suffered a possible L4-5 disc protrusion.

Claimant was hospitalized for twelve days, during which time a discogram revealed probable degenerative disc disease L4-5. At the conclusion of this hospitalization, it was felt by claimant's doctors that conservative treatment should be continued. However, if no progress was made a lumbar discectomy was in order. Dr. Danielson's dismissal diagnosis was a herniated nucleus pulposus L4-5.

On January 26, 1977 claimant's employer denied any responsibility for claimant's low back problem on September 14, 1976, stat-

ing her problem relates back to the injury of October 21, 1975.

On January 26, 1977 an order under ORS 656.307 designated as the paying agent claimant's employer, a self-insurer.

The Fund denied claimant's claim for aggravation of April 5, 1977, stating claimant's condition resulted from a new injury or incident of September 14, 1976.

Dr. Danielson requested approval to perform a laminectomy and disc excision of L4-5 on April 6, 1977. This operation was performed and claimant is still recuperating from it.

The Referee found claimant had proven her aggravation claim. He felt the greater weight of the evidence supported the conclusion that claimant's condition was not stable at the time of the incident in September 1976. Therefore, he remanded her claim to the Fund for payment of compensation and ordered Crown Zellerbach to be reimbursed for the compensation it paid pursuant to the .307 order and awarded claimant's counsel an attorney fee.

The Board, after de novo review, concurs with the Referee's conclusion. The medical evidence indicates that claimant's pain in September 1976 was in the same area of her body as it was after the October 1976 incidents. It appears that the last incident was merely a recurrence of the first, it did not contribute independently to claimant's present condition. Claimant had suffered the same symptoms since her injuries in October 1975, but she endured them and continued to work until September 1976; thereafter she was unable to do so because her condition originating as a result of her October 1975 injuries had worsened.

The Board concludes claimant did not suffer a new injury, but did suffer an aggravation of her October 1975 injuries.

ORDER

The Referee's order, dated August 22, 1977, is affirmed.

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

WCB CASE NO. 76-6773 MAY 4, 1978

JOHN K. RAGSDALE, CLAIMANT
Caldwell & Wiggins, 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 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. 76-6724 MAY 4, 1978

RICHARD SEYMOUR, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On March 31, 1978 the attorney for the claimant in the above entitled matter applied to the Workers' Compensation Board for counsel fees to be paid him by the State Accident Insurance Fund.

The Board had, on September 14, 1977, remanded the above entitled matter to a Referee to convene a hearing and secure evidence to determine whether claimant was entitled to retain all of the money collected from a judgment issued by the Circuit Court for Coos County in a case in which claimant, as plaintiff, proceeded against a third party for injuries resulting from an automobile accident. Claimant, initially, elected to proceed under the provisions of ORS 656.576 through 656.595 but later contended his injuries were the result of the automobile accident and not related to his industrial injury of July 1973.

The Referee determined that the injuries resulting from the automobile accident were totally unrelated to claimant's industrial injuries and, furthermore, that the provisions of ORS 656.576 through .595 were not applicable because the automobile accident was not a compensable injury. He concluded that the Fund had no statutory right to share in the recovery of the third party action.

The Board accepted the recommendation of the Referee and, on March 22, 1978, issued its order in accordance therewith.

Claimant's attorney alleges that claimant had been forced to request a hearing before the Board to resolve this issue, therefore, he was entitled to an attorney's fee pursuant to ORS 656.382(3).

The Board, after full consideration of this matter, concludes that ORS 656.382(3) is not applicable. First, the request for hearing was not initiated by the employer; it was initiated by the claimant. Second, if it had been initiated by the employer, there is no indication that it would have been done for the purpose of delay or other vexacious reasons or without reasonable ground.

The Board concludes that it cannot, under the provisions of ORS 656.382, grant claimant's attorney a fee payable by the State Accident Insurance Fund in a case such as this.

ORDER

The application for attorney's fees received by the claimant's attorney on March 31, 1978 is hereby refused.

WCB CASE NO. 77-4019 MAY 4, 1978

THEODORE A. TESKE, 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 review by the Board of the Referee's order which affirmed the denial by the State Accident Insurance Fund of claimant's claim for a disabling lung condition.

The claimant has emphysema, asthmatic bronchitis and rheumatoid arthritis. He is now 56 years old, has an eighth grade education and has been doing sheet metal work, working with heat and ventilator systems since 1946. His last job was a six-plex theater located at 164th and Division in Portland. Claimant worked on that job two months and quit in March 1977.

Claimant commenced treatment with Dr. Ramsthel at the Tigard Clinic in 1969. He denied any treatment for a lung problem before that date. Claimant quit smoking in 1964, but still has problems with coughing, wheezing and shortness of breath that comes on progressively. On March 16, 1977 he quit work because he couldn't breathe and couldn't go up and down ladders and nearly collapsed. He was admitted to the VA Hospital.

Claimant contends that he has been exposed to contaminants of sheet rock dust, paint fumes, sawdust, insulation glass and dust off the floors and that such irritants were exclusively from exposure on the different jobs he had worked on.

Claimant's last employer was aware of his condition and

put him on jobs which exposed him to less irritants and when claimant was not working and not exposed to the job environment his condition improved. Claimant has been using an oxygen tank during the last year; he also takes pills, inhalants, and medication every day.

Claimant advised his employer he was retiring because of his lung condition and, initially, his treating physician, Dr. Ramsthel, expressed his opinion that claimant's problems were not job related.

The Referee found that claimant had failed to meet his burden of proof by a preponderance of the evidence that the on-the-job exposure materially contributed to an exacerbation or medical worsening of his underlying progressive lung disease. He found that Dr. Ramsthel had revised his opinion that the condition was job related on the belief that claimant had had significant exposure to fiberglass at his most recent employer's, but the evidence did not support the basis for this opinion.

The Board, on de novo review, relies primarily on the last opinion expressed by Dr. Ramsthel, who had treated claimant for lung problems since 1969, that claimant had more symptoms at work than he has at home and that there was a causal relationship of his symptoms to his exposure to the irritants on the job. Dr. Ramsthel testified that this was a progressive disease and the progress of claimant had been intensified far greater than would have been expected under normal conditions. His original observation that it was not job related was given at a time when he was not aware that claimant was exposed to all the irritants, especially fiberglass, while on the job.

The Board concludes that claimant has adequately proven by the evidence, especially that of Dr. Ramsthel, that the on-the-job exposure materially contributed to his underlying progressive lung disease and, therefore, that claimant's claim should have been accepted by the Fund.

ORDER

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

Claimant's claim is remanded to the State Accident Insurance Fund for acceptance and for the payment of compensation, as provided by law, commencing March 16, 1977 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 both before the Referee at the hearing and on Board review a total sum equal to $1,000, payable by the State Accident Insurance Fund.

WCB CASE NO. 76-6350 MAY 4, 1978

WILLIAM WARNER, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which 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 November 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 $100, payable by the Fund.

WCB CASE NO. 77-2062 MAY 4, 1978

HELEN WEAVER, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
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 her 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 November 9, 1977, is affirmed.

WCB CASE NO. 76-6535 MAY 12, 1978

LEWIS CAVE, CLAIMANT
Samuel A. Hall, Claimant's Atty.
Brian L. Pocock, Defense Atty.
Stipulation

It is hereby agreed and stipulated, that claimant acting by and through his attorney, Samuel A. Hall, and the State Accident Insurance Fund acting by and through its attorney, Brian L. Pocock, as follows:

1. That on or about March 9, 1978, Referee John Drake awarded the claimant permanent total disability and 29% binaural hearing loss.

2. That on or about March 24, 1978, the State Accident Insurance Fund filed a request for review with the Workers' Compensation Board from the Opinion and Order of Referee Drake.

3. That the parties are agreed that the claimant is not entitled to an award for his hearing loss separate from the permanent total disability award.

4. That the parties are agreed that the Board may enter an order awarding the claimant permanent total disability compensation from and after November 2, 1976. Temporary total disability compensation paid to the claimant shall serve as an offset to permanent total disability compensation otherwise payable pursuant to the Order for a corresponding period.

5. That the claimant is not entitled to a separate award for binaural hearing loss.

6. That claimant's attorney, Samuel A. Hall, shall be entitled to $50.00 as a reasonable attorney fee for services rendered to the claimant payable by the State Accident Insurance Fund and not out of any compensation due or owing to the claimant.

7. The parties stipulate that the Fund's request for Board review may be dismissed with prejudice on the entry of the Order based on the foregoing stipulation.

ORDER

It is hereby ordered:

1. That claimant shall be paid permanent total disability compensation from and after November 2, 1976, and that temporary total disability compensation paid to claimant shall serve as an offset to permanent total disability compensation otherwise payable pursuant to this Order for a corresponding period.

2. That claimant shall not receive any separate award for binaural hearing loss.

3. That claimant's attorney shall be paid $50.00 as a reasonable attorney fee payable directly by the State Accident Insurance Fund and not out of any compensation due or owing to the claimant.

4. That the Fund's request for Board review is hereby dismissed with prejudice.

WCB CASE NO. 77-5242 MAY 12, 1978

JAMES CONTRERAS, CLAIMANT
Dye & Olson, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
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 he is entitled.

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

ORDER

The order of the Referee, dated December 29, 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. 77-882 MAY 12, 1978
WCB CASE NO. 77-1590

IRWIN E. HEATH, CLAIMANT
Don G. Swink, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson,
& Schwabe, Defense Attys.
Gearin, Landis, Aebi, Defense Attys.
Request for Review by Home Ins.

Reviewed by Board Members Wilson and Phillips.

The employer, by and through its carrier, The Home Insurance Company, seeks Board review of the Referee's order which found claimant suffered a new injury on December 29, 1976 and remanded his 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 September 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 $100, payable by The Home Insurance Company.

WCB CASE NO. 77-4708 MAY 12, 1978

JACK DAVID JOHNSON, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Charles Paulson, 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 3, 1976 Determination Order whereby he was granted no permanent partial 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 statement of the Referee on page one of his order which indicates that claimant was released for modified work on August 10, 1976 is in error. Claimant was originally released to "modified" work on August 16, 1976; this was changed to "regular" work by Dr. Anderson in his next report with the date remaining the same.

ORDER

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

WCB CASE NO. 77-1574 MAY 12, 1978

PHYLLIS KANWISCHER, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Attys.
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 she is entitled in addition to assessing penalties and attorney fees 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. The Board would, however, point out an error in the Referee's order on page 4 in the third paragraph under "Penalties". "ORS 656.258" should be corrected to read "ORS 656.268".

ORDER

The order of the Referee, dated October 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 Fund.

WCB CASE NO. 77-2996 MAY 12, 1978

STEVE KNIGHT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
Roger Warren, 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 Determination Order of March 24, 1977 whereby claimant was awarded 27° for 20% loss of the right foot.

Claimant sustained a compensable injury on March 6, 1975 when a hyster ran over his right foot, crushing it. Claimant was treated at the Meridian Park Hospital by Dr. Soot, who, in October 1975, requested that claimant be evaluated for job placement by the Disability Prevention Division. No specific recommendation or provisions were made for retraining claimant.

On March 1, 1976 Dr. Pasquesi examined claimant; he felt that claimant's fractures had healed but there were considerable residual soft tissue injuries in the right foot which were then stable and would be permanent. He felt claimant would have to seek employment in some capacity not requiring him to be on his feet more than three hours during an eight-hour shift and he would need to continue to use the metatarsal bar in the sole of his right shoe. The limitation of motion in the toes, the paresthesia and the evidence of severe scarring on the back of the foot would probably remain. Claimant's impairment of the lower extremity was 18% based on loss of motion, neurological deficit and chronic moderate pain. Dr. Soot concurred with Dr. Pasquesi's findings.

On November 18, 1976 Dr. Soot reported that claimant's right heel had been swelling over the past several months intermittently causing difficulty with movement in the ankle. Medication alleviated the swelling, but claimant continued to have some pain across the back of his heel. On January 27, 1977, Dr. Soot reported claimant's condition was stable and the claim was closed on March 24, 1975.

On September 14, 1977, after examining claimant, the Orthopaedic Consultants rated claimant's total loss of function of the right foot as mild.

Claimant returned to work as a foreman of a concrete foundation crew on January 3, 1977 and is still working at that job.

The Referee found that claimant's present job is supervisory in nature although claimant does work with the men. Claimant had difficulty with his foot in the performance of his work particularly when it involved walking on uneven ground or climbing up and down ladders. His foot swells in the morning and after a hard day at work and it is very stiff in the morning. He is able to go on two to three hour back packing hikes and he also plays pool. He has only missed two days of work since he returned in January 1977.

The Referee found that claimant had lost both function and use of his foot as well as experiencing pain which disables him from performing certain activities, however, he felt that the award for 20% was sufficient.

The Board, on de novo review, feels the award for 20% does not adequately compensate claimant for his loss of function and use of his right foot. Dr. Pasquesi found limitation of motion in the toes of the right foot, paresthesia and also severe scarring at the back of the foot, all permanent. This was in March 1976; in November 1976 Dr. Soot found evidence of swelling in the foot which caused claimant difficulty moving his ankle up or down. In his closing evaluation Dr. Soot stated that the pain claimant had across the forefoot toward the ankle which increased with use of

the foot would limit him from standing more than 35 to 40 minutes. He could not walk more than a mile and the distance claimant walked was limited by the rate of speed used. He also limited claimant to lifting no more than 40 pounds.

Both Dr. Pasquesi and Dr. Soot felt that claimant would have to seek work in some capacity which would not require him to remain on his feet for more than three hours during an eight-hour shift and would have to continue to use the metatarsal bar in his shoe. Both felt that claimant would have to be retrained.

The Board concludes, based upon this medical evidence, that claimant has suffered a greater loss of function and use of his right foot than is indicated by the award of 20% and would, therefore, increase the award to 30%.

ORDER

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

Claimant is awarded 40.5° for 20% loss function of his right foot. This award is in lieu of the award granted by the Determination Order of March 24, 1977 and affirmed by the Referee's order of November 3, 1977 which, in all other respects, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services on Board review a sum equal to 25% of the increased compensation granted by this order, payable out of said increased compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-3610 MAY 12, 1978

JASON W. LEE, CLAIMANT
Robertson & Hilts, Claimant's Attys.
William H. Replogle, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer, a self-insurer, seeks review by the Board of the Referee's order which directed it to pay claimant additional compensation equal to 112°, giving claimant a total award of 208° for 65% unscheduled low back disability.

Claimant suffered a compensable low back injury on October 22, 1975 while working as a mail clerk for the employer. Dr. Gilsdorf, on March 12, 1976, performed a laminectomy and fusion and in his closing report stated that claimant would be permanently restricted to modified activities, would not be able to tolerate work

requiring sustained standing, walking or sitting, nor do repetitive stooping or bending and placed a lifting limit of 20 to 30 pounds.

Claimant had had an off-the-job injury to his low back in 1968 which had required a laminectomy. After that injury he returned to his former duties as an installer/repairman, however, he did not climb poles. In 1971 claimant commenced to have low back symptoms and was advised to avoid lifting more than 30 pounds, getting into awkward positions and crawling. Because of these limitations, claimant was given the job of mail clerk, but he retained the status and pay of an installer/repairman. After the 1974 injury and at the time of the hearing, claimant was working as a records clerk, which involved very little back work and allowed claimant to stand up, walk around and stretch whenever necessary. This job was not as physically demanding as the job of mail clerk.

Claimant was offered one job which would have paid more than his job as records clerk, however, he was unable to take it because of the lifting involved. Claimant testified he took four Darvon a day, twice as many as he had been taking before the 1975 accident. He complained that he was unable to ride a bike or to jog or fish; prolonged sitting bothered him and he was unable to do his yard work.

Claimant has worked for the employer for 29 years, he has a high school education and three months of technical electrician training received while in high school. Of the 29 years, 24 of them were as an installer/repairman.

The Referee found that in the period prior to the October 22, 1975 incident claimant had had some physical restrictions imposed upon his work activities because of the 1968 injury, however, he was able to do the activities associated with mail clerking. He concluded that claimant had suffered a permanent loss of wage earning capacity because of the 1975 injury equal to approximately 65% because a significant portion of the general labor market was precluded to him.

The Board, on de novo review, finds that claimant would be adequately compensated for his potential loss of wage earning capacity by an award equal to 50% of the maximum for his unscheduled disability. The Board makes this reduction primarily because of the willingness of claimant's employer to keep claimant working. The job that claimant has cannot be described as a "sheltered workshop", it is a regular job which someone has to do and is one which claimant, after his 1975 injury, is physically able to do.

However, the Board does take into consideration the fact that if claimant should lose his present position with the employer, he would find it very difficult to secure employment because of the limitations placed upon him involving his work activities.

ORDER

The order of the Referee, dated October 14, 1977, is modified.

The claimant is awarded 160° for 50% unscheduled low back disability. This is in lieu of the award of 96° granted by a Determination Order dated May 10, 1977 and the additional award of 112° awarded by the Referee's order which in all other respects is affirmed.

WCB CASE NO. 76-335 MAY 12, 1978
WCB CASE NO. 76-4160

WILLIAM M. PAUL, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
Roger Warren, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks Board review of that portion of the Referee's order affirming the Determination Order dated January 16, 1976 which granted claimant 60° for 40% loss of use of the left leg.

Claimant was injured on June 28, 1974 while falling trees; he twisted his left knee as the saw flew out while he was sawing an undercut. The occurrence of the incident was not disputed. Claimant was treated by Dr. Denker and Dr. Cronk; his injury was diagnosed as a severe bicompartmental degenerative arthritis, left knee, probably post-traumatic in etiology. A total left knee replacement surgery was performed on October 2, 1974.

In November 1975 Dr. Cronk reported claimant was no longer undergoing any specific active treatment and claimant's claim was closed by the Determination Order dated January 16, 1976.

After the issuance of the Determination Order and after the hearing was commenced and then continued for the purpose of obtaining additional medical evidence, the employer's carrier denied responsibility of the degenerative arthritic condition, related surgery, temporary disability and permanent partial disability, based on a medical diagnosis made by Dr. Rosenbaum. Dr. Rosenbaum felt that the total artificial knee joint replacement was required for treatment of a chronic condition and he doubted that the June 28, 1974 incident had any major effect in hastening the need for surgery.

Claimant had requested a hearing on the adequacy of the Determination Order and after the denial he requested a hearing on

its validity. The two issues were consolidated for hearing and the Referee's order deals with both issues, however, as stated earlier, the only issue on appeal by claimant was the Referee's findings on the extent of disability of claimant's left leg.

Claimant has had prior injuries to his left knee and, as a result of an injury suffered on October 23, 1967 he had received an award equal to 10% loss of the left leg.

The Referee found that claimant did have additional permanent disability of the left leg as a result of the June 28, 1974 injury and subsequent treatment through the loss of functional use of the left leg; however, he felt it must also be distinguished because claimant has other conditions which contributed to his present state which have not been shown to be attributable to the industrial injury, e.g., patellofemoral arthritis.

The Referee concluded that claimant had failed to establish that he has any greater amount of permanent left leg disability attributable to the June 1974 injury than that for which he was awarded by the January 1976 Determination Order, therefore, he affirmed that Determination Order.

Dr. Cronk, claimant's treating physician, stated that the June 28, 1974 injury had an exacerbating effect on the preexisting degenerative arthritic condition of the left knee and that it was the industrial injury which resulted in the severe pain and the inability to work and required the surgical treatment which was performed. The Referee concluded that claimant had established the causal relationship between the June 28, 1974 and the subsequent surgery, other medical treatment, temporary disability and permanent disability compensation.

The Referee found no evidence of medical treatment of a curative nature being required after the entry of the Determination Order in January 1976. However, the medical treatment rendered before the entry of the order and the temporary disability benefits designated by that order were attributable to the 1974 injury as residual consequences.

The Board, on de novo review, finds that the medical evidence indicates that claimant has a greater amount of permanent left leg disability attributable to his industrial injury of 1974 than the award for 40% indicates. Claimant has already been compensated for 50% loss of his leg, however, the evidence reveals that claimant is unable to stand for more than an hour before his left knee weakens and he has to sit down and rest. He has constant pain in the knee and is often required to get up in the middle of the night to take a pain pill; claimant also takes two pain pills four times a day. He is unable to squat and he walks with a cane and a brace. He is unable to walk for more than a quarter of a mile and prior to using a cane and the elastic support, fell three times. The evidence indicates that claimant has difficulty getting in

and out of his pick-up truck, that he has difficulty climbing stairs and also sitting properly and comfortably in a chair. Although claimant had previously injured his left knee and had some degree of existing degenerative arthritis in the knee joint prior to the June 28, 1974 injury, his left knee was still serviceable and claimant was able to use it while working as a logger. The 1974 injury was the final insult which rendered claimant's leg all but useless.

The Board conludes that the reports of claimant's treating physician as well as claimant's testimony established that claimant has suffered a greater loss of the use of his left leg and, therefore, should be awarded compensation for 65%.

The Referee, in dealing with the other issues raised at the two hearings, found that the carrier's denial of responsibility made on July 28, 1976 was in error; that the degenerative arthritic condition following the 1974 injury required medical treatment, including surgery, and also resulted in temporary and permanent disability. He directed the carrier to pay any compensation yet due for medical treatment received by claimant between June 1974 and January 1976 for the treatment of the left knee injury. The Referee also found that the claimant was entitled to recover an attorney's fee from the employer and its carrier for having prevailed against the rejected claim.

The Board agrees with these findings and directives, however, they were not presented on appeal to the Board and, therefore, will not be dealt with by this order, except as set forth below.

ORDER

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

Claimant is awarded 22.5° for 15% loss function of the left leg. This award is in addition to the award of 15° for 10% loss function of the left leg by a Determination Order entered March 19, 1968 and the additional award of 60° for 40% loss function of the left leg granted by the Referee's Opinion and Order 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 increased compensation granted claimant by this order, payable out of said increased compensation as paid, not to exceed $2,300.

WCB CASE NO. 76-1189 MAY 12, 1978

RALPH SCHWAB, CLAIMANT
F. P. Stager, Claimant's Atty.
SAIF, Legal Services, Defense Attys.
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 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. However, the Board does have jurisdiction in this matter despite the fact that the employer was not served with a copy of the Request for Review. The employer's attorney was served and this constitutes service on the employer; also, the employer did not object to the request for Board review.

ORDER

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

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

WCB CASE NO. 76-6023 MAY 12, 1978

MELVIN SPAIN, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Request for Review by the SAIF

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund requests Board review of the Referee's order which remanded claimant's aggravation claim to it for payment of compensation from February 28, 1977 until claim closure pursuant to ORS 656.268, directed it to pay claimant, as a penalty, an additional amount equal to 25% of the compensation due from February 28, 1977 to the date of his order, June 10, 1977, and awarded claimant's attorney a reasonable attorney's fee of $650.

The issues before the Referee were whether claimant's disability from an injury suffered on May 24, 1976 had become aggravated,

claimant's entitlement to recover penalties and attorney fees because of the Fund's failure to pay compensation within 14 days after notice of claimant's inability to work following aggravation of his disability and, if claimant is medically stationary, the extent of his permanent disability.

Claimant filed a claim for the May 24, 1976 injury on June 10, 1976 indicating he was injured when he struck the top of the carrier he was operating which had bounced when it hit a hole. Claimant was examined by Dr. Bert on June 8, 1976 for evaluation of neck pain. Claimant gave a history of having had a cold and difficulty swallowing the preceding winter along with some associated neck pain. Claimant denied any specific traumatic incident but stated that the constant looking around and vibrations associated with operating his carrier at work aggravated the neck pain.

Claimant was off work from June 15, 1976 to August 30, 1976 and, on October 11, 1976, the Determination Order awarded claimant compensation for temporary total disability from June 15 to August 30, 1976 but no compensation for permanent partial disability.

Claimant, who has a high school education, has spent most of his working career since graduation in sawmills of various kinds. He denies any significant neck or back problems prior to the onset of his difficulties in May 1976.

Claimant had testified that during the period he was off he had pain in the back of his neck extending across the shoulders and down the arms and also had pain in his legs but that after returning to work in August he had had very little difficulty with his arms or legs although his neck continued to hurt somewhat. He lost no time from work as a result of these problems until the first of 1977 at which time, according to claimant, his neck started to hurt "real bad" as did his arms and legs and, in claimant's opinion, his condition then was substantially the same as it had been in the summer of 1976.

On February 18, 1977 Dr. Bert instructed claimant to discontinue working and to go home and rest and use heat on his neck. On May 12, 1977,which was subsequent to the hearing before the Referee, Dr. Bert reported that he thought claimant was medically stationary, that he would recommend only an occasional Darvon compound and claimant could perform light to moderate work.

Claimant testified to having difficulty turning his head and to an inability to bring his chin down to his chest or fully extend the neck. Films taken by one of the Fund's investigators revealed claimant operating a carrier on the job on February 1, 1977. This was just a couple of weeks before claimant was seen by Dr. Bert.

In the summer of 1976 Dr. Bert had reported his impression of a possible subacute disc syndrome, stating however there were minimal localizing signs. Later he noted the pain pattern was "most

unusual". Lumbar and cervical myelograms were normal and, on July 26, 1976, Dr. Grieser had noted that claimant's display of discomfort appeared to be "somewhat theatrical and not in keeping with the findings"; he concluded that claimant, in his opinion, suffered a mild cervical strain and at that time had significant functional overlay.

On February 18, 1977 Dr. Bert commented that claimant had had a recurrence of his musculoskeletal physiologic reaction; later he expressed his opinion that claimant's continuing work problem was an aggravation from the type of work that he does, however, he could not state that claimant's job had caused or created the problem.

On April 29, 1977 claimant was examined by the physicians at Orthopaedic Consultants and the diagnosis was functional problem with hysterical features not yet documented. It was recommended that claimant have a psychiatric examination.

The Referee, after viewing the films, found that claimant appeared to be able to move his head without any problems. He also observed claimant during the hearing turning his head from time to time without difficulty, although at other times he was sitting in what appeared to be quite a rigid posture.

The Referee concluded that although Dr. Bert had found claimant to be medically stationary on May 12, 1977, it would not be appropriate for him to make a present finding on the extent of disability in light of the recommendation by Dr. Bert that claimant be referred to the Disability Prevention Division and the recommendation of the Orthopaedic Consultants that he have a psychiatric examination. However, he felt that the lay and medical evidence demonstrated aggravation of claimant's disability. Dr. Bert's report of February 28, 1977, which requested the Fund to send claimant to the DPD, was sufficient to constitute an aggravation claim under the provisions of ORS 656.273 and the Fund's failure to pay compensation within 14 days after notice or knowledge of the medically verified inability of claimant to work constituted unreasonable refusal to pay compensation inasmuch as the Fund had also failed to deny the claim within that period of time.

The Referee remanded the claim to be accepted for the payment of compensation as of the date of Dr. Bert's report (February 28, 1977) and until the claim was closed again and assessed a penalty of 25% of such compensation due claimant from February 28, 1977 to the date of his order.

The Board, on de novo review, finds that neither the medical evidence nor the film of claimant's activities on February 1, 1977 indicate that claimant has suffered an aggravation. Although the testimony of Dr. Bert, who was claimant's treating physician, normally would be given the greatest weight, his testimony was equivocal. In his report of February 28, 1977 he stated that claimant's

symptoms seem to be presented in quite a "dramatic" way and claimant is "claiming" this is an on-the-job injury and that at that time the best approach was to send claimant to the Disability Prevention Division and he would check him again after he had returned.

On the other hand, Dr. Grieser, after examining claimant on July 26, 1976, reported that claimant had suffered a mild cervical strain but at the time of his examination claimant had significant functional overlay. On April 29, 1977, nearly a year later, claimant was examined by the physicians at the Orthopaedic Consultants and their findings indicated functional problems with hysterical features, not yet documented. It was their recommendation that claimant have a psychiatric examination.

The Board, after reviewing the films, finds very little in said films that would indicate claimant had any difficulty turning his head as he backed up his carrier.

The Board concludes that, based on the lay and medical evidence, claimant's claim for aggravation must be denied. However, the Board agrees with the Referee's assessment of a penalty and the award of attorney fees. The evidence clearly shows that the Fund paid no payment of compensation after it received Dr. Bert's report of February 28, 1977 and under the provisions of ORS 656.273(6) it must commence payment no later than the 14th day thereafter or be subject to a penalty and payment of attorney fees even though the claim for aggravation is found not to be compensable. Jones v. Emanuel Hospital, 280 Or 147.

ORDER

The order of the Referee, dated June 10, 1977, is affirmed only as it directs the State Accident Insurance Fund to pay claimant, as a penalty, an additional amount equal to 25% of the compensation due claimant from February 28, 1977 to the date of his order, June 10, 1977, and awards claimant's attorney a reasonable attorney's fee of $650.

Claimant's aggravation claim is hereby denied.

SAIF CLAIM NO. FC 237542 MAY 12, 1978

WILLIAM H. STOFIEL, CLAIMANT
SAIF, Legal Services, Defense Attys.
Own Motion Order

Claimant suffered a compensable injury in 1965 while working for Dean Warren Plumbing Company whose workers' compensation coverage was furnished by the State Accident Insurance Fund. The claim was closed and claimant's aggravation rights have expired.

On February 1, 1978 Dr. Eckhardt, after examining claimant because of an exacerbation of a longstanding problem claimant had had with his low back, requested the Fund to reopen claimant's claim for conservative treatment of his recurrent low back problem which appeared to be related to his 1965 injury.

The Board was advised by the Fund that it would not resist reopening the claim.

ORDER

Claimant's claim, identified as FC 237542, is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on February 1, 1978, the date of Dr. Eckhardt's request, and until closed pursuant to the provision of ORS 656.278.

WCB CASE NO. 77-5354 MAY 12, 1978

FRED TATE, CLAIMANT
Richardson, Murphy & Nelson,
Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
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 December 16, 1977, is affirmed.

WCB CASE NO. 76-4873 MAY 12, 1978

CLARENCE R. WILLIAMS, CLAIMANT
Emily Lynn Knupp, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On April 28, 1978 the Board received from the State Accident Insurance Fund, by and through one of its attorneys, a request that it reconsider its Order on Review entered in the above

entitled matter on April 20, 1978 on the grounds that claimant had been found to be medically stationary by Dr. Case at a date earlier than June 2, 1976 according to a report from Dr. Halferty dated March 12, 1976.

The Board finds that Dr. Halferty's report of March 12, 1976 states only that claimant indicated to him that his treating physician, Dr. Case, had seen him the day before and he (claimant) stated that he had been released to return to work (Joint Exhibit 16). Actually, Dr. Case did not release claimant to return to work until June 2, 1976 when he furnished the Fund with a closing evaluation (Joint Exhibit 18).

The Board concludes that the request to reconsider its Order on Review entered in the above entitled matter on April 20, 1978 should be denied.

IT IS SO ORDERED.

CLAIM NO. D53-117994 MAY 17, 1978

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

Claimant's claim for a compensable injury suffered on June 8, 1967 was reopened by Own Motion Order issued February 3, 1977 which granted claimant compensation beginning December 8, 1975 and until the claim was closed pursuant to ORS 656.278.

Claimant subsequently has been receiving treatment from several doctors, including examinations at the Northwest Pain Clinic and by the Orthopaedic Consultants. All reports indicated considerable inconsistent response. It appears that claimant's motivation to improve his condition or return to work is non-existent.

Claimant has been granted compensation totaling 65% for unscheduled disability and 10% for partial loss of the left leg.

The Evaluation Division of the Workers' Compensation Department was requested to make a determination of claimant's present condition; it recommends that claimant be granted compensation for temporary total disability from December 8, 1975 through February 9, 1978 only.

The Board concurs with this conclusion.

ORDER

Claimant is hereby granted compensation for temporary total disability commencing December 8, 1975 and until February 9, 1978.

WCB CASE NO. 77-6411 MAY 17, 1978

DAVID H. BARNETT, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order Referring Matter For Hearing

On January 27, 1978 the Board received from claimant's attorney a petition for own motion relief based upon an industrial injury suffered by claimant on March 11, 1954. That claim was closed and claimant's aggravation rights have expired.

After the initial claim closure, the claim was reopened and closed again on February 10, 1956 with an award for 50% loss of the right leg. It was again reopened and closed on June 13, 1958 with an increase to 65% loss of the right leg.

On January 4, 1977 claimant was seen by Dr. Scheinburg, complaining of pain in the right hip area and on January 25, 1977 he performed a total hip arthroplasty with a Charnley-Miller prosthesis. The Fund reopened the claim and it was closed by an Own Motion Determination, dated September 19, 1977, whereby claimant was granted compensation for temporary total disability from January 4, 1977 through February 22, 1977, the date Dr. Scheinburg indicated claimant was again performing normal activities. This is the date of the last award or arrangement of compensation received by claimant for his 1954 injury.

On December 14, 1977 claimant's attorney had filed a supplemental request for hearing, alleging therein that the issues to be determined at hearing were whether claimant had suffered a disabling occupational disease as a result of his employment with Tillamook County, was claimant entitled to benefits as a result of this disabling injury and, if so, the extent of claimant's disability. This matter was originally set for hearing on March 8, 1978 but was canceled at the request of both attorneys with the request that it be heard at a later date in consolidation with the claimant's request for own motion relief. On April 18, 1978 the claim for the occupational disease was denied by the Fund.

The Board does not have sufficient evidence at this time to rule on the merits of claimant's request for own motion relief and, pursuant to the request from both attorneys, hereby refers the claimant's request for such relief to its Hearings

Division to be set for hearing on a consolidated basis with the claimant's request for hearing on the occupational disease.

If, after the hearing, the Administrative Law Judge (ALJ) shall find that claimant's present condition is directly attributable to his 1954 injury and that it has worsened since the last award or arrangement of compensation, he shall cause to be prepared a transcript of the proceedings to be forwarded to the Board together with his recommendation on the merits of claimant's request for own motion relief. An Opinion and Order will also be entered by the ALJ on the propriety of the denial by the Fund on April 18, 1978 of claimant's claim for an occupational disease.

SAIF CLAIM NO. A 654930 MAY 17, 1978

HOWARD F. BLAKENEY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 26, 1978 the Board received a letter from claimant which it construed to be a request for the Board to reopen his claim pursuant to its own motion jurisdiction granted by ORS 656.278. Claimant was injured on February 12, 1958, his claim was closed, and his aggravation rights have expired.

On April 27, 1978 the State Accident Insurance Fund was advised by the Board of the request and asked to state its position with respect thereto. The correspondence, including letters from Dr. Kubler dated September 9, 1974 and October 21, 1977, was also forwarded to the Fund.

The Fund responded on May 10, 1978, stating it felt there was no justifiable basis for granting claimant own motion relief and attached a report from the Orthopaedic Consultants, based upon an evaluation of claimant on December 16, 1977, that claimant's condition was stationary at that time, he would need no further treatment, that claimant could do some occupation and would need job placement, and that the previous award for 65% unscheduled back disability was consistent with their findings on the date of the examination and they recommended no change.

The Board, after giving full consideration to all of the medical reports relating to claimant's condition, conclude that they fail to support a finding that claimant's condition at the present time is worse than it was on the date of the last award or arrangement of compensation for his February 12, 1958 injury and, therefore, his request for own motion relief must be denied.

IT IS SO ORDERED.

SAIF CLAIM NO. HC 58054 MAY 17, 1978

JACK FISHER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On March 2, 1978 the Board entered an Own Motion Order requesting the Evaluation Division of the Workers' Compensation Department to re-evaluate claimant's present disability as it results from a compensable injury suffered on January 31, 1967, taking into consideration not only Dr. Misko's report of January 17, 1978 but also all previous medical reports relating to claimant's condition. Thereafter, it was to determine whether claimant should be awarded additional compensation for temporary and/or permanent disability and make its recommendation to the Board accordingly.

On June 30, 1977 an Own Motion Determination had been entered, based upon a closing examination made by Dr. Misko on June 14, 1977, which had granted claimant compensation for temporary total disability from March 16 through April 24, 1977.

The Evaluation Division, after re-reviewing the medical evidence, including Dr. Misko's latest report, recommended that the awards totaling 15% which claimant had received for loss of use of his right arm be considered adequate compensation to claimant for the physical impairment to, and the limitation of, his right arm. No further award for either temporary or permanent disability was recommended.

The Board concurs in this recommendation.

ORDER

The Own Motion Determination entered on June 30, 1977 in the above entitled matter is hereby ratified and reaffirmed.

WCB CASE NO. 76-7140-B MAY 17, 1978

EVA MAE KELLY, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Jaqua & Wheatley, 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 present condition to be an aggravation of his June 14, 1974 industrial injury and remanded the claim to the Fund 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 October 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 $100, payable by the Fund.

WCB CASE NO. 76-1769 MAY 17, 1978

MERLE LASH, CLAIMANT
Coons & Anderson, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
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.

ORDER

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

WCB CASE NO. 77-5437 MAY 17, 1978

KENNETH R. LEONARD, 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 claim for aggravation, directing that he could be provided psychological therapy under ORS 656.245, and found that he is entitled to no further 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 November 29, 1977, is affirmed.

WCB CASE NO. 77-1151 MAY 17, 1978

JUNE METCALF, CLAIMANT
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Order

On April 29, 1978 claimant in the above entitled matter mailed a letter to the Board requesting that it review the Referee's order entered on April 5, 1978. On May 3, 1978 copies of the request were mailed by the Board to all parties to the proceeding before the Referee.

On May 11, 1978 the Board received from Equitable Savings and Loan Association and its insurer, Northern Insurance Company, by and through their attorney, a motion for an order dismissing claimant's request for Board review on the grounds and for the reason that copies of said request were not mailed by claimant to all parties who appeared before the Referee, stating specifically that the claimant's letter of April 28, 1978 was not mailed by claimant to Equitable Savings and Loan, Northern Insurance Company, Fireman's Fund, and Employers Overload.

ORS 656.295(1) states: "The request for review by the board of an order of a referee need only state that the party requests a review of the order." Subsection (2) of the same statute states: "The requests 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."

The Board interprets subsection (2) of 656.295 to require that all parties to the proceeding receive a copy of the request within the period established by ORS 656.289(3); it is not material that the claimant actually mail the copies. In this case, the Board received claimant's request within 30 days after entry of the Opinion and Order of the Referee; it made copies thereof and mailed them on May 3, 1978 to all parties who appeared before the Referee.

Neither the Notice of Hearing nor the Referee's Opinion and Order indicate that Employers Overload was a party to the proceeding before the Referee and the Board's records indicate that copies of claimant's request for Board review were mailed to Equitable Savings and Loan, Fireman's Fund Insurance, Northern

Insurance Company and Robert Joseph, Attorney at Law, at the addresses set forth on page three of the Referee's Opinion and Order.

Based upon the foregoing facts, the Board concludes that the Motion to Dismiss is not well taken and should be denied.

IT IS SO ORDERED.

WCB CASE NO. 76-6210 MAY 17, 1978

DEAN C. MONROE, CLAIMANT
Haessler, Stamer & Esler, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Request for Review by the SAIF
Cross-request 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 compensation equal to 208° for 65% 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 December 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 $300, payable by the Fund.

WCB CASE NO. 76-4670 MAY 17, 1978

FRANK F. PROPES, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
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. 76-6117 MAY 17, 1978

In the Matter of the Compensation of
RICHARD L. STAUSS, CLAIMANT
And the Complying Status of
DARCO CEDAR PRODUCTS, INC., EMPLOYER
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which found it to be a subject employer and claimant to be a subject workman, as defined by ORS 656.005.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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 29, 1977, is affirmed.

WCB CASE NO. 77-611 MAY 17, 1978

TROY STINSON, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Attys.
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 compensation for permanent total disability.

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

ORDER

The order of the Referee, dated December 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 $350, payable by the Fund.

WCB CASE NO. 77-4137 MAY 17, 1978

MICHAEL YOUNG, CLAIMANT
Michael Brian, Claimant's Atty.
Scott M. Kelley, Defense Atty.
Stipulation Settling Award of Permanent
Partial Disability

The claimant sustained a compensable low back injury on September 15, 1975, while working for the subject employer. Treatment was provided and a determination order was made on January 4, 1977, granting time loss and an award of permanent partial disability equal to 5% unscheduled for 16 degrees. Thereafter the claimant made a request for hearing contending that his award of permanency was less than adequate. Subsequently a hearing was held and by opinion and order of the administrative law judge of March 17, 1978, an additional 80 degrees was awarded, of the equivalent value of $5,600. Thereafter the employer appealed contending that the award was excessive. The parties have now resolved their contentions as follows:

It is stipulated hereby that the award of the judge shall be reduced from 80 degrees to 73 degrees, being a reduction of 7 degrees, of the equivalent value of $490. It is further stipulated that the reduced value of the award is FIVE THOUSAND ONE HUNDRED TEN DOLLARS ($5,110) and such shall be paid to the claimant in a lump sum, minus the attorneys' fees of 25%, payable to the attorneys for the claimant, and minus permanent partial disability because of the Order of March 17, 1978, compensation paid to the claimant to the date of payment of the sums under this agreement. The lump sum will be used to pay claimant's bills and for claimant to go to college.

It is further stipulated that the parties request the board to approve this agreement and dismiss the employer's appeal.

Based upon the foregoing stipulation, compensation is awarded pursuant thereto, the parties are directed to comply with this agreement, and the employer's request for review is hereby dismissed.

WCB CASE NO. 77-1637 MAY 18, 1978

RUSSELL A. 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 remanded claimant's aggravation claim to the Fund for acceptance and payment of compensation including related medical

expenses. The Fund's denial of responsibility for submitted medical bills, dated November 1, 1976,was approved and penalties were assessed. Claimant contends that medical bills submitted on February 2, 1976 and October 13, 1976 should be compensable and further penalties and an attorney's fee should be assessed against the 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 24, 1977, is affirmed.

WCB CASE NO. 77-75 MAY 18, 1978

JOHN M. REED, CLAIMANT
Thwing, Atherly & Butler, Defense Atty.
Order

On May 10, 1978 the Board received from claimant a motion to amend its Order on Review entered in the above entitled matter on April 26, 1978 on the grounds that the issues stated are incomplete and incorrect. Attached to the motion was a copy of the respondent's brief which previously had been submitted by claimant and had been considered by the Board on review of the Referee's Opinion and Order.

The Board, after reviewing the respondent's brief, finds no justification for amending its Order on Review.

ORDER

Claimant's motion to amend the Order on Review entered in the above entitled matter on April 26, 1978 is hereby denied.

WCB CASE NO. 76-3579 MAY 19, 1978
WCB CASE NO. 72-3528

ROBERT E. FARANCE, CLAIMANT
Al Roll, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Own Motion Order Referred for Hearing

On March 2, 1978 the Board received from claimant, by and through his attorney, a motion for an order to rescind and set aside a disputed claim settlement previously approved and to

order a hearing on claimant's denied claim or, in the alternative, to exercise its own motion jurisdiction and rescind and correct the prior erroneous disputed claim settlement as approved.

Claimant had filed a claim against the State Accident Insurance Fund in 1972 which was subsequently denied; a hearing was requested (WCB Case No. 72-3528) but the matter was concluded by a disputed claim settlement, approved on February 8, 1973.

In 1976 claimant had filed a claim for aggravation of a 1970 injury against Publishers Paper and its carrier, represented by Daryll Klein, and against the Fund on account of the denied 1972 claim. A hearing was requested on these denials and assigned WCB Case No. 76-3579. Claimant contended that the disputed claim settlement was void and the Fund contended it was valid and the attack on the settlement in WCB Case No. 76-3579 was a collateral attack and could not be permitted. The Referee ruled in favor of the Fund.

On January 17, 1978 Mr. Estell, associate counsel for the Fund, advised the Board, with a copy to Mr. Roll, claimant's attorney, and to Mr. Klein, suggesting that before the Board make any ruling in WCB Case No. 72-3528 the legal issue should be briefed thoroughly and perhaps supplemented by affidavits of the necessary parties.

On March 7, 1978 the Board advised Mr. Roll, Mr. Estell and Mr. Klein that it would accept briefs from all parties. The schedule for briefing was on a 20-20-10 basis.

On March 10, 1978 Mr. Roll wrote to the Board, with copies to Mr. Estell and Mr. Klein, stating that he wished the Board to consider the documentation in claimant's motion and the exhibits attached thereto and in support thereof as claimant's initial brief. All briefs were due on April 26, 1978, however, as of the date of this order, neither Mr. Estell nor Mr. Klein have filed a brief.

Inasmuch as the Board has only the brief of the moving party and it contains just enough information to cause the Board some concern about the validity of the disputed claim settlement but not enough, without responses of the other parties, upon which to base a determination of the propriety of the disputed claim settlement, the Board refers claimant's request for own motion relief to its Hearings Division to be set for hearing, with notification to all parties, to determine whether claimant's motion should be granted.

After the hearing, the Referee shall cause to be prepared a transcript of the proceedings which is to be furnished to the Board together with the Referee's recommendation on the claimant's motion to rescind the disputed claim settlement. The Board will act upon the Referee's recommendation pursuant to the own motion jurisdiction conferred upon it by ORS 656.278.

WCB CASE NO. 76-6978 MAY 19, 1978

HESTER MILKS, CLAIMANT
Gray, Fancher, Holmes & Hurley,
Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which granted her compensation for 20% unscheduled mid-back disability and temporary total disability benefits from May 27, 1975 through April 14, 1976. 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 November 7, 1977, is affirmed.

WCB CASE NO. 77-4232 MAY 19, 1978

MICHAEL B. PARIS, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson &
Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the April 22, 1977 Determination Order whereby he was granted compensation equal to 45° for 30% loss of the left hand. 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 October 18, 1977, is affirmed.

WCB CASE NO. 77-568 MAY 19, 1978

CLEO PINKERTON, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Philip A. Mongrain, Defense Atty.
Collins, Velure & Heysell, Defense Attys.
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. C 61834 MAY 19, 1978

MARGUITA RAMPENTHAL, CLAIMANT
SAIF, Legal Services, Defense Attys.
Own Motion Determination

Claimant, who at the time of her injury on February 28, 1967 was a 36-year-old bus driver, suffered a compensable injury when the car she was driving on an employment errand was struck head on by another vehicle. Claimant suffered multiple injuries including pelvic and jaw fractures, left hip and sacroiliac dislocations, concussion and internal bleeding. Extensive oral repair and reconstruction restored the mouth to satisfactory function and the internal bleeding resolved quickly. The concussion affects left no residual problems nor did the head injuries.

The most serious and disabling injury was to claimant's left hip; both the femoral head and the acetabulum were compromised, the latter with fracture and the femoral head carried a threat of avascular necrosis. In March 1968 Dr. Fry inserted a metal cup over the femoral head, however, this displaced and in December 1968 traction to correct this was unsuccessful. The femoral neck was resected and an Austin-Moore prosthesis inserted.

Dr. Cooper examined claimant for closure in December 1969 and noted that the left leg was approximately one and one-fourth inches longer than the right leg, that claimant had a limp and loss of motion and pain, but no further treatment was recommended. The claim was closed by an order dated December 26, 1969 which awarded claimant 20% loss of arm by separation for her unscheduled disability and 70% loss of use of her left leg.

On September 10, 1975 claimant wrote the Fund, stating that her prosthesis had deteriorated and that her doctor had advised further surgery. On September 19, 1975 Dr. Fry reported that the prosthesis had protruded through the acetabulum and he recom-

mended a total hip replacement prosthesis and a leg shortening. This was carried out on November 18, 1975 with difficulty due to the acetabular problems and femoral alterations due to the prior prosthetic device.

The following March a foot brace was provided and claimant was released to return to work on March 29, 1976; actually she had returned on March 15.

Dr. Knox, a neurologist, examined claimant in April and found Peroneal palsy and, to a lesser extent, tibial nerve palsy, due to the longstanding sciatic nerve irritation, possibly due to the low back injury. Dr. Fry in August 1976 found weakness and paresthesias still present in claimant's left leg but noted some improvement. At that time claimant was working and wearing a brace.

In March 1977 claimant had problems with her knee blamed on the weakness in the quadricep muscles in the thigh. An arthrogram taken in June 1977 was negative and the claimant's peroneal problem continued to improve. Her knee was being injected with steroids to control synovitis.

Dr. Fry's reports of February and March 1978 submitted as a basis for claim closure indicated that the left leg length discrepancy had, for the most part, been rectified. There was some atrophy in the thigh and the calf. Claimant had a reduction of range of motion in the left leg as compared to the right but still retained a reasonably good functional range of motion. Her knee was no longer giving her significant distress.

The claim was submitted to the Evaluation Division of the Workers' Compensation Department which recommended no additional award for claimant's unscheduled disability but found that claimant's left leg was quite poor for occupational functioning and recommended an additional award for 10% for loss use of her left leg, giving claimant a total of 80%. It also recommended that claimant be granted compensation for temporary total disability from November 18, 1975 through March 14, 1976.

ORDER

Claimant is awarded compensation for temporary total disability from November 18, 1975 through March 14, 1976 and compensation equal to 10% loss use of the left leg. The awards for claimant's temporary total disability and the scheduled disability of her left leg are in addition to any previous awards received by claimant as a result of her February 28, 1967 injury.

WCB CASE NO. 77-75 MAY 19, 1978

JOHN M. REED, CLAIMANT
Thwing, Atherly & Butler, Defense Attys.
Order

On May 10, 1978 the Board received from claimant a motion to reconsider its Order on Review entered in the above entitled matter on April 26, 1978. The motion was supported by a brief from the claimant.

The Board, after considering the facts and contentions as set forth in the claimant's brief, concludes that the motion should be denied.

IT IS SO ORDERED.

WCB CASE NO. 76-3823 MAY 19, 1978

EDITH ROGERS, CLAIMANT
Feitelson & Terry, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
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 her claim for an alleged injury suffered on December 4, 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 29, 1977, is affirmed.

WCB CASE NO. 77-738 MAY 19, 1978

KEITH SHARP, CLAIMANT
Donald Miller, Claimant's Atty.
Cheney & Kelley, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks Board review of the Referee's order

which awarded claimant compensation equal to 19.2° for 10% loss of his left arm in lieu of the award for the scheduled disability granted by the Determination Order, dated August 10, 1977, which in all other respects he affirmed.

Claimant was a field service technician who sustained a compensable injury on December 27, 1973 as the result of an automobile accident. He suffered chronic cervical and lumbar strain. Dr. Parsons, in his closing evaluation, stated that claimant was able to perform any employment not requiring repetitive bending or heavy lifting. The claim was initially closed on January 14, 1975 by Determination Order which awarded compensation for time loss and 48° for 20% unscheduled back disability.

Claimant's back and neck problems continued and he was treated by Dr. Silver who performed a left ulnar nerve transposition in August 1975. Thereafter, claimant transferred to the care of Dr. Grewe who saw claimant in the latter part of 1975 and in January 1976. In January 1976 Dr. Grewe believed claimant had returned to his pre-injury level and the claim was again closed by a Second Determination Order, dated February 23, 1976, which awarded compensation for time loss only.

Later in 1976 claimant again saw Dr. Grewe complaining of increasing problems with his left arm. The closing evaluation of claimant's condition in May 1977 indicated mild limitations of neck movement of about 10° and full extension of the left elbow lacked 20° with tenderness above the elbow joint. The range of back movement was also restricted and there was evidence of denervations from prior surgical procedures. The claim was closed for the third time by an order dated August 10, 1977 which awarded claimant compensation for partial time loss and an additional 32° for 10% unscheduled back disability and awarded him 9.6° for 5% loss of the left arm. This is the Determination Order upon which claimant requested a hearing.

At the hearing claimant testified that he could not straighten his left elbow completely and that it had about half the strength of his right. Claimant suffers from arm tremors after exertion and is unable to lift or grip properly. He states that there is constant numbness in the fingers, he lacks dexterity in the fingers and coordination in the hand and arm. He states he has constant pain in the little and ring fingers which increases on exertion.

Claimant states that he is unable to bend or lift and cannot stand for more than 15 minutes nor walk more than 2 miles. He says he can no longer play golf, umpire, or play basketball, volleyball or bowl. His handwriting becomes illegible after a half hour of writing and he takes medication for the pain and said medication affects his ability to work and drive. He testified he has had to leave several jobs because of his physical disability.

Claimant is 46 years of age; he has had classes in basic

electronics, power plant operation and water treatment. He is also certified in water treatment and has an associates degree from Columbia Basin College where he majored in Psychology and minored in Business.

His job as field service technician entailed extensive travel to job sites; his salary was $800 a month and he was also paid $15 a day for meals and $12.50 a day for a room while away from home.

The Referee found that the employer had recorded claimant's wages on the Form 801 as $800 a month and did not include the allowance for expense money. Claimant testified he was allowed to retain the unspent allowance over and above his actual expenses. The Referee concluded that such allowances are properly included in the average weekly wage after reduction of the actual expenses to determine the net amount. However, in this case, claimant had not presented any evidence upon which it would be possible to calculate the net benefits from said allowance, and it would be improper for him to speculate thereon. Claimant's wage base, therefore, was not enlarged to include the unspent allowances.

On the issue of the adequacy of the award for claimant's scheduled disability, the Referee found, based upon Dr. Grewe's report, that claimant lacked 20° of full extension of the left elbow and there was tenderness and ulnar sensory loss to pinprick temperature and light touch together with claimant's credible testimony to his inability to lift, his weakness of grip, his loss of dexterity in the fingers and lack of coordination in the hand and arm, that such disabling factors indicate claimant has a greater disability to his left arm than that for which he received the award of 5%. He increased the award to 10%.

The Referee, again relying upon Dr. Grewe's report which rated claimant in the light work category, concluded that claimant had been sufficiently compensated by his awards which totalled 96° for 30% of the maximum for his unscheduled back disability.

The Board, on de novo review, concurs with the Referee's finding that claimant's net benefits from the gross allowances should not be included in claimant's average weekly wage. It also agrees that claimant has been adequately compensated for his unscheduled injury.

The Board finds that the medical evidence clearly reveals that the claimant has suffered a substantial loss of function and use of his left arm and concludes that claimant is entitled to an award of 38.4° for 20% loss use of the left arm.

ORDER

The order of the Referee, dated December 2, 1977, is modified.

Claimant is awarded compensation equal to 19.2° for 10% loss of his left arm. This award is in addition to the award granted by the Referee by his order 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 awarded claimant by this order, payable out of such increased compensation as paid, not to exceed $2,300.

WCB CASE NO. 78-163 MAY 19, 1978

FAY STIEHL, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
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. 76-6759 MAY 19, 1978

ALFRED WEST, CLAIMANT
Randolph Lee Garrison, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order which affirmed the denial by Liberty Mutual on October 15, 1976 of claimant's claim for aggravation.

At the hearing, the attorney for the employer and its carrier moved for an order of dismissal, claiming that the Referee had no jurisdiction because the request for hearing had not been filed with the carrier within five years from the date of the first determination which was November 30, 1971. The request for hearing was mailed by claimant with a postmark of December 7, 1976. It was also contended that the request was invalid because copies of the same were not forwarded to the carrier. The Referee denied the motion, stating that the request was filed in response to the carrier's denial and within 60 days of the date of said denial; furthermore, the statute does not indicate that the request

for hearing must be served upon the carrier, but specifically states that the request be mailed to the Board which then assumes the responsibility of notifying all interested parties.

The Referee further found that claimant's request to reopen his claim because of aggravation was timely made by his attorney to the carrier on October 8, 1976 which was within 5 years of the issuance of the first Determination Order, which closed claimant's claim for industrial injury suffered on April 16, 1970.

Claimant's claim was subsequently reopened and a second Determination Order, dated March 23, 1972, awarded claimant 32° for 10% unscheduled back disability; it was reopened by an order by Referee Daron on January 9, 1974 and again closed by a third Determination Order, dated April 3, 1974, which awarded no additional compensation for permanent disability. On October 31, 1974 pursuant to a stipulation claimant was awarded an additional 64°. This was the date of the last award and arrangement of compensation claimant received for his April 16, 1970 injury.

In support of his claim for aggravation, claimant relies on reports from Drs. Young, Hald and Campagna. Claimant and his wife also testified as to his present condition in an effort to show that it had worsened. Dr. Young first indicated that additional medical treatment was desirable; however, he repudiated this opinion within 19 days, after reviewing the medical reports. Neither Dr. Hald nor Dr. Campagna indicated any need for additional medical services; both found claimant to be medically stationary and made diagnoses identical to those made on this claimant's condition prior to October 1974.

The Referee concluded, based upon the medical evidence and the lay testimony to which the Referee accorded very little credibility, that claimant's condition had not worsened since October 31, 1971, the date of the last award or arrangement of compensation which claimant had received for his April 16, 1970 injury. Claimant had failed to carry the necessary burden of proof as required by statute, therefore, the denial by the carrier was affirmed.

The Board, after de novo review, agrees with the conclusion reached by the Referee and would affirm his order.

ORDER

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

WCB CASE NO. 76-3883 MAY 22, 1978

RICHARD HARPER, CLAIMANT
Haviland, deSchweinitz, Stark & Hammack,
Claimant's Attys.
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 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 October 3, 1977, is affirmed.

WCB CASE NO. 77-3511 MAY 22, 1978

CYNTHIA HILL, CLAIMANT
Davies, Biggs, Strayer, Stoel & Boley,
Defense Attys.
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 her claim for an alleged injury suffered on March 22, 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 December 8, 1977, is affirmed.

WCB CASE NO. 77-4345 MAY 22, 1978

HAROLD M. KNUTSON, 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 June 13, 1977 Determination Order whereby he was granted 48° for a total award equal to 112° for 35% 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 December 1, 1977, is affirmed.

CLAIM NO. 428-C-01297 MAY 22, 1978

KENNETH LARSEN, CLAIMANT
Coons & Anderson, Claimant's Attys.
McMenamin, Joseph, Herrell & Paulson,
Defense Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Own Motion Determination

On December 16, 1976 claimant, by and through his attorney, had requested the Board to reopen his claim for further permanent disability and referral to the Division of Vocational Rehabilitation, contending that his present condition was related to an industrial injury to his left knee on November 22, 1966. Claimant also had requested a hearing on a denial of an alleged injury suffered on December 20, 1976.

The Board referred the request for own motion relief to the Hearings Division to set for hearing in consolidation with the hearing on the denial. After a hearing on April 8, 1977, Referee Fitzgerald found, based upon the medical evidence, that claimant's present condition was an aggravation of his April 22, 1966 injury and the responsibility of Great American Insurance Company who was providing the employer workers' compensation coverage at that time. Based upon the Referee's recommendation the Board entered an Own Motion Order on October 19, 1977 remanding claimant's claim for

aggravation of his November 22, 1966 injury to Great American Insurance Company. This order was amended on November 4, 1977.

The Great American Insurance Company requested a hearing and, as a result of that hearing before Referee Foster, the Board's Own Motion Order issued on October 19, 1977, as amended, was affirmed and the matter was dismissed.

The claimant requested claim closure based upon a report from Dr. Brooke dated December 8, 1977.

The Evaluation Division of the Workers' Compensation Department on March 23, 1978 recommended that claimant be awarded an additional 5% for loss use of his left leg as a result of the aggravation; claimant had previously received awards which combined for a total of 15% loss of leg.

The medical report submitted by Dr. Brooke stated that when he had examined claimant in 1973 he felt claimant's problem was "mild" and that claimant was able to continue working in the lumber mill but by 1977 claimant's condition disabled him from working any longer in mills. It was Dr. Brooke's opinion that claimant should receive an award of moderate permanent partial disability of the lower extremity.

Based upon Dr. Brooke's report, the Board concludes that claimant should receive an additional award for 25% loss use of his left leg which would give claimant a total for 40%.

ORDER

Claimant is awarded compensation for temporary total disability, as provided by law, commencing December 20, 1976, and until his claim is closed pursuant to ORS 656.278, less time worked.

Claimant is awarded compensation for 25% loss use of his left leg. This award is in addition to the awards received by claimant in 1967 and in 1973.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in behalf of claimant's request for own motion relief a sum equal to 25% of the compensation granted to claimant by this Own Motion Determination, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-4101 MAY 22, 1978

In the Matter of the Compensation of
LARRY B. MARSHALL, CLAIMANT
And the Complying Status of
DONALD P. VANDEHEY, JR., EMPLOYER
E. Kimbark MacColl, Jr., Claimant's Atty.
Stephen E. Andersen, Defense Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks Board review of that portion of the Referee's order which granted claimant an attorney's fee equal to $750. The employer contends that this award 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. The Board's opinion is that the attorney fee granted by the Referee's order is an appropriate amount. If there is dissatisfaction with this award the proper remedy is to request a determination by the circuit court under ORS 656.388.

ORDER

The order of the Referee, dated October 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 $100, payable by the carrier.

WCB CASE NO. 76-373 MAY 22, 1978

ELIZABETH WINSLOW, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Request for Review by the SAIF

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund requests Board review of the Referee's order which reversed its denial of claimant's claim on December 2, 1975, remanded it for acceptance and payment of compensation, pursuant to law, commencing June 20, 1975, less any time loss that may have been paid, and until the claim was closed pursuant to ORS 656.268 and awarded claimant's attorney a fee of $1,500 payable by the Fund.

The question is whether claimant has an occupational disease arising out of and in the scope of her employment as a laundry worker at MacLaren School from August 1, 1973 to and including June 20, 1975.

Claimant commenced working at Hillcrest School for Girls as a group life supervisor, i.e., a houseparent, in September 1967. She continued to do such work until August 1, 1973 when she was transferred to MacLaren to work in the laundry where she worked until June 20, 1975 when she quit state employment.

Claimant testified that while she was working in the laundry at MacLaren she was exposed to chemicals and soap, bleaches, detergents and other cleaning substances and, after working for awhile in the laundry, she seemed to be having a bad cold which caused her chest to hurt and made it difficult to breathe; the burning in her chest felt like she was being scalded internally, more on her left side than the right. Her legs would become numb and her arms were affected. She also had numerous other symptoms.

Claimant first consulted Dr. Reid and thereafter was hospitalized, treated, consulted and diagnosed many times by many doctors, most of whom can be considered as experts in their specialty field. Dr. Campbell, an internist, upon referral from Dr. Reid, examined claimant in July 1974 and expressed his opinion that claimant's problems were not related to her working conditions at the laundry. He again saw claimant in March 1975 and stated that in addition to his initial diagnoses of menopausal syndrome, a chronic anxiety syndrome, obesity and possible hyperparathyroidism, he now found indication of arteriosclerotic heart disease.

On July 10, 1975 Dr. Meienberg, also an internist, examined claimant and, after considering claimant's belief that there was some connection between her weakness and other symptoms and the use of the strong laundry detergents, stated that it was very difficult to determine whether or not there was any connection between such symptoms and the use of the detergents. His opinion was that the detergents might be regarded as irritants, if not allergents, based upon the history related to him by claimant. He did find a definite tension syndrome which was responsible for some aggravation of her symptoms. Dr. Campbell testified at the hearing that the anxiety tension which pre-dated her work at MacLaren was the cause of claimant's symptoms rather than toxics to which she was exposed.

Dr. Edwards in August 1975 found no significant lung disease. Four days later Dr. O'Hollaren of the Portland Allergy Clinic found no significant inhalant reactions.

Claimant was again seen by Dr. Meienberg and examined by Dr. Rumbaugh; the latter diagnosed probable chest wall pain and hyperventilation and chronic anxiety but indicated no causal relationship. Dr. Meienberg had been of the opinion that irritation from the detergents inhaled by claimant in the laundry would probably cause the shortness of breath but it would be difficult, if

not impossible, to attempt to prove or maintain that claimant's symptoms were due to the inhalation from an objective medical standpoint.

Claimant filed a claim for an occupational disease on August 8, 1975, which indicated she had developed an allergy from chemicals used in the work which in turn caused a heart condition, that it was progressive in nature and commenced shortly after August 1, 1973 when she began working in the laundry.

Claimant's treating physician, Dr. Neisius was unable to reach a diagnosis in his report of September 15, 1975, however, on October 16, 1975, Dr. Akpata, a general surgeon practicing in Canada, suggested claimant's problem might be related to the inhalation of fumes from the chemicals used in the laundry substances.

In November 1975 Dr. Campbell advised the Fund that in his opinion claimant's symptoms were largely nervous in origin and claimant would be better off not working so hard nor worrying so much. It was his unequivocal opinion that none of claimant's conditions were job related. Based upon this opinion from Dr. Campbell, the Fund denied claimant's claim on December 2, 1975.

Claimant was examined by Dr. Gortner at the Mason Clinic in Seattle who found that claimant had a psychophysiological reaction and possibly a hyperventilation syndrome. In his opinion, claimant did not have any physical ailment as a result of her exposure to soaps and bleaches. He suggested that because of the anxiety and tension resulting from claimant's working in the laundry that she no longer continue such work, but found that claimant was perfectly capable of all other forms of work.

In May 1977 Dr. Baker, a specialist in allergy and asthma who examined claimant, was of the opinion that the presence of reactive airway disease in claimant did not arise out of her employment but that the irritants to which she was exposed aggravated such condition by narrowing and causing a feeling of chest heaviness.

Dr. Jones, a clinical psychologist, after evaluating claimant's condition, was of the belief that claimant was an individual who had overwhelming needs related to duty, conformity and moralistic responsibility, that she was a personality type to suffer conversion hysteria. He felt her occupational environment would cause such condition.

The Referee did not question Dr. Campbell's opinion that the toxic substances were not directly producing the physical symptoms suffered by claimant, but he felt they were setting off the psychological mechanism described in Dr. Jones' report which stated that there was a causative connection between the work at MacLaren, including exposure to the fumes of the toxic substance used in the laundry where claimant worked, and her physical symptoms presenting themselves as a reflection of the mental disorders which claimant

had prior to going to work at the laundry which mental disorders were only worsened by work at the laundry.

The Referee found that the evidence was quite clear that claimant had disliked intensely working in the laundry because it appeared to be demeaning to her after her pleasant association at Hillcrest working as a houseparent. He concluded that Dr Jones' report clearly and overwhelmingly established the existence of psychological problems and that the job at MacLaren materially contributed to these pre-existing conditions and problems and apparently added additional mental problems.

The Referee took into consideration the evidence that claimant's mental disorders had not incapacitated her previous to her assignment to the laundry but after the assignment the anxiety created in claimant's mind produced what might be designated as a psychosomatic allergy. Claimant believed she was being poisoned by the toxic substances and this belief was augmented by the adverse affects of the irritants upon her pre-existing reactive airway disease sufficiently to create a high enough level of intensity of anxiety to present physical effects through the mechanism of psychophysiological genesis, according to the Referee.

The Referee found claimant's claim was compensable and he remanded it to the Fund to be accepted commencing June 20, 1975, the day claimant last worked in the laundry at MacLaren.

The Board, on de novo review, finds that the medical evidence indicates that none of claimant's physical problems are related to her work in the laundry at MacLaren. However, based upon Dr. Jones' report, the Board does find that claimant's work in the laundry at MacLaren materially contributed to her pre-existing psychological problems.

The Board agrees with the Referee that unquestionably the claimant felt that she had been demoted when she was transferred from Hillcrest to MacLaren. The requirements of, and the duties involved in, the two jobs were vastly different and, based upon Dr. Jones' evaluation of claimant's psychopathology, it is understandable that she would relate every physical symptom which she felt she had to her work in the laundry.

When claimant was employed as a houseparent at Hillcrest she undoubtedly obtained greater satisfaction in terms of duty, conformity and moralistic responsibility than she did when she was transferred to MacLaren and, according to Dr. Jones, claimant needed fulfillment in those areas and such could not be obtained while working in the laundry at MacLaren.

The Referee had concluded that claimant had established in terms of probability a medical connection between her exposure to the chemicals in the laundry and her symptoms which produced, in the manner described by Dr. Jones in his psychological evaluation of claimant on May 5, 1977, an occupational disease.

The Board concludes that the Fund's responsibility must be limited to claimant's psychological problems. The medical evidence is not sufficient to support a conclusion that claimant's purely physical problems are work-related. Therefore, the Board concludes that the Referee's order must be amended to indicate this limitation of responsibility.

ORDER

The order of the Referee, dated November 1, 1977, is modified.

Claimant's claim, only insofar as it relates to her psychological conditions, is remanded to the State Accident Insurance Fund for acceptance for payment of compensation, as provided for by law, commencing June 20, 1975 and until the claim is closed pursuant to ORS 656.268, less any time loss which may have previously been paid claimant by the Fund.

This is in lieu of the third full paragraph on page 14 of the Referee's order which, in all other respects, is affirmed.

WCB CASE NO. 77-3111 MAY 23, 1978

MICHAEL SCHMITZ, CLAIMANT
Rutherford & Drabkin, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
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 to which he is entitled in addition to assessing 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 November 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. 77-4758 MAY 24, 1978

BILLIE DUNBAR, CLAIMANT
Evans, Anderson, Hall & Grebe,
Claimant's Attys.
SAIF, Legal Services, Defense Attys.
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 November 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 $300, payable by the Fund.

WCB CASE NO. 72-479 MAY 24, 1978

DONALD L. FRY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Atty.
Jaqua & Wheatley, Defense Attys.
Own Motion Order

On June 6, 1977 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for a 1971 industrial injury but was advised that the Board would need more medical reports to support the request. Such reports were received and submitted to the employer, Georgia-Pacific Corporation, who on November 14, 1977 responded, stating that the medical expenses of claimant's recent surgery were being paid pursuant to ORS 656.245 but it would oppose reopening claimant's claim.

The Board did not at that time have sufficient evidence upon which to make a determination of the validity of claimant's request and, therefore, referred the request to its Hearings Division by an Own Motion Order entered on December 7, 1977.

On February 28, 1978 Kirk A. Mulder, Administrative Law Judge (ALJ), held a hearing and, on May 4, 1978, submitted to the Board a transcript of the proceedings together with his recommendation that the Board find claimant's present condition was related to his April 23, 1971 industrial injury and that claimant had suffered a worsening of said injury related condition since the last award or arrangement of compensation.

The Board, after de novo review of the transcript of the proceedings, accepts and adopts as its own the recommendation of the ALJ, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

Claimant's claim for an industrial injury suffered on April 23, 1971 is hereby remanded to the employer, Georgia-Pacific Corporation, self-insured, to be accepted and for the payment of compensation, as provided by law, commencing May 31, 1977, the date of the surgery, and until the claim is again closed pursuant to the provisions of ORS 656.278.

Claimant's counsel is awarded as a reasonable attorney's fee for securing own motion relief for claimant a sum equal to 25% of the compensation which claimant shall receive as a result of this order for temporary total disability and/or permanent partial disability, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-4426 MAY 24, 1978

FRANK GIGLIOTTI, CLAIMANT
Willner, Bennett, Riggs & Skarstad,
Claimant's Attys.
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 compensation for permanent total disability.

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

ORDER

The order of the Referee, dated October 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 $100, payable by the carrier.

SAIF CLAIM NO. DC 368493 MAY 24, 1978

ROBERT A. NASH, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On January 19, 1978 claimant requested the State Accident Insurance Fund to reopen his claim in the above entitled matter which related to an industrial injury which he had suffered on April 7, 1972. The request was accompanied by letters from Dr. Fitch dated November 25, 1977 and April 2, 1973.

Claimant's claim was closed by a Determination Order dated August 1, 1972 which awarded claimant compensation for time loss only. Claimant's aggravation rights have expired.

The Fund has advised the Board that, based upon Dr. Fitch's report of November 25, 1977, it will not oppose reopening claimant's claim at this time.

ORDER

Claimant's claim, identified as DC 368493, is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation as provided by law, commencing on October 28, 1977, the date he was examined by Dr. Fitch, and until the claim is closed pursuant to ORS 656.278, less any time worked.

SAIF CLAIM NO. HC 273885 MAY 24, 1978

DELL E. PIPKIN, JR., CLAIMANT
Richardson, Murphy & Nelson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

Claimant suffered a compensable injury to his left wrist on October 23, 1970 which required a two-stage surgical repair. Dr. Grewe's June 28, 1971 report indicated that the residuals of the injury primarily involved the sensory portion of the medial nerve distribution of the left hand.

The July 12, 1971 Determination Order granting claimant 23° for partial loss of the left forearm was affirmed by an Opinion and Order, dated September 28, 1971.

The claim was reopened by a Stipulation, dated October 27, 1977, with payment of time loss benefits commencing September 5, 1977. Claimant underwent internal and external medial neurolysis and neuroma excision on September 23, 1977.

Claimant, on December 1, 1977, underwent preganglionic dorsal sympathectomy and ganglionectomy, T-3, as further treatment for his left median neuropathy and causalgia. The causalgia was found to be "minor" by Dr. Grewe. Claimant received no further pain medication from his doctor after February 14, 1978. On March 15, 1978 claimant was found to be medically stationary.

On March 21, 1978 the State Accident Insurance Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant be granted further temporary total disability benefits from September 5, 1977 (per stipulation of October 27, 1977) through March 15, 1978, less time worked, but no additional award for permanent disability.

The Board concurs with this recommendation.

ORDER

Claimant is hereby granted compensation for temporary total disability from September 5, 1977 through March 15, 1978, less time worked.

WCB CASE NO. 77-353 MAY 24, 1978

RHEA RAMBERG, CLAIMANT
Bechtold & Laird, Claimant's Attys.
Jaqua & Wheatley, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of the Referee's order which directed it to pay claimant time loss benefits from November 1, 1976 through December 14, 1976, assessed penalties and attorney's fees against it and ordered it to pay a medical bill dated February 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 October 19, 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 $300, payable by the carrier.

WCB CASE NO. 76-6023 MAY 24, 1978

MELVIN SPAIN, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Order

On May 17, 1978 the State Accident Insurance Fund requested the Board to reconsider its Order on Review entered in the above entitled matter on May 12, 1978.

The Board, after considering the case cited in the letter-request, concludes that there is no basis for reconsidering its order.

ORDER

The Request to Reconsider the Order on Review entered in the above entitled matter on May 12, 1978 is hereby denied.

WCB CASE NO. 76-5841 MAY 24, 1978

IRENE R. WOLENSKY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn,
& O'Leary, Claimant's Atty.
Acker, Underwood, Beers & 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.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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 28, 1977, is affirmed.

WCB CASE NO. 77-2018 MAY 26, 1978
WCB CASE NO. 77-3738

TONY APODACA, CLAIMANT
Jones, Lang, Klein, Wolf & Smith,
Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Request for Review by the SAIF
Cross-appeal by Claimant

Reviewed by Board Members Moore and Phillips.

The State Accident Insurance Fund seeks Board review of the Referee's order which directed it to pay claimant an additional 25% of the temporary total disability benefits heretofore paid claimant for the period from May 30, 1976 to July 15, 1976 as a penalty for unreasonable delay; to pay compensation to claimant for temporary total disability from April 15, 1977 through June 1, 1977, less 10 days work; to pay claimant's attorney the sum of $750 (WCB Case No. 77-2018).

The Referee also directed that claimant be paid temporary total disability benefits from February 1, 1977 through May 25, 1977, less benefits paid for any of said period under WCB Case No. 77-2018 for disability and that 10% of the sum due for the temporary total disability benefits in this case be paid to claimant as penalty for unreasonable delay of acceptance or denial of a claim, awarded claimant's attorney a fee of $250 payable by the Fund and affirmed the denial issued on May 26, 1977 (WCB Case No. 77-3738).

On October 24, 1977 there was a cross-appeal filed by claimant's attorney, requesting that the first Amended Order on Reconsideration be reversed and the original Opinion and Order be reinstated.

This case involves two claims for an industrial injury. One was incurred on May 30, 1976, the other on February 1, 1977; both claims concerned the same employer and insurer.

After the Referee had entered his Opinion and Order on September 27, 1977 (the order upon which the Fund seeks Board review), he issued an Amended Order on Reconsideration on October 10, 1977. This amended order deleted the penalties and attorney's fees awarded for unreasonable delay with respect to WCB Case No. 77-3738, based upon the ruling of the Court of Appeals in Jones v. Emanuel Hospital, 29 Or App 265, entered on April 26, 1977. In all other respects he reaffirmed his original order.

On October 24, 1977 the Fund requested Board review of the Referee's order of September 27, 1977. On October 28, 1977 the Referee issued a second Amended Order on Reconsideration because the Oregon Supreme Court, in Jones v. Emanuel Hospital, 280

Or 147, had reversed the ruling of the Court of Appeals. He voided his Amended Order on Reconsideration dated October 10, 1977 and reinstated in its entirety his original order dated September 27, 1977.

The Board, on de novo review, finds that the Request for Review filed by the Fund on October 21, 1977 divested the Referee of jurisdiction, therefore, his second Amended Order on Reconsideration was null and void. However, the Board agrees with the findings and conclusions set forth in the original Opinion and Order of the Referee entered on September 27, 1977 and adopts it as its own. A copy of this Opinion and Order is attached hereto and, by this reference, made a part hereof.

ORDER

The order of the Referee, dated September 27, 1977, is affirmed.

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

WCB CASE NO. 77-2682 MAY 26, 1978

JAMES BIRCHARD, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Attys.
SAIF, Legal Services, Defense Attys.
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 in addition to assessing 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 December 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 carrier.

SAIF CLAIM NO. WB 161566 MAY 26, 1978

RICHARD CUMMINS, CLAIMANT
SAIF, Legal Services, Defense Attys.
Own Motion Order Referring for Hearing

On March 8, 1978 claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for an industrial injury incurred on December 3, 1965 with benefits for time loss to commence on June 23, 1977 and continue until Dr. Degge found claimant to be medically stable.

Claimant was working for Horse Creek Logging Company, whose carrier was the State Accident Insurance Fund, when he suffered an injury to his left ankle and right knee. The claim was closed on September 7, 1966 with an award for 70% loss of the right leg and 20% loss of the left foot. In 1967 claimant was seen by Dr. Degge, who had treated him initially, with additional complaints. A stipulation was approved on October 27, 1967 which granted claimant an additional 10% loss of the right leg and 10% loss of the left foot.

On January 27, 1977 Dr. Degge performed surgery for repair of torn tissue and reefed the ligaments to restore stability. On April 25, 1977 the Fund requested a determination and, based upon the recommendation of the Evaluation Division, an Own Motion Determination, dated June 9, 1977, granted claimant compensation for temporary total disability from December 6, 1975 through February 7, 1977. This is the last award or arrangement of compensation for claimant's December 3, 1965 industrial injury.

At the time the request for own motion relief was made to the Board, the Board was also informed that claimant's attorney had written to the Fund on August 15, 1977, asking that it commence payment of time loss benefits based on the medical report of Dr. Degge, dated June 23, 1977, which stated that claimant became disabled due to a low back disability on that date. Claimant contends this disability is a direct result of the knee injury of December 3, 1965 according to a report from Dr. Robert McKillop that the knee problem, in his opinion, did contribute to claimant's back problem in that the knee instability and the associate limping increased the mechanical stress in the lower back.

On March 9, 1978 the Fund was advised of claimant's request for own motion relief; it had been furnished a copy of the request with the various attachments, including the report of Dr. McKillop dated February 24, 1978. The Fund was requested to advise the Board within 20 days of its position with regard to claimant's request.

The Fund responded on May 9, 1978 in opposition to claimant's request, submitting a report from Dr. James R. Degge, dated April 24, 1978, which indicates that claimant's recent

back treatment furnished by Dr. Degge was primarily caused by the spinal fusion which claimant underwent in 1962 rather than by the right knee injury of November 3, 1965. The Fund contended that the 1962 injury was the responsponsibility of a private carrier rather than the Fund.

The Board has conflicting medical opinions before it relating to the causation of claimant's present problems. Therefore, it refers claimant's request for own motion relief for his 1965 industrial injury to its Hearings Division to set for hearing before an Administrative Law Judge (ALJ) who shall determine, based upon the evidence, whether claimant's present condition is causally related to his injury of December 3, 1965 and, if so, if it represents a worsening since the date of the last award or arrangement of compensation which claimant has received for said injury.

Upon conclusion of the hearing, the ALJ shall cause a transcript of the proceeding to be prepared and submitted to the Board together with his recommendation on claimant's request for own motion relief.

WCB CASE NO. 69-1801 MAY 26, 1978

EUGENE E. FIELDS, CLAIMANT
C. H. Seagraves, Jr., Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On March 23, 1977 the Board issued an Amended Own Motion Order remanding claimant's claim for a heart attack suffered on April 30, 1969 to the State Accident Insurance Fund for acceptance and payment of compensation, as provided by law, until the claim was closed pursuant to the provisions of ORS 656.278 and awarding claimant's attorney as a reasonable attorney's fee a sum equal to 25% of any compensation claimant might receive as a result of that order, payable out of said compensation as paid, to a maximum of $2,300.

On February 21, 1978 the Fund requested a determination of claimant's disability and on May 16, 1978 the Evaluation Division of the Workers' Compensation Department recommended to the Board that claimant be awarded compensation equal to 40% of the maximum allowable by statute for unscheduled disability and compensation for temporary total disability from April 30, 1969 through December 8, 1971 and from June 10, 1976 through June 15, 1976 (this compensation has already been paid to claimant by the Fund).

Claimant's attorney, on March 13, 1978, had asked for an opportunity to submit an additional medical report before a determination was made, stating that Dr. Glatte had advised the claimant

and his wife that he was very much opposed to the concept of work-related cardiac claims. The Evaluation Division recommended no further medical examination; it believed that Dr. Glatte had properly separated the residuals due to claimant's injury from unrelated medical problems.

The Board concurs in the recommendation of the Evaluation Division.

ORDER

Claimant is awarded compensation equal to 40% of the maximum allowable by statute for unscheduled disability resulting from his April 30, 1969 injury.

The compensation previously paid claimant by the State Accident Insurance Fund for temporary total disability from April 30, 1969 through December 8, 1971 and from June 10, 1976 through June 15, 1976 is approved.

Claimant's attorney has already been awarded an attorney's fee by the Board's Amended Own Motion Order dated March 23, 1977.

WCB CASE NO. 76-4395 MAY 26, 1978
WCB CASE NO. 76-4103

ROGER W. GRANGER, CLAIMANT
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
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 and affirmed the March 2 and 18, 1976 Determination Orders granting him 16° for 5% unscheduled 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 December 9, 1977, is affirmed.

WCB CASE NO. 77-5378 MAY 26, 1978

ETTA HEPNER, CLAIMANT
Bailey, Welch, Bruun & Green,
Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which granted him compensation for 15% unscheduled disability. Claimant contends that he is entitled to temporary total disability compensation beyond April 30, 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 December 8, 1977, is affirmed.

WCB CASE NO. 76-1286 MAY 26, 1978

BRUCE LATTIN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order on Remand

On November 18, 1977 the Workers' Compensation Board affirmed the Referee's order dated January 21, 1977 which dismissed the hearing which claimant had requested because of the refusal by the State Accident Insurance Fund to pay compensation from January 17, 1974, the date claimant suffered a myocardial infarction, to February 6, 1976, the date the circuit court entered a judgment order which, inter alia, ordered that claimant be considered permanently and totally disabled as the result of the January 17, 1974 incident.

The Board, in affirming the Referee's order, stated, as a matter of clarification, that claimant was 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 order.

On December 13, 1977, claimant appealed to the Oregon

Court of Appeals which filed its opinion on April 17, 1978, stating that the State Accident Insurance Fund did not pay claimant compensation for the period between January 17, 1974 and February 6, 1976 but only commenced payment of compensation from February 6, 1976 until the Court of Appeals reversed the circuit court's ruling that claimant was permanently and totally disabled. The Court stated that the Fund should have paid claimant for the entire period and reversed and remanded the matter for an entry of an order in accordance with such opinion.

Based upon the remand from the Court of Appeals, the Board hereby issues an amended order on review in the above entitled matter as follows:

ORDER

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

The State Accident Insurance Fund is directed to pay claimant compensation for permanent and total disability from January 17, 1974 to June 14, 1976.

WCB CASE NO. 77-6475 MAY 26, 1978

RONALD SLUDER, CLAIMANT
Anderson, Fulton, Lavis, & Van Thiel,
Claimant's Attys.
SAIF, Legal Services, Defense Attys.
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 12, 1977 Determination Order granting him 15° for 10% loss of the right leg in addition to time loss benefits from December 17, 1974 through May 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 January 6, 1978, is affirmed.

WCB CASE NO. 77-1988 MAY 26, 1978

RICHARD THOMAS, CLAIMANT
Keith D. Evans, Claimant's Atty.
SAIF, Legal Services, Defense Attys.
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 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 December 23, 1978, is affirmed.

WCB CASE NO. 76-72-SI MAY 30, 1978

In the Matter of the Petition of
BOISE CASCADE CORPORATION
For Reimbursement From the
Second Injury Reserve Fund
In the Case of JOHN KISLING
Souther, Spaulding, Kinsey, Williamson &
Schwabe, Defense Attys.
Order on Review

Reviewed by Board Members Wilson, Moore and Phillips.

On December 9, 1976 Referee Terry L. Johnson, after a hearing, recommended that the Board grant the employer's request for reimbursement from the Second Injury Relief Fund in the amount of 100% of the actual claim cost incurred because of the injury to Mr. Kisling, his employee, arising out of the accident of December 8, 1974.

Notice was given to the parties to the hearing before the Referee that exceptions or arguments to the Referee's Findings, Conclusions and Recommended Order must be filed with the Workers' Compensation Board within 30 days from the date of the recommended order. Inadvertently, the entire file was mislaid and it was not brought to the attention of the Board until two weeks ago. Upon a request from the Board a copy of the Referee's Findings, Conclusions and Recommended Order and a copy of the abstract of the proceedings was furnished to the Board.

The Board, after de novo review of the abstract of the proceedings, accepts the recommendation of the Referee and adopts as its own the findings of fact and conclusions of law as set forth in the recommended order, a copy of which is attached hereto and, by this reference,made a part of this order.

SAIF CLAIM NO. WA 425480 MAY 30, 1978

WILLIAM E. CLARK, CLAIMANT
A. C. Roll, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Amended Own Motion Determination

On February 15, 1978 an Own Motion Determination was entered in the above entitled matter which awarded claimant's attorney as an attorney's fee a sum equal to 25% of the compensation for temporary total disability granted claimant by the order, payable out of said order as paid, not to exceed $500.

On May 11, 1978 the Board was advised by claimant's attorney that he did not desire to have a fee withheld for his services; he asked that the entire amount of the temporary total disability benefits granted claimant be paid directly to the claimant.

Based upon this generous gesture on the part of claimant's attorney, the Own Motion Determination entered on February 15, 1978 should be amended by deleting therefrom the second paragraph in the "Order" portion thereof.

IT IS SO ORDERED.

WCB CASE NO. 76-5453 MAY 30, 1978

GERALDINE MADARUS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
Davies, Biggs, Strayer, Stoel & Boley,
Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks review by the Board of the Referee's order which increased claimant's award for unscheduled disability to 35%, directed it to pay claimant compensation for temporary total disability from August 23 to October 22, 1976 plus a sum equal to 25% of that compensation, to be paid as a penalty for unreasonable

resistance to the payment of compensation, directed it to pay claimant's attorney $300, affirmed the finding by the Disability Prevention Division that claimant was not entitled to additional vocational rehabilitation, affirmed the denial of the employer made on October 22, 1976, and ordered the employer to pay claimant's attorney as a reasonable attorney's fee 25% of the increase due claimant by virtue of his order.

Claimant sustained an injury to her low back on June 1, 1975 while employed in the laboratory of the employer. After a short period of conservative treatment, a laminectomy, L4-5, on the left, was performed by Dr. Cruickshank. Following surgery, claimant was treated by Dr. Carlstrom and Dr. Schuler and also referred to the Disability Prevention Division where she was examined by Dr. Holm.

Based upon the reports from Dr. Schuler, Dr. Carlstrom and Dr. Pasquesi, claimant's claim was closed by a Determination Order dated August 23, 1976 which awarded claimant 48° for 15% unscheduled low back disability and compensation for temporary total disability from June 3, 1975 through March 27, 1976, less time worked, and for temporary partial disability from March 28, 1976 through July 15, 1976.

On the same date, August 23, 1976, Dr. Carlstrom submitted a report advising that he had directed claimant not to return to work because of continuing low back and right leg pain, although he had authorized a return to work on a trial basis under date of March 28, 1976. The doctor's diagnosis was aggravation of right leg and back. The employer stated that its first knowledge of this report was received on September 10, 1976. At first it appeared to be with merit and at one point in time the employer had agreed with claimant's attorney that the aggravation claim would be accepted; however, there was a dispute between the parties as to whether the Determination Order should be set aside and the employer declined to accept the aggravation claim.

On October 22, 1976 the employer served notice on claimant that her claim for aggravation was denied. The letter of denial was in the statutory form.

The Referee found claimant to be an alert, intelligent witness who had received her GED after quitting high school. She had worked for the employer for approximately 11 years and had a very good job with which she was quite happy. After her surgery she had returned to work for one week but was unable to tolerate the difficulty she was having and was forced to quit. She stated she was unhappy with the results of the surgery and that was her reason for seeking medical treatment from Dr. Schuler and Dr. Carlstrom. She testified she had continuing pain in the low back although her legs do not bother her as much as before the surgery; she was unable to do any lifting and had difficulty sleeping because of her low back pain. She drives a car only when necessary and has trouble getting in and out of it.

The Referee found that claimant's permanent partial disability was greater than that awarded by the Determination Order and increased it from 15% to 35%; he did not feel the evidence indicated claimant was in need of further medical care and treatment or to payment of compensation for temporary total disability. He found that at the time the Determination Order was issued claimant's condition was stationary as of July 15, 1976 and that there was no curative treatment furnished claimant thereafter.

With respect to claimant's entitlement to penalties and attorney's fees for defendant's failure to accept her claim of aggravation, the Referee found that such penalties and attorney's fees should be paid by the employer for its failure to commence payment of compensation within 14 days after its notice or knowledge of the claim and he further found that claimant was entitled to have such payments commence on August 23, 1976, the date the aggravation occurred and continue until October 22, 1976, the date of the denial. The Referee found that the employer could have denied forthwith upon notice of the claim but having not done so, it amounted to undue resistance to the payment of compensation, therefore, he assessed the penalty and awarded claimant's attorney $300 payable by the employer.

Claimant had alleged by an amended request for hearing that she was entitled to vocational rehabilitation training because she had a vocational handicap; she also contended by her amended request that the Determination Order was premature and should be set aside.

The Referee found against claimant on both issues. Claimant has demonstrated by almost 11 years of continuous employment with one employer that she did have, prior to her accident, the tenacity to stay at a job and the ability to progress to higher levels of employment. Claimant had testified that during her one week of working as a real estate salesperson she was very unsuccessful in obtaining any listings or making any sales; furthermore, that such work required her to be in an automobile 98% of an eight-hour work day. The Referee was not convinced that claimant's one week's attempt at real estate work indicated she was not capable of making a success ultimately in this field.

The Vocational Rehabilitation Division had found that claimant had demonstrated that she did possess the qualities that would enable her to work in real estate sales and declined to refer claimant for retraining and the Referee concluded that under OAR 436-61-060(2) there were no grounds upon which he could set aside the refusal to refer claimant for vocational rehabilitation.

The Board, on de novo review, finds that although claimant alleged that she had aggravated her June 1, 1975 industrial injury on August 23, 1976, the employer had no knowledge of Dr. Carlstrom's report advising it that he had directed claimant not to return to work because of the continuing leg and low back problem until September 10, 1976. Therefore, pursuant to the provisions

of ORS 656.273(6) the employer was required to pay compensation within 14 days of that date and from that date until the claim was denied on October 22, 1976.

The Board also finds that the medical evidence does not indicate that claimant has suffered a loss of wage earning capacity that would entitle her to an award of 35% of the maximum allowable by statute for unscheduled disability. The evidence indicates that there is a good possibility that claimant may return to the labor market without any authorized program of vocational rehabilitation. The very fact that she was found not to have a vocational handicap indicates that she possesses the abilities which will enable her to return to suitable employment.

The Board agrees with the Referee that claimant's attempt to work as a real estate salesperson which lasted only for one week is hardly significant in assertaining what she might eventually be able to do in that type of work. Furthermore it is hard to believe that such work would require a person to spend at least 98% of an eight-hour work day in an automobile.

The Board concludes that the Referee's order must be modified to commence the payment of time loss and penalties on September 10, 1976 rather than August 23, 1976 and to reduce the award for claimant's loss of wage earning capacity to 25% of the maximum allowable by statute.

ORDER

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

Claimant is awarded 80° for 25% unscheduled disability. This is in lieu of the award for unscheduled disability granted by the Referee in his order.

Claimant is entitled to compensation for temporary total disability from September 10, 1976 and to an additional sum equal to 25% of that amount to be paid as a penalty for unreasonable resistance to the payment of compensation. This is in lieu of the Referee's order.

Claimant's attorney is awarded as a reasonable attorney's fee for his services before the Referee at hearing a sum equal to 25% of the compensation awarded by this Board order, payable out of such compensation as paid, not to exceed $2,000, including the $300 which the Referee directed the employer to pay in his order, which in all other respects is affirmed.

WCB CASE NO. 77-554 MAY 30, 1978

PAUL NIKKEL, CLAIMANT
Franklin, Bennett, Ofelt & Jolles,
Claimant's Attys.
SAIF, Legal Services, Defense Attys.
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 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, and the amendment thereto, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated December 16, 1977, as amended on January 6, 1978, 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.

SAIF CLAIM NO. GC 13552 MAY 30, 1978

BILLY D. NORRIS, CLAIMANT
Donald R. Duncan, Claimant's Atty.
SAIF, Legal Services, Defense Attys.
Own Motion Determination

On March 9, 1978 the Board entered its Own Motion Order remanding claimant's claim for a compensable injury suffered on April 15, 1966 to the State Accident Insurance Fund for acceptance and for payment of compensation, as provided by law, commencing on November 15, 1977, the date claimant was admitted to Emanuel Hospital, and until the claim was again closed pursuant to the provisions of ORS 656.278.

On April 4, 1978 the Fund requested the Evaluation Division of the Workers' Compensation Department to make a determination of claimant's disability. On May 12, 1978 the Evaluation Division recommended to the Board that, based upon Dr. Grewe's report of March 20, 1978 which stated, in part, that the claimant still had some residual symptoms but could be returned to some sort of gainful employment and had reached a maximum benefit as

far as neurosurgical treatment was concerned, the claimant be awarded compensation for temporary total disability from November 15, 1977 through March 20, 1978 and compensation equal to 10% loss function of an arm for unscheduled disability.

The Board concurs in this recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from November 15, 1977 through March 20, 1978 and compensation equal to 10% loss function of an arm for unscheduled disability. These awards are in addition to awards previously granted claimant for his April 15, 1966 industrial injury.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services in obtaining own motion relief a sum equal to 25% of the permanent partial disability compensation granted by this order, payable out of said compensation as paid, not to exceed $2,300.

SAIF CLAIM NO. B 100466 MAY 30, 1978

GENEVIEVE REYNOLDS, CLAIMANT
Emmons, Kyle, Kropp, & Kryger, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Own Motion Determination

Claimant suffered a compensable injury on December 26, 1964 when a piece of a broken mirror fell on her right wrist cutting the ulnar artery, the ulnar nerve and several flexor tendons, requiring multiple surgeries for repair. On October 18, 1975 Dr. Blue rated her impairment at 65% of the forearm and recommended additional surgery which was declined by the claimant. The claim was closed on October 10, 1966 by a Determination Order which awarded claimant 78.65° for 65% loss of the right arm.

Claimant requested a re-hearing for increase of permanent partial disability and after she was examined by Dr. Shlim and Dr. Kanzler, both of whom recommended additional treatment for relief of chronic severe pain, on May 9, 1966, a Second Determination Order increased the award to 100% loss of function of the forearm.

Claimant requested claim reopening for additional treatment on several occasions between May 1966 and 1973, all of which were denied by the carrier due to the lapse of the two-year aggravation period. However, on December 20, 1973, the State Accident Insurance Fund voluntarily reopened the claim for surgery performed by Dr. Nathan; a post-surgery incident of acute respiratory failure was also accepted as a temporary aggravation of pre-existing asthma, emphysema and chronic bronchitis. On August 8, 1974 Dr. Nathan

made a closing evaluation of 74% of the forearm (less than previously awarded). On August 21, 1974 the Fund again closed the claim giving claimant an additional award of compensation for time loss from December 19, 1973 through August 21, 1974.

On October 23, 1975 the claimant requested the Board to award additional benefits; the request was forwarded to the Fund which, by letter dated October 30, 1975, denied reopening.

On December 8, 1975 the Board exercised its own motion jurisdiction and ordered the claimant to undergo a psychiatric examination at the Disability Prevention Center to determine the questionable relationship of the emphysema and asthma to claimant's industrial injury. Upon being furnished a report of Dr. Quan's, dated May 22, 1975, and one of Dr. Nathan's dated July 22, 1975, the Board, upon reconsideration, set aside its order of December 8, 1975.

Claimant then submitted Dr. Parvaresh's report dated April 14, 1976 which disagreed with Dr. Quan's report. Because of the diametrically opposing psychiatric opinions, the Board referred the matter for a hearing. On August 9, 1977 the Referee recommended that the claim be reopened for further medical care and the Board issued its Own Motion Order in conformity therewith on September 20, 1976. However, claimant failed to obtain additional treatment and an Own Motion Determination was entered on January 5, 1977 which closed the claim with no award for temporary or permanent disability.

On November 21, 1977 Dr. Parvaresh wrote the Fund, recommending hospitalization of claimant at the Holladay Park Hospital for psychiatric treatment and evaluation of her asthma condition; the Fund accepted the responsibility for this treatment on a diagnostic basis and paid compensation for temporary total disability from December 8, 1977, the date claimant was admitted to the hospital.

Claimant was discharged 12 days after admission with the diagnosis of "psychoneurotic depressive reaction", sympathetic dystrophy of the right hand and asthma. In his closing evaluation, Dr. Parvaresh, on March 23, 1978, stated that claimant was medically stable and he recommended changes in her living arrangements. He felt that she needed help with daily self-care, medicine administration and complete avoidance of cigarette smoking and alcoholic beverages. He rated her permanent psychiatric residuals as mild.

Claimant was again hospitalized on April 5, 1978 and released to her daughter's care on April 17; she had been admitted because she was having hallucinations, periods of depression, confusion and uncontrolled anxiety. On April 25, 1978 Dr. Parvaresh stated that during the last hospitalization claimant had suffered another serious lung problem and had nearly died. Claimant's condition was again stable with mild residual psychiatric impairment; the prognosis for treatment was poor, and due to the chronic obstructive lung disease, the psychiatric condition was untreatable

and her life expectancy has diminished, according to Dr. Parvaresh.

On May 1, 1978 the Fund requested a determination by the Evaluation Division of the Workers' Compensation Department. The Evaluation Division recommended that the Board close claimant's claim with compensation for temporary total disability from December 8, 1977 through April 25, 1978 and 32° for 10% unscheduled psychiatric disability.

The Board concurs in this recommendation.

ORDER

Claimant is awarded compensation for temporary total disability from December 8, 1977 through April 25, 1978 and compensation equal to 32° for 10% unscheduled psychiatric disability. The awards for temporary total disability and permanent partial disability are in addition to all awards previously received by claimant for her industrial injury of December 26, 1964.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in obtaining this own motion relief for claimant, a sum equal to 25% of the compensation awarded claimant by this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-6714-E MAY 30, 1978

JIMMY RUST, CLAIMANT
Maurice V. Engelgau, 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 seeks Board review of the Referee's order which dismissed its request for hearing in the above entitled matter.

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 January 17, 1978, 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. 77-7026 MAY 30, 1978

LERLOWE O. SHORES, CLAIMANT
Ackerman & Dewenter, Claimant's Attys.
J. W. McCracken, 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 aggravation claim to it for acceptance and payment of compensation.

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

ORDER

The order of the Referee, dated January 12, 1978, 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. 77-3947 MAY 31, 1978

DEWEY COOMBS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
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 denied claimant's request that his claim be remanded to the Evaluation Division of the Workers' Compensation Department for processing and the issuance of a Determination Order.

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

ORDER

The order of the Referee, dated October 2, 1977, as amended on November 3, 1977, is affirmed.

SAIF CLAIM NO. AC 186359 MAY 31, 1978

CARL A. FREEMAN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his low back on May 21, 1969 while working for Dick Krohn's Appliance Center whose workers' compensation coverage was furnished by the State Accident Insurance Fund. Claimant's claim was initially closed on December 17, 1969. It has since been reopened and closed three times, however, claimant's aggravation rights have expired.

On November 26, 1976 Dr. Struckman requested the Fund to reopen claimant's claim, stating his opinion that claimant probably has a degenerative disc in his back which may finally, after 10 years, be beginning to bulge and pick up a nerve root. Dr. Struckman did not, at that time, recommend surgery or hospitalization unless claimant failed to improve. On December 16, 1976 a myelogram indicated a herniated disc L5-S1, left, and, on December 28, 1976, Dr. Struckman performed a laminectomy, L5-S1.

On January 9, 1978 Dr. Struckman advised the Fund that claimant's condition was now stationary and that his claim could be closed; he felt that claimant did have some mild permanent disability, consisting of pain.

On January 19, 1978 the Fund requested a determination of claimant's disability. On May 18, 1978 the Evaluation Division of the Workers' Compensation Department recommended to the Board that claimant be awarded compensation for temporary total disability from December 28, 1976 through June 30, 1977 (claimant had advised the Fund on July 15, 1977 that he had returned to full time work as of July 1, 1977) and 32° for 10% unscheduled low back disability.

ORDER

Claimant is awarded compensation for temporary total disability from December 28, 1976 through June 30, 1977 and 32° for 10% low back disability. The award of compensation for temporary total disability is in addition to the previous awards for temporary total disability claimant received for his May 21, 1969 industrial injury.

WCB CASE NO. 77-1231 MAY 31, 1978

HERMAN HOWLAND, CLAIMANT
Dezendorf, Spears, Lubersky &
Campbell, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks Board review of the Referee's order which approved the denial of claimant's claim for aggravation by the State Accident Insurance Fund on December 22, 1976.

Claimant had sustained a compensable injury on February 24, 1973 when, together with a co-employee, he lifted a heavy object. At that time claimant, 27-years-old, was employed as a material handler for the employer and had worked for them for approximately one month. The injury was diagnosed as a lumbar strain. Claimant was seen by Drs. Field and Zimmerman; he was hospitalized from March 9 through March 21, 1973 for conservative care. Dr. Zimmerman, on March 20, 1973, referred claimant to the Disability Prevention Division, stating that claimant had been fired from his job while hospitalized and it was his opinion that claimant would continue to have back pain unless he received retraining early in the course of his difficulties.

Dr. Carlson, at the Disability Prevention Center, examined claimant in May and June 1973; it was his opinion that claimant had a subacute dorsolumbar strain with no involvement of the lower extremities. Dr. Carlson thought claimant should not return to the heavy type of lifting which he had been doing at the time of his injury but that he did not think that claimant had any permanent disability.

Claimant became employed as an attendant at a service station in July 1973; his duties at first involved only pumping gas, however, he gradually began to do some servicing of cars and mechanics' work. He did not do any heavy lifting.

Claimant continued to work steadily at the service station until April 8, 1976. He testified that while he was working at the service station he occasionally would experience blunt pain which would last a few days and then dissipate. Claimant's employer was aware claimant had a back problem before claimant went to work He recalled that claimant had mentioned that he had pains in his back on a few occasions between July 1973 and April 1976.

Claimant had seen Dr. Zimmerman just prior to his employment at the service station; he did not see him again nor did he see any other doctor until April 1976. Dr. Zimmerman had reported on August 7, 1973 that claimant's condition was medically stationary as of June 28, 1973 and that there was no permanent impairment

as a result of the injury. On August 23, 1973 a Determination Order closed claimant's claim with an award of 16° for 5% unscheduled disability.

Claimant worked steadily at his job at the service station until April 8, 1976 when, shortly after arriving on the job, he experienced a sudden onset of low back pain which he said was unbearable. Claimant stated he had done no heavy lifting nor heavy work and that there was no incident or accident to which he could attribute this pain but it was different than any pain he had felt before while at work. He worked for approximately three hours, was permitted to go home where he lay on the floor for approximately three hours. He arose and then sat down again and was unable to get back up. Dr. Zimmerman had him taken by ambulance to Emanuel Hospital.

On June 1, 1976 Dr. Zimmerman wrote the Fund stating that claimant desired to have his claim for back pain reopened for the time loss and treatment rendered in April 1976 and thereafter. On October 19, 1976 Dr. Zimmerman stated, among other things, that claimant had suffered a back injury in the past which had been accepted as a compensable industrial injury and that since that time he has gotten along well and now has had a second incident of back pain. He stated that the cause of the second incident was due to his age, the fact that he stands on two legs, and the fact that he had had the previous incident of trauma to his back. As to the relationship between his present back pain and the accident of 1973, Dr. Zimmerman said that the accident of 1973 was one of multiple causes of backache to which claimant is now subjected. The decision as to whether or not this incident is covered by the employer's workers' compensation coverage is a decision to be made by the insurance industry, not the medical profession, according to Dr. Zimmerman.

On December 22, 1977 the Fund denied claimant's claim.

On May 16, 1977 Dr. McKillop, after examining claimant, diagnosed a chronic lumbosacral strain syndrome. He concluded that if the history received from claimant was accurate, it was probable that the second episode of back pain was related to the original injury; that it was also probable that the increasing back ache experienced over the past year was related to the original injury, thus claimant probably has undergone some degree of aggravation.

The Referee found that in this case claimant had sustained a low back strain in 1973 which, after a period of conservative care, was resolved to the extent that he had returned to work five months later and worked steadily with minimal symptomatology until April 8, 1976. Claimant received no medical treatment nor did he consult a physician from June 1973 until April 1976, nearly three years after his industrial injury.

The Referee concluded that although claimant's back strain in February 1973 might have been a factor in causing his

symptoms in April 1976 claimant had failed to prove by a preponderance of the evidence that his original injury under all of the facts and circumstances of the case was a material, as distinguished from a minimal, contributing cause of his symptoms and need for treatment in April 1976.

The Board, on de novo review, finds that the medical evidence, especially that of Dr. McKillop, indicates that claimant has aggravated an injury which he suffered on February 24, 1973. Dr. Zimmerman advised the Fund on June 1, 1976 that claimant wished to have his claim reopened.

Dr. Zimmerman's report of October 19, 1976, given in response to an inquiry from the Fund, is basically an attempt to avoid making a medical determination on causal relationship, stating that it was a matter to determine by the insurance industry, not the medical profession. The Board does not necessarily agree with this. Dr. Zimmerman did state that the claimant's 1973 injury was one of multiple causes of claimant's present back ache; he does not say that the contribution was minimal or diminimus. It is well established in this state, as noted by the Referee, that the injury need not be the sole cause but it is sufficient if the initial injury is a material contributing cause to the subsequent disability.

In this case the Board concludes that claimant has proven that the injury of February 24, 1973 was a material contributing cause to the onset of pain which he suddenly experienced on April 8, 1976 and represents an aggravation of the original injury.

ORDER

The order of the Referee, dated November 17, 1977, is reversed.

Claimant's claim is remanded to the State Accident Insurance Fund for acceptance and the payment of compensation, as provided by law, commencing June 1, 1976 and until the claim is closed under ORS 656.268, less time worked.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at the hearing before the Referee a sum of $600, payable by the State Accident Insurance Fund.

Claimant's attorney is 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. 76-3739 MAY 31, 1978

ARTHUR HYATT, CLAIMANT
John M. Ross, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks Board review of the Referee's order which affirmed the State Accident Insurance Fund's denial on May 31, 1977 of claimant's claim for aggravation.

Claimant was originally injured on August 25, 1976; the injury was diagnosed by Dr. Campagna as nerve root irritation, S1, right, and a laminectomy was performed on September 29, 1976 at the L5-S1 level, right.

Claimant made a good recovery and was authorized to return to work on January 3, 1977; however, immediately upon his return the symptoms reappeared. On February 14, 1977 Dr. Campagna indicated that claimant's condition was stationary and the claim closure could be made; in his opinion claimant had suffered moderate disability of the low back as the result of his industrial injury. Notwithstanding, the Determination Order entered on April 5, 1977 awarded claimant compensation for time loss only.

On May 10, 1977 Dr. Campagna reported that claimant had returned, stating that his symptoms had worsened since he was last seen in February 1977, that he continued to have pain in the coccyx area and both legs were numb along with a burning in the feet. He told Dr. Campagna that truck driving, his occupation, greatly aggravated his symptoms. Dr. Campagna recommended no work for one month and set up a consultation with Dr. Matthews.

On May 31, 1977 the Fund denied claimant's claim for aggravation, stating its opinion that the medical report did not support claimant's claim for aggravation but indicated that his current complaints were the result of a subsequent injury and activity. It did not identify the subsequent injury or activity in the letter of denial.

On June 1 Dr. Matthews examined claimant and found that claimant had recovered from his various previous back problems until the August 1976 injury but since that date he was unable to go very long without suffering back or leg difficulty. On July 6, 1977 Dr. Matthews opined that claimant was medically stationary but there was no evidence of any definitive treatment that would return him to a heavy work status.

Claimant had testified that between August 1976 and May 31, 1977, the date of the denial, in addition to his efforts to return to employment, he had also engaged in other activities

of somewhat heavy physical nature, such as lifting and moving a heavy picnic table, suffering several cracked ribs while working with his horse and building a fence on his property.

The Referee found no medical evidence that after the last award or arrangement of compensation, i.e., the Determination Order of April 5, 1977, that claimant's condition has worsened nor that claimant had a need for further medical care or additional compensation. Neither Dr. Campagna nor Dr. Matthews indicated in their respective reports that additional medical treatment was required. The Referee did not consider the prescribing of a lumbosacral support to be medical treatment and Dr. Campagna gave no actual treatment but simply referred claimant to Dr. Matthews for an evaluation. Dr. Matthews gave no treatment other than to try a period of medication and restrict claimant from involvement in heavy work activities during the evaluation of his condition.

The Referee concluded that claimant was medically stationary before the issuance of the Determination Order and remained medically stationary thereafter; for that reason claimant's claim for aggravation must be denied.

The Referee stated in his order that since the hearing and prior to the issuance of the order claimant had filed another request for hearing which raised the issue of the extent of his disability. He stated that question would be ajudicated in due course.

The Board, after de novo review, finds that the medical evidence is sufficient to indicate that since the last award or arrangement of compensation on April 5, 1977 claimant's condition has worsened and that his condition at the present time is a direct result of the original injury suffered on August 25, 1976.

Dr. Matthews states that although claimant is basically medically stationary and is on symptomatic treatment only, there is no evidence of any definite treatment which will return him to heavy work status. Prior to the aggravation on May 10, 1977 claimant had been able to do heavy work, in fact, it was the continuous truck driving, which must be considered as heavy type work, that gradually brought on a worsening of claimant's condition.

The Board concludes, based upon Dr. Campagna and Dr. Matthews' respective reports, that claimant's condition has worsened since the last award or arrangement of compensation and is related directly to his industrial injury of August 25, 1976, therefore, his claim for aggravation should be accepted.

ORDER

The order of the Referee, dated September 29, 1977, is reversed.

Claimant's claim for aggravation is remanded to the State Accident Insurance Fund to be accepted and for the payment of com-

pensation, as provided by law, commencing on May 10, 1977, and until the claim is closed pursuant to the provisions of ORS 656.268, less any time worked.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at the hearing before the Referee a sum equal to $600, payable by the State Accident Insurance Fund.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum of $300, payable by the State Accident Insurance Fund.

WCB CASE NO. 77-4291 MAY 31, 1978

JOSEPH NELL, CLAIMANT
Bailey, Welch, Bruun & Green,
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 reinstated the June 8, 1977 Determination Order thereby affirming the award equal to 32° for 10% unscheduled disability and temporary total disability compensation from July 1, 1976 through May 10, 1977, less time worked. 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 November 21, 1977, is affirmed.

WCB CASE NO. 77-3796 MAY 31, 1978

MITCHELL J. PATTEN, CLAIMANT
Samuel A. Hall, Jr., Claimant's Atty.
W. D. Bates, Defense Atty.
Stipulation

Come now the claimant, Mitchell J. Patten, by and through his attorney, Samuel A. Hall, Jr., and the State Accident Insurance Fund, by and through its authorized representative, and move the Board for an Order based upon the following stipulations:

1. The Administrative Law Judge issued an Opinion and Order on February 28, 1978, allowing the claimant permanent partial disability for loss of use of the right eye in the amount of 15%.

2. On March 8, 1978 the State Accident appealed to the Workers' Compensation Board.

3. On April 17, 1978 the State Accident Insurance Fund requested dismissal of the above entitled matter.

4. The State Accident Insurance Fund hereby stipulates to pay the claimant's attorney $50 as and for a reasonable attorney fee.

It is so stipulated.

WCB CASE NO. 77-4808 MAY 31, 1978

RAYMOND G. VAN ORSOW, CLAIMANT
Ben T. Gray, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks review by the Board of the Referee's order approving the denial of July 15, 1977 by the State Accident Insurance Fund of claimant's claim for a compensable injury suffered on January 21, 1977.

Claimant was a 50-year-old foreman for the employer when, on January 21, 1977, he slipped on some grease and fell, landing with his left leg doubled under him. Claimant's immediate problem was a painful and swollen left ankle which he wrapped with an ace bandage; he did not seek any medical attention and missed only three or four days of work, returning and working steadily until March 31, 1977. At that time, claimant left work because he had developed a painful lump on his left hip which caused him difficulty with walking and with rising from a sitting position. He was seen by Dr. Hardiman on April 4, 1977.

Claimant had had a previous injury in 1947, i.e., a fractured femur which, after treatment, became infected and resulted in a two-inch shortening of claimant's left leg. Claimant was required as a result of this injury to wear a built up shoe to compensate for the limp. Claimant worked regularly from 1951, the date of his last surgery for the 1947 injury, until March 31, 1977. In 1976 claimant had seen Dr. Albrich for a urological problem and, at that time, he complained of pain in his hip. Dr. Albrich referred claimant to Dr. Hardiman who first saw claimant on April

14, 1977. He reported that claimant recited a history of having been able to work and do quite well until about five years earlier when he began to have increasing difficulty with his hip on the left. At that time Dr. Hardiman diagnosed old aseptic necrosis of the femoral head with resulting degenerative osteoarthritis; he felt claimant was a good candidate for a total hip replacement and recommended this procedure. However, claimant stated, after viewing a movie describing such procedure, that he could not afford to be off work for the time such surgery required.

Nearly a year later, claimant again sought medical treatment and advice from Dr. Hardiman who saw him several times during the month of April and, on April 25, 1977, recommended again that claimant have a total hip replacement. On April 13 he had filed a form report stating that it was undetermined as to whether claimant's condition which required treatment was related to his slip and fall, however, on May 13, Dr. Hardiman stated that he thought the injury that occurred on January 21 probably aggravated the pre-existing hip condition which stemmed from a problem of many years. He thought the Fund might have difficulty in deciding how much responsibility it would want to accept for claimant's hip problem.

In the latter part of June a total hip arthroplasty was performed on claimant. On July 15, the Fund issued a denial, stating that the claimant's symptoms and treatment on and after April 1977 were an on-going pre-existing problem and not the result of, or caused by, his employment.

On August 17, 1977 Dr. Hardiman felt that sooner or later claimant would have had to have the total hip replacement surgery but, based on the patient's history, he would have to assume that the industrial injury probably did aggravate the pre-existing condition; he could not honestly say that the accident itself precipitated the operation, more than likely had claimant not had the pre-existing condition he would never have required a total hip arthroplasty regardless of the accident that occurred on January 21, 1977.

The Referee found that claimant did fall at work on January 21, 1977 and suffered an injury to his ankle but this was not an injury which required medical services nor resulted in disability and therefore was not a compensable injury as defined by ORS 656.005(8).

The Referee then dealt with the remaining question of whether the claimant had suffered a compensable injury to his hip and found that claimant's hip problem was pre-existing, originating from a 1947 injury for which he had sought medical treatment one year prior to the date of the industrial injury and at which time he had advised his doctor that his hip was becoming progressively worse and had been for the past five years.

Based upon all the evidence and considering Dr. Hardiman's statement that there probably was some aggravation of claim-

ant's aggravation due to the fall but that claimant would have required the surgery regardless of the fall, the Referee concluded that claimant had failed to prove by a preponderance of the evidence that his industrial injury was a material contributing cause of his need for the treatment of surgery.

The Board, after de novo review, finds that the medical evidence does indicate that the surgery might have had to be performed eventually because of claimant's pre-existing condition. Nevertheless, the report of Dr. Hardiman quite clearly indicates that the incident of January 21, 1977 did affect the claimant's condition. If any injury tends to accelerate a pre-existing condition such injury must be construed as a compensable injury under the Workers' Compensation Act. Claimant had been able to work without any substantial time loss from the recovery of his surgery for the 1947 injury until six years later when the accident in January 1977 required a total hip replacement. Dr. Hardiman's opinion is that although the incident of January 21, 1977 was not the sole reason for the surgery, it did hasten the need for it. This is sufficient.

The Board finds that this is sufficient to justify a conclusion that the injury of January 21, 1977 resulted in an earlier need for the total hip arthroplasty and, therefore, claimant's claim should have been accepted as a compensable industrial injury.

ORDER

The order of the Referee, dated December 14, 1977, is reversed.

Claimant's claim is hereby remanded to the State Accident Insurance Fund for acceptance and for the payment of compensation, as provided by law, commencing January 21, 1977 and until the claim is closed pursuant to the provisions of ORS 656.268, less any time worked.

Claimant's counsel is awarded as a reasonable attorney's fee for his services before the Referee at the hearing a sum of $600, payable by the State Accident Insurance Fund.

Claimant's counsel 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.

WCB CASE NO. 77-1933 JUNE 2, 1978

JETTIE MAE CLAY, CLAIMANT
R. Ladd Lonnquist, Claimant's Atty.
James D. Huegli, Defense Atty.
Stipulation and Order of Dismissal

This matter having come on before the Workers' Compensation Board upon stipulation of the parties, the claimant acting by and through her attorney, R. Ladd Lonnquist, and the employer acting by and through their counsel, James D. Huegli, and it appearing that the matter having been compromised between the parties and that this order may now be entered,

Now, therefore, it is hereby ordered that claimant be and is hereby awarded an additional 10% unscheduled disability for injury to her low back (32°), said award amounting to $2240, and bringing claimant's total award to 75% unscheduled disability.

It is further ordered that claimant's attorney be and is hereby awarded 25% of the increase in compensation made payable by this order.

It is further ordered that claimant's Request for Board Review be and is hereby dismissed.

It is so stipulated.

It is so ordered and this matter is dismissed.

WCB CASE NO. 76-6363 JUNE 5, 1978

LAVERNE EMMONS, CLAIMANT
Ackerman & DeWenter, Claimant's Attys.
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 November 17, 1977, is affirmed.

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

WCB CASE NO. 77-2757 JUNE 5, 1978

FRANK H. JOHNSTON, CLAIMANT
Elden M. Rosenthal, 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 compensation equal to 64° for 20% unscheduled disability. Claimant contends that this award is inadequate and that he is also entitled to an additional scheduled award for 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 November 22, 1977, is affirmed.

WCB CASE NO. 77-886 JUNE 5, 1978
WCB CASE NO. 77-887

LEWIS W. LE FRANCOIS, CLAIMANT
C. H. Seagraves, Claimant's Atty.
Breathouwer & Gilman, Defense Attys.
Collins, Velure & Heysell, Defense Attys.
Request for Review by Mission Ins.

Reviewed by Board Members Wilson and Phillips.

West Coast Truck Lines, by and through its carrier, Mission Insurance Company, seeks Board review of the Referee's order which remanded claimant's claim to it for acceptance and payment of compensation, thereby affirming the denial of SWF Plywood Company.

The Board, after de novo review, affirms and 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 on page 4 of the order which should be corrected. In the fourth full paragraph of that page "closing is authorized . . ." should be corrected to read "closing as authorized . . .".

ORDER

The order of the Referee, dated September 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 $50, payable by Mission Insurance Company.

WCB CASE NO. 77-2564 JUNE 5, 1978

ERNEST R. MILLER, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which granted him compensation equal to 160° for 50% 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 January 3, 1978, is affirmed.

WCB CASE NO. 77-3130 JUNE 5, 1978

DAVID MUNDAY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
Cheney & Kelley, Defense Attys.
Reuqest for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which granted claimant compensation equal to 224° for 70% unscheduled disability together with 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 November 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 $350, payable by the carrier.

WCB CASE NO. 76-5287 JUNE 5, 1978

JOHN J. WHITLEY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
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 compensability of his 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 November 10, 1977, is affirmed.

WCB CASE NO. 76-5163 JUNE 6, 1978

MARIANNE AARNAS, CLAIMANT
Pippin & Bocci, Claimant's Attys.
G. Howard Cliff, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which approved the Second Determination Order issued August 31, 1976 which granted claimant an additional 32°, giving claimant a total of 64° for 20% of the maximum allowable for unscheduled disability.

Claimant is a native of The Netherlands who came to the United States in 1953. While in The Netherlands she completed her high school education and trained as a registered nurse; after moving to the United States claimant studied at the University of Washington and became certified in Oregon as a pediatric nurse practitioner (PNP). Claimant testified that a PNP has all of the duties of an RN with a specialty in the field of pediatrics. Her duties included physical examinations on infants and adolescents up to 18 years of age. Sometimes she acts as an assistant to a pediatrician, however, most of the time the work is done in a health department. The duties of both an RN and PNP require bending, stooping, lifting, sitting and standing.

When claimant first came to the United States she took a refresher course at Providence Hospital; she hadn't worked for 12 years and felt this would be necessary. Thereafter, claimant worked one year with Dr. Hart, a Portland pediatrician, two years with a visiting nurse's association as a staff registered nurse, and then six years with Emanuel Hospital which was claimant's employer at the time she was injured. All of claimant's training and background has been in nursing. She has no other vocational skills and has never had a job in any other field.

On April 14, 1972 claimant, while walking in one of the hospital halls, collided with another person and was pushed against the wall, sustaining left leg pain. She had had an appointment to see Dr. Fisher prior to this incident for similar left leg pain. Claimant was hospitalized on April 21 for two weeks of traction. She apparently appeared to be improving when she was discharged but was re-hospitalized for a myelogram and, on June 26, 1972, a left hemilaminectomy of L4-5 with removal of the herniated nucleus was performed by Dr. Hopkins. Claimant's recovery was uneventful and she was discharged from the hospital on July 12, 1972.

After the recovery from the surgery, claimant returned to part time work at Emanuel from September 1972 until April 1974. After leaving Emanuel she worked full time for the State of Oregon until August 1975 when the department in which she was employed was "phased" out and she was unable to continue full time employment due to her increasing back discomfort. She did find part time employment immediately thereafter with Multnomah County Health Department as a PNP. This job required claimant to work no more than every other day. She did this until February 1976 when she acquired an extended leave of absence because she could no longer do the work. Claimant testified she noted some improvement in her condition when she was not working.

On January 27, 1975 Dr. Hopkins, who treated claimant at the Emanuel Hospital, requested that the claim be reopened for the purpose of performing a myelogram. He felt claimant had developed saddle anesthesia, the only neurological finding since her surgery and he was convinced that it was linked to the original herniated

disc. The carrier considered reports from Dr. Goldman and Dr. Wilson, neither of whom were able to make a definite diagnosis, and the request for reopening was ultimately denied on February 6, 1975.

Dr. Wilson was of the opinion that claimant's symptoms were related to the original injury but were aggravated by claimant's anxiety and her concern that she was going to become totally disabled in the future. Upon his recommendation an independent evaluation was made of claimant's condition by Dr. Vessely, who found very weak abdominal and back muscles and mild functional overlay. He felt no necessity for a repeat myelogram nor surgery, but did suggest a therapy program for muscle strengthening and recommended reopening to allow medical treatment and therapy. Claimant continued to treat with Dr. Wilson who confirmed that claimant had a neurological deficit that arose after her disc surgery and was not related to the surgery but was as yet undiagnosed.

Dr. Hopkins reported claimant's condition was worse during April 1976 than at the time he had last seen her; he did not clearly understand the relationship between her original accident and the condition which she had at that time but stated that claimant was not completely recovered from her laminectomy when these neurogenic and neurologic symptoms developed and the continuity was linked in her mind.

Claimant's claim was reopened and she was paid compensation for temporary total disability from February 20, 1976 through July 19, 1976. She was examined twice by the Orthopaedic Consultants who found moderate functional disturbance but no neurological deficit. Closure was recommended and in July 1976 Dr. Wilson concurred, stating claimant had some residual back pain with very few objective findings. The claim was again closed by the Second Determination Order dated August 31, 1976.

The Orthopaedic Consultants, in January 1977, found claimant to be medically stationary and able to return to the same occupation with limitations at the beginning. During August 1977 Dr. Parson, a neurosurgeon, examined claimant and found claimant had many subjective complaints without significant objective findings. He did not feel any further treatment was necessary.

The Referee found it was undisputed that claimant had refused psychological or psychiatric examination and therefore, he had to accept the findings of functional overlay. He found that all of the doctors who treated claimant felt she was able to return to work and left restrictions up to her discretion.

The Referee concluded that under these circumstances it was impossible to modify the Determination Order. He found that there was a possibility that claimant was not faithfully performing the physical therapy exercises recommended by many of the doctors and that claimant was going to do "as she alone saw fit". He evidently thought that claimant was picking and choosing the ad-

vice of the doctors and rejecting such advice not to her liking. He felt this had a bearing on her slow recovery.

He found that claimant liked to swim and that it was of some benefit as a form of physical therapy, therefore, he approved the $100 donation to Lewis and Clark College made by claimant to allow daily use of the swimming pool for therapy purposes.

The Board, on de novo review, finds that prior to the industrial injury of April 14, 1972 claimant had had some back problems but the medical evidence clearly indicates that the laminectomy performed in June was necessitated by her work-related injury. After the surgery claimant was able to return to her work at Emanuel Hospital although most of her work was part time. Later she worked full time for approximately 18 months for the State of Oregon and after that part time for Multnomah County Health Department but in February 1976 her condition became such that she could no longer continue to do the work even though it only required her to work every other day.

Claimant obviously wants to work. In January 1977 she started to work as a substitute for Multnomah County and she is continuing to do that work. At the same time she has also explored other employment possibilities which would not require the physical stress associated with active nursing. She wanted to teach, however, this would require a bachelor's degree and a minimum of two years of active nursing and this appears to be impossible when claimant's current physical condition is taken into consideration. Claimant has also attempted to find work in other hospitals in Portland as well as at the University of Oregon Medical School but has been unsuccessful. At the present time her substitute position calls for one day a week and a maximum of 5 hours at a time. In addition claimant tries to donate two or three hours to Doernbecher Hospital each week.

The Referee has referred to claimant having been seen by many doctors and also picking and choosing the advise of those with whom she agrees and discarding the advice of the others; the Board finds that actually claimant, herself, sought medical treatment from only three doctors. The other doctors were seen in consultation or on a referral basis from one of her treating doctors and at least seven of the physicians were seen for the purpose of defense medicals offered at the hearing.

At the present time PNP's are earning approximately $1,200 a month; claimant's income has been in the area of $10 per hour and her present substitute position for Multnomah County allows only one day a week and a maximum of five hours at one time. It is quite apparent that claimant has suffered a substantial loss in her wage earning capacity. Claimant's background is limited to nursing work either as an RN or as a PNP. Both jobs require physical abilities which she does not have at the present time and, according to the medical evidence, may not have in the future. The medical profession has failed to determine how to improve

claimant's condition as is evidenced by the many referrals for consultation and treatment; most doctors have stated that only claimant can determine her limitations. Claimant has attempted to do this through repeated attempts at long and strenuous employment which have met with little or no success.

The Board concludes, based upon the medical evidence, that claimant is entitled to an award of 112° for 35% unscheduled low back disability to adequately compensate her for her loss of potential wage earning capacity.

At the first hearing scheduled on January 5, 1977 Referee Leahy was advised by both counsel (at that time claimant had a different attorney than the one who represented her at the October 1977 hearing) that a settlement had been reached whereby claimant would be awarded a total of 112° for her unscheduled disability. However, this settlement was never consummated and at the time of the October 1977 hearing claimant had been awarded only 64° for 20% of the maximum for unscheduled disability.

ORDER

The order of the Referee, dated October 27, 1977, is modified.

Claimant is awarded 112° for 35% unscheduled low back disability. This is in lieu of all previous awards granted claimant for her April 14, 1972 industrial injury.

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

The 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 claimant by this order, payable out of said increased compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-1711 JUNE 6, 1978

ALMOND GRAHAM, JR., CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-request by the SAIF

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which granted him compensation equal to 240° for 75% unscheduled low back disability. Claimant contends that he is permanently and totally

disabled whereas the Fund, on cross-appeal, contends the award is too high.

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

ORDER

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

WCB CASE NO. 77-889 JUNE 6, 1978

DENNIS LESSAR, CLAIMANT
Bailey, Welch, Bruun & Green,
Claimant's Attys.
Cheney & Kelley, Defense Attys.
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 to which he is entitled, in addition to assessing 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 December 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. 77-2706 JUNE 6, 1978

JIM D. MAYO, CLAIMANT
Bailey, Welch, Bruun & Green,
Claimant's Attys.
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 April 7, 1977 Determination Order granting him 96° for 30% left shoulder 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 November 29, 1977, is affirmed.

WCB CASE NO. 77-2922 JUNE 6, 1978

CHARLOTTE MORGAN, CLAIMANT
Dye & Olson, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
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 to which she is entitled, in addition to assessing penalties and attorney fees.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, together with the order dated January 27, 1978, a copy of which is attached hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated January 6, 1978, together with the subsequent order dated January 27, 1978, 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. 76-685 JUNE 6, 1978

ARNOLD SNAPP, 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 seeks Board review of the Referee's order which granted him permanent total disability compensation as of April 26, 1977. Claimant contends that this compensation should commence on the date of his injury in October 1969, thereby granting him total disability compensation during the period December 11, 1975 through April 26, 1977 when he received no 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 October 27, 1977, is affirmed.

WCB CASE NO. 77-2470 JUNE 7, 1978

DANIEL P. BERG, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on November 8, 1956. His claim was closed and his aggravation rights have expired.

On May 20, 1977 the Board, exercising its own motion jurisdiction pursuant to ORS 656.278, referred claimant's request that his claim be reopened for further medical care and treatment to its Hearings Division to be heard on a consolidated basis with a hearing requested by claimant on the denial by his employer, Boise Cascade Corporation, of a claim for a new injury allegedly sustained on July 30, 1976.

After a hearing, the Referee recommended that the Board exercise its own motion jurisdiction and reopen the claim for claimant's injury of November 8, 1956 and affirmed the denial of Boise Cascade of claimant's claim for a new injury on July 30, 1976.

The Board adopted the Referee's recommendation and remanded the claimant's claim for his November 8, 1956 industrial injury to the State Accident Insurance Fund for acceptance and payment of compensation, as provided by law, commencing July 30, 1976 and until closed pursuant to ORS 656.278. This order was dated August 15, 1977.

On August 2, 1976 Dr. German had examined claimant for back, left hip and leg pain; he had found a non-union of an old spinal fusion at the L4-5 level. The L5-S1 fusion was solid. Dr. German diagnosed the pain as a result of the psuedoarthrosis and felt it was aggravated by claimant being overweight. Claimant was placed on a weight loss and exercise program and the conservative treatment was followed with immediate weight loss. However, in September 1977 claimant commenced gaining weight again and on re-examination of claimant on April 7, 1978 Dr. German recommended weight loss, care of the back regime and the use of arthritic medications. He found no neurological problems, the back motion had marked limitation and claimant was limited to lifting not in excess of 30 pounds. Dr. German recommended only light work.

On April 27, 1978 the Fund requested an evaluation of claimant's present disability and the Evaluation Division of the Workers' Compensation Department recommended to the Board that claimant be granted compensation for temporary total disability from July 30, 1976 through August 15, 1976 and compensation equal to 10% loss function of an arm for his unscheduled disability.

The Board concurs in these recommendations.

ORDER

Claimant is granted compensation for temporary total disability from July 30, 1976 through August 15, 1976 and compensation equal to 10% loss function of an arm for unscheduled disability. These awards are in lieu of all previous awards granted claimant for his November 8, 1956 injury.

Claimant's attorney is awarded as a reasonable attorney's fee a sum equal to 25% of the compensation awarded claimant for permanent partial disability by this order, payable out of said compensation as paid not to exceed $2,000. Claimant's attorney was awarded a sum equal to 25% of the compensation for temporary total disability by the Board's Own Motion Order dated August 15, 1977.

WCB CASE NO. 77-4426 JUNE 7, 1978

FRANK GIGLIOTTI, CLAIMANT
Willner, Bennett, Riggs & Skarstad,
Claimant's Attys.
Keith D. Skelton, Defense Atty.
Amended Order on Review

On May 24, 1978 the Board affirmed and adopted the Opinion and Order of the Referee dated October 27, 1977, attaching a copy of said Opinion and Order to the Order on Review and making it a part thereof.

On line two of the first paragraph of the Order on Review the words "for permanent total disability" should be deleted and "equal to 160° for unscheduled low back disability" should be inserted in lieu thereof.

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

IT IS SO ORDERED.

WCB CASE NO. 77-2299 JUNE 7, 1978

PATRICIA A. HASTRICH, CLAIMANT
Elden M. Rosenthal, 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 compensation equal to 32° for 10% unscheduled psychological 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 October 6, 1977, is affirmed.

WCB CASE NO. 76-2407 JUNE 7, 1978

LLOYD J. HUGHEY, CLAIMANT
Coons & Anderson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks review by the Board of the Referee's order which affirmed the Fund's denial, dated July 14, 1976, of claimant's claim for aggravation but ordered the Fund to pay claimant time loss benefits from January 3, 1976 to July 14, 1976, less time worked.

Claimant contends his aggravation claim is compensable and that he is entitled to penalties and attorney fees because of the Fund's failure to pay time loss benefits pending acceptance or rejection of the claim and its failure to accept or deny claimant's claim within 60 days after notice of the same.

Claimant was a 63-year-old district maintenance supervisor for the Douglas County Road Department when he was injured on July 8, 1973. He sustained multiple compensable injuries and has since been examined by many doctors, however, all of his treatment has been conservative in nature.

The claim was closed on May 13, 1974 by a Determination Order which awarded claimant 192° for 60% unscheduled neck and back disability.

At the time the claim was closed, claimant's complaints included neck pain, right shoulder pain radiating down and throughout his right arm, low back pain, right hip pain radiating down and through his right leg, left leg pain, and periodic numbness of both feet. Claimant was limited to lifting no more than 30 pounds and could not drive more than 20-25 miles or sit for more than 3/4 to 1 hour, his walking was limited to 1/2 mile at a time and he was advised not to do any repetitive bending or stooping. The Back Evaluation Clinic rated his loss of function of the back as moderately severe and as mildly moderate due to the injury; they also rated the loss of the function of claimant's neck as mild.

Dr. Oelke, after examining claimant on October 31, 1974, reported no objective medical findings to support claimant's chronic complaints of neck, shoulder and lower left leg pain and recommended no further treatment.

On July 2, 1975 Dr. Cherry examined claimant at the request of Dr. Oelke. He felt that claimant had osteoarthritis of the neck and low back with which claimant was willing to live and he also recommended no further medical treatment.

Dr. Serbu, after examining claimant on December 15, 1975, felt claimant showed arthritic changes with no definite nerve root impingement of the soft disc nature and recommended no further medical treatment and advised against surgery.

Since January 3, 1976 claimant has been examined by Dr. Streitz and Dr. Sproed because claimant believed he had fallen and landed on a concrete structure on that date and that the fall was caused because his left leg gave way as it had done in the past.

The Referee found it was undisputed that such fall exacerbated claimant's physical condition, furthermore, claimant sustained a compression fracture of the L-2 vertebra. Dr. Streitz' opinion was that claimant's left leg weakness and the "giving out" of the left leg were contributing factors to his fall which resulted in the decompression fracture.

Dr. Harwood, medical consultant for the Fund, stated on March 10, 1976 that claimant's present condition which resulted from his fall on January 3, 1976, including the L-2 compression fracture, was not the responsibility of the Fund because the cause of the fall was dizziness and loss of balance control which stemmed from claimant's cerebral vascular disease. Dr. Oelke was unable to determine whether claimant's back condition had worsened between May 13, 1974 and January 3, 1976; claimant's subjective complaints supported an aggravation claim but the objective medical evidence did not and Dr. Oelke would not express an opinion.

Dr. Serbu also was hesitant to express an opinion, saying that it was difficult for him to really state whether the fall suffered by claimant on January 3, 1976 was neurological in nature or whether it was simply a fall. As far as claimant's legs giving out in the presence of back disease, Dr. Serbu expressed his opinion that this is usually a functional phenomenon and no one single nerve root pathology would cause a leg to give out suddenly.

Claimant's claim for aggravation was submitted on March 9, 1976 and supported by medical reports from Dr. Streitz and Dr. Sproed. On July 14, 1976 the Fund denied the claim for aggravation because the available medical information did not substantiate that claimant's condition had worsened after his last award or arrangement of compensation and that the January 3, 1976 condition, including the compression fracture of the L-2 vertebra, was a direct result of an off-the-job accident.

The Referee found claimant had been paid no time loss in connection with his aggravation claim nor had his medical expenses been paid even though they were submitted to the Fund. He found, based upon the credible lay testimony, that claimant had failed to prove an aggravation; only claimant's subjective complaints supported his contention that his physical condition had worsened from May 13, 1974 to January 2, 1976. The medical examinations and reports prepared by Dr. Oelke, Dr. Cherry and Dr.

Serbu made after the claim closure when compared with pre-claim closure medical examination reports indicate no material difference in claimant's condition after claim closure as opposed to his condition immediately preceeding such closure.

The Referee found that it was quite probable that claimant's fall on January 3, 1976 and his condition thereafter could be attributed to symptoms arising out of claimant's cerebral vascular disease, therefore, the January 3, 1976 incident would constitute an intervening superceding occurrence and would not be compensable as an aggravation of claimant's industrial injury suffered on July 8, 1973.

The Referee found that claimant was not entitled to penalties or attorney fees because of the Fund's failure to pay time loss benefits prior to the denial or its failure to deny the claim timely because the claim was not compensable. The Referee relied upon the ruling of the Court of Appeals in Jones v. Emanuel Hospital, 29 Or App 265.

The Referee found, however, that claimant was entitled to be paid compensation for time loss from January 3, the date his condition became disabling, until July 14, 1976, the date of the denial, less any time claimant may have worked. Claimant had given notice of his aggravation claim on March 9, which, if received in the normal course of mail, would have been received on March 10, and attached were certain medical reports verifying claimant's inability to work because of his physical condition. The Referee concluded the Fund's obligation to pay time loss benefits matured 14 days after such notice of the aggravation claim and continued until the claim was denied and said obligation related back to the date claimant's condition became disabling and resulted in his inability to work.

The Board, on de novo review, concurs in the Referee's findings and conclusion that claimant failed to prove a compensable aggravation claim. However, since the date of the Referee's order (August 16, 1977) the Supreme Court of Oregon overruled the Court of Appeals by ruling that compensation for temporary total disability must be paid even though the claim may ultimately be found noncompensable. Jones v. Emanuel Hospital, 280 Or 147. Therefore, the Fund was obligated to pay claimant compensation for time loss no later than the 14th day after it received notice or had knowledge of medically verified inability of claimant to work and its failure to do so subjects it to pay penalties and attorney fees.

The Referee directed claimant to be paid compensation for time loss commencing January 3, 1976, the date claimant's condition became disabling. The Board finds that the Fund did not receive the medical reports which verified claimant's inability to work because of his physical condition until March 10, 1976, therefore, the Fund's obligation to pay claimant's compensation for time loss should commence as of that date rather than the earlier date.

ORDER

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

The State Accident Insurance Fund shall pay to claimant time loss benefits from March 10, 1976 to July 14, 1976, less time worked, if any, as if this were a compensable claim.

The State Accident Insurance Fund shall pay to claimant additional compensation equal to 25% of the amount due claimant from March 10, 1976 to July 14, 1976 as a penalty for its failure to timely pay claimant compensation.

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

WCB CASE NO. 76-5077 JUNE 7, 1977

DARLA W. TOLMAN, CLAIMANT
Bailey, Welch, Bruun & Green,
Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson &
Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which granted her compensation equal to 160° for 50% unscheduled 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 November 14, 1977, is affirmed.

WCB CASE NO. 77-1475-B JUNE 7, 1978
WCB CASE NO. 77-1476-B

WAKEFIELD WALKER, CLAIMANT
Green & Griswold, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Gearin, Landis & Aebi, Defense Attys.
Request for Review by CNA Ins.

Reviewed by Board Members Wilson and Moore.

The Continental Casualty Company (CNA) requests Board review of the Referee's order which directed it to accept claimant's claim as an aggravation claim arising out of and as a consequence of claimant's June 20, 1976 injury.

Claimant, while in the employ of the employer, suffered two injuries. The first injury was on July 20, 1976, at which time the employer was furnished workers' compensation coverage by CNA; the second was on January 9, 1977 when the employer's coverage was furnished by Home Insurance Company. The sole question was whether claimant had suffered an aggravation of the 1976 injury or a new injury on January 9, 1977 when he suffered low back pain while at work and was unable to continue.

The injury suffered on January 9, 1977 was to the same part of the body as the July 20, 1976 injury.

After the 1976 injury claimant was off work for a couple of weeks; he then attempted to go back to work, worked five days, felt he was getting worse and quit. Claimant was seen by Dr. Schwartz, an orthopedic physician, on September 22, 1976, who diagnosed a chronic lumbosacral strain and gave claimant conservative treatment. On October 27, 1976 claimant requested pain medication which Dr. Schwartz declined to give him.

On November 8, 1976 Dr. Schwartz stated claimant could return to full activity. Claimant returned to work and was able to do his work even though it involved a considerable amount of lifting; however, he stated that although he did the work it was done with discomfort. He received his first prescription for pain medication after returning to work. Dr. Schwartz approved the prescription on November 19, 1976 and claimant continued to take such medication for pain from that time until he was injured on January 9, 1977. At that time he stated he was lifting and felt a popping in the back; he was unable to see Dr. Schwartz at that time and was treated by Dr. Campbell.

The Referee found a clear case of aggravation of a pre-existing injury; very little time had elapsed between the first and second incidents and in the interim claimant had been

off work on two separate occasions. Furthermore, claimant testified that he had had to work with discomfort and ultimately received a prescription for pain medication which enabled him to work until January 9, 1977. The Referee also found Dr. Schwartz had expressed his opinion that the incident of January 9, 1977 was an aggravation of a pre-existing injury and although such opinion was not controlling it did lend substantial weight to that conclusion.

On March 15, 1977 an order had been issued pursuant to ORS 656.307 designating CNA as the paying agent pending resolution of the determination of which carrier was responsible for the claim; there was no dispute as to the compensability of such claim.

The Board, on de novo review, agrees that the evidence supports a finding of aggravation on January 9, 1977 of the July 20, 1976 injury. However, there is no evidence that claimant's claim for his July 20, 1976 injury was ever closed pursuant to ORS 656.268, therefore, it will be necessary to remand that claim to CNA with directions to have said claim closed pursuant to ORS 656.268 so that there may be a proper commencement date for claimant's aggravation rights. The Board finds that this will not cause any problems inasmuch as the July 20, 1976 injury was accepted by CNA and presumably claimant was being paid benefits for temporary total disability by that carrier up to March 15, 1977 when it was designated as the paying agent by a .307 order and is now found to be responsible for claimant's aggravation of that injury.

ORDER

The order of the Referee, dated October 31, 1977, is affirmed insofar as it remands claimant's claim for aggravation to CNA 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 and awards claimant an attorney's fee payable by the carrier, CNA.

Claimant's claim for his compensable injury of July 20, 1976 is also remanded to CNA with directions to submit said claim to the Evaluation Division of the Workers' Compensation Department for closure pursuant to the provisions of ORS 656.268.

Claimant's attorney is awarded as a reasonable attorney's fee for her services in connection with this Board review the sum of $50, payable by CNA.

WCB CASE NO. 77-5250 JUNE 9, 1978

GARY E. LUKAS, CLAIMANT
Thomas O. Carter, Claimant's Atty.
Gearin, Landis & Aebi, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson, Moore and Phillips.

The employer seeks Board review of the Referee's order remanding to it claimant's claim for acceptance, directing it to pay claimant additional compensation equal to 25% of all temporary total disability compensation accrued in Oregon prior to the date of the Referee's order as a penalty for unreasonable resistance to the payment of compensation and awarding claimant's attorney a reasonable attorney's fee of $500.

The Referee's order authorized the employer to deduct all sums heretofore paid to claimant on his California claim from any sums due claimant as temporary total disability compensation herein; provided, however, said deductions shall not be made until after penalties have been computed on the total amount.

The only question is whether claimant is a subject California employee or a subject Oregon employee. Claimant is a truck driver who, on June 1, 1977, responded to a classified ad in the Oregonian seeking cross-country truck drivers. Claimant filled out an application at the employer's Portland office and was told to call back in a few days to ascertain if his application had been accepted. He did so and was told he had been hired and was instructed to go to Paramount, California at his own expense to pick up a truck. On arriving in California, claimant's credentials, e.g., a drivers license, Department of Transportation cards and ICC papers, were checked and photocopied and claimant was dispatched to Millbrae, California to pick up a load to be returned to the terminal at Paramount. Claimant was then assigned a different truck and dispatched to Washington, D.C. After completing a delivery he was told to call the California office for instructions and if there was no load available in California he was to call the Portland office. If Portland did not have a load to be picked up, claimant was expected to utilize his own resources in locating a back haul.

On July 23, 1976 claimant suffered an injury when he slipped and fell while alighting from his truck. He returned to Oregon and was under the care of Dr. Cherry. Claimant filed a claim in California under the California Workmen's Compensation Act which was accepted. When the maximum benefits had been paid claimant a request for hearing seeking Oregon Workers' Compensation benefits was filed.

The Referee found that claimant had never officially filed a claim for benefits in Oregon nor had such a claim been

officially denied, however, claimant contended that his request for Oregon benefits was effectively denied by Home Insurance by its refusal to furnish claimant with the appropriate forms. The Referee accepted claimant's contention.

The employer contends claimant was hired in California, stating that all truck drivers were hired in California where they were given a road test and a drivers' test by a Mr. Mitten who also did the hiring and the firing. The Referee found that claimant had never met Mr. Mitten nor was he required to take any road test or drivers' test other than taking the rig to Millbrae, California and returning it to Paramount.

The Referee cited House v. SIAC, 167 Or 257, in which the court's ruling had the effect of denying the beneficiaries' claim in both Oregon and California. It was denied in Oregon because, at that time, Oregon required the place of regular employment to be in Oregon but California required that the place of contract be in California. In House, the contract of employment was made in Oregon for employment in California. He found that claimant was an Oregon resident and that his employer was an Oregon corporation. Claimant was recruited in Oregon, hired in Oregon, and was sometimes dispatched from Oregon. He also found that although the employer was an Oregon corporation, its home office was in California and most of the dispatching was done in that state; that claimant's paychecks were issued in California and his application for California benefits was filed and first paid from California on September 17, 1976. The employer considered claimant to be a California employee, no Oregon income tax was withheld, no deductions were made for coverage under the Oregon Workers' Compensation Act and claimant worked most of the time outside of the State of Oregon. The employer contended that claimant is not a workman employed in Oregon who temporarily left the state incidental to that employment, and cannot claim benefits under the Oregon Workers' Compensation Act.

The Referee concluded that claimant's California claim was improperly accepted because claimant did not qualify under the California law nor was he entitled to benefits under Oregon law because, although he was employed in Oregon, his departure from the state was more permanent than temporary and he had far more significant contact with California than he did with Oregon. However, the Referee stated that the public policy considerations reflected in Giltner v. Commodore Contract Carriers, 14 Or App 340, necessitated the protection of Oregon residents and since the employer refused to allow claimant to file a claim in Oregon if he, the Referee, upheld the position taken by the employer, the carrier (the same carrier which accepted claimant's California claim) might rescind its acceptance of the California claim and, therefore, claimant would be deprived of benefits provided by either state.

The Referee concluded that claimant was entitled to Oregon Workers' Compensation benefits. He further concluded that

the carrier's refusal to permit claimant access to an Oregon Workers' Compensation claim form constituted unreasonable resistance to the payment of compensation and awarded claimant additional compensation equal to 25% of the benefits accrued prior to the date of the Referee's order (November 30, 1977).

The majority of the Board, on de novo review, finds the evidence indicates that claimant was a resident of Oregon and was employed in Oregon by an Oregon corporation. After claimant was hired he returned to Oregon three times between June 3 and July 23, 1976 and loads were picked up and delivered in Portland and dispatches were made out of Portland. The evidence indicates the most substantial contacts between the employer and claimant took place in Oregon.

The claimant cites in his brief the "Relevant Interest Test, 4 Larson, The Law of Workmen's Compensation, § 87.41 (1978), and contends that Oregon clearly has a more relevant interest when it is considered that this matter involves an Oregon corporation, an Oregon employer and an Oregon resident. The majority of the Board agrees.

Relief may be awarded under the Workers' Compensation statute of a state of the United States although the statute of a sister state is also applicable. 4 Larson, The Law of Workmen's Compensation, §85.20. In this case claimant was paid under the Workmen's Compensation law of both California and Oregon; his Oregon benefits were offset against previous benefits paid by the State of California.

Although the Board agrees with the Referee that the claimant's claim for Oregon Workers' Compensation benefits should be referred to the employer and its carrier for acceptance and the payment of benefits pursuant to the Oregon Workers' Compensation Act, nevertheless, the majority of the Board finds that under the circumstances of this case, penalties should not have been assessed for unreasonable resistance to the payment of compensation. Claimant was furnished a claim form for his California claim by the Home Insurance Company (the carrier involved in both the Oregon and California claims). Benefits for the California claim commenced on September 17, 1976 and included time loss beginning on July 24, 1976. The evidence indicates that although claimant sought legal assistance approximately four months after the date of his injury no formal claim was filed on his behalf and he continued to accept the benefits paid under the California Workmen's Compensation Act.

ORDER

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

The second complete paragraph on page four of the Ref-

eree's Opinion and Order which directs the payment of a 25% penalty is deleted.

In all other respects the Referee's Opinion and Order is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum of $300, payable by the employer, Tillamook Growers Co-op, by and through its carrier, the Home Insurance Company.

Board Members George A. Moore dissents as follows:

I find more persuasive the testimony of Mrs. Verneulen which would indicate that claimant answered a classified ad in Oregon and was advised of a job opportunity in California. Claimant went to California at his own expense and was hired by Mr. Mitten, who by company policy was the company's designated employment officer. The record does not demonstrate a temporary leave from Oregon and along with claimant's accepting the withholding of California income taxes and other deductions and benefits, California workmen's compensation acceptance became a condition of employment and when insured the claimant's claim was processed under that system. Under the above set of facts this reviewer cannot agree that claimant has proved he is a subject worker in the state of Oregon. The Referee's Opinion and Order should be reversed and the matter dismissed.

George A. Moore, Board Member

CLAIM NO. 2460 JUNE 14, 1978

FRANK JANGULA, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Order Approving Third Party Settlement Pursuant to ORS 656.587

Claimant suffered an industrial injury on December 13, 1974 when the delivery truck he was operating was struck from the rear by a tractor-trailer truck. At the time claimant was in the employ of Sears, Roebuck and Co., a self insurer.

Claimant elected to file a suit to recover damages from the third party, pursuant to ORS 656.587. Action was filed in Multnomah County Circuit Court and assigned the number A7610-14973. On March 30, 1978, prior to trial, settlement was reached with the defendant in the gross sum of $15,000. The settlement was reported to the court and an order was entered which will ultimately dismiss the suit.

After the settlement of the third party claim a request was made of the employer to approve the settlement. The proposed disbursements of the $15,000 would include full repayment of the employer's present lien in the sum of $6,985.09; also there would be a surplus of $402.97.

The check in the sum of $15,000 has been received by claimant from defendant and tendered to the employer for endorsement. The Board is advised that the employer's counsel has refused to execute the endorsement for the reason that the employer, under the provisions of ORS 656.593(1)(c) is entitled to reasonably-to-be-expected future expenditures except for anticipated aggravation claims.

The employer's counsel fears that because claimant has requested a hearing on the adequacy of the award of 32° granted him by a Determination Order, dated January 30, 1978, the sum of $6,985.09 may not be sufficient to fully repay the employer should claimant prevail and gain an increased award of compensation. Therefore, the employer seeks to have claimant withdraw his request for hearing before it will approve the settlement.

The Board concludes that claimant is entitled to request a hearing on the adequacy of the Determination Order and if, as a result of a Referee's order, a Board's Order on Review or an opinion of the Court of Appeals, claimant is awarded additional compensation then the employer, who is self insured and is the paying agency, will be allowed to apply the surplus of $402.97 against such additional award. This surplus of $402.97 shall remain in a trust until a final determination of claimant's permanent disability is made.

The Board, being fully advised by all parties concerned, concludes that the settlement of the third party claim in the amount of $15,000 should be approved and the disbursements proposed in the letter from claimant's counsel to employer's counsel under date of March 20, 1978, a copy of which is attached to this order, should be considered as a proper disbursement.

IT IS SO ORDERED.

WCB CASE NO. 77-4337 JUNE 15, 1978

ARVID C. EKMAN, CLAIMANT
Dye & Olson, Claimant's Attys.
Lindsay, Nahstoll, Hart, Neil & Weigler,
Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks Board review of the Referee's order which granted him compensation equal to 64° for 20% unscheduled disability to his back. 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 January 23, 1978, is affirmed.

WCB CASE NO. 77-6310 JUNE 15, 1978

ELOISE E. EMMY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order of Dismissal

On March 22, 1978 an Administrative Law Judge entered his order dismissing claimant's request for hearing in the above entitled matter.

On April 22, 1978, according to the United States Postal Service postmark on the envelope addressed to the Workers' Compensation Board, claimant requested review of the Referee's order.

More than 30 days have passed from the date of the issuance of the Referee's order, therefore, the order is final by operation of law and claimant's request for review must be dismissed. ORS 656.289(3).

IT IS SO ORDERED.

WCB CASE NO. 72-479 JUNE 15, 1978

DONALD L. FRY, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Jaqua & Wheatley, Defense Attys.
Order

On May 24, 1978 the Board entered its Own Motion Order remanding claimant's claim for an injury suffered on April 23, 1971 to Georgia-Pacific Corporation, self insured, for the payment

of compensation, as provided by law, commencing May 31, 1977, and until the claim was again closed pursuant to ORS 656.278.

On June 5, 1978 the Board received from the employer a motion to reconsider and enter an order denying claimant's request. In support of its motion, the employer submits by written argument that the exercise of own motion jurisdiction pursuant to ORS 656.278 is discretionary and that in the present case there was no need to exercise the discretion in favor of claimant. The employer states that at a hearing held in April 1972 claimant had contended he was permanently and totally disabled and he has made no effort to change the situation and return to gainful work since that date, therefore, payment of compensation for temporary total disability at the present time would constitute nothing less than a pure windfall.

The Board relied upon the findings made by Kirk A. Mulder, Administrative Law Judge (ALJ), after a full hearing. The ALJ concluded that the weight of the evidence was that claimant had suffered a worsening of his condition resulting from his industrial injury of April 23, 1971 and that said worsening had occurred since the last award or arrangement of compensation for said industrial injury; he recommended that the Board remand the claim to the employer.

The Board, after reviewing the transcript of the proceedings, was in complete agreement with the findings, conclusions and the recommendation made by the ALJ and adopted it as its own. The Board finds nothing in the employer's written argument which would justify altering its position with respect to the recommendation of the ALJ.

Each request for the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 is considered on its own merits. Requests for own motion relief are not automatically granted; only when the medical evidence justifies reopening the claim does the Board exercise its discretionary power.

ORDER

The employer's motion to reconsider the Own Motion Order entered on May 24, 1978 in the above entitled matter is hereby denied.

SAIF CLAIM NO. EB 46240 JUNE 15, 1978

ARTHUR FUQUA, CLAIMANT
SAIF, Legal Services, Defense Attys.
Own Motion Determination

Claimant sustained a puncture wound to the sole of his

right foot on February 25, 1964. The claim was initially closed on December 8, 1964 with an award for compensation equal to 5% of the right foot.

Claimant continued to have problems and his claim was reopened in January 1977. In April 1977 claimant was hospitalized with a diagnosis of multiple hammertoes of the right foot. On April 4 partial phalangectomies were performed on the second, third fourth and fifth toes.

In July 1977 claimant was readmitted to the hospital with a dislocated third metatarsophalangeal joint, right foot, which required exploratory surgery and in December claimant was again hospitalized with chronic osteomyelitis third metatarsal head, right foot. The third metatarsal head of the right foot was excised. Drs. Thompson and Fagan ordered an arch support for claimant's shoe.

On April 17, 1978 Dr. Thompson, in his closing report, indicated that although claimant had continuing discomfort he could wear a soft shoe without a great deal of difficulty. There was mild tenderness and some limitation of motion of the second and third toes, however, claimant is able to be on his feet for four to five hours without much difficulty.

On May 5, 1978 the Fund requested a determination of claimant's disability. On May 22, 1978 the Evaluation Division of the Workers' Compensation Department recommended that the Board grant claimant compensation for temporary total disability from January 18, 1977 through April 11, 1978, less time worked, and compensation equal to 5% of the right foot.

ORDER

Claimant is awarded compensation for temporary total disability from January 18, 1977 through April 11, 1978, less time worked, and compensation equal to 5% of the right foot. These awards are in addition to any awards claimant has previously received for his industrial injury of February 25, 1964.

WCB CASE NO. 77-4832 JUNE 15, 1978

JACQUELINE L. GOLD, CLAIMANT
Rask & Hefferin, Claimant's Attys.
Merten & Saltveit, Defense Attys.
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 16, 1977 Determination Order whereby she was granted temporary total disability benefits

from April 14, 1977 through July 12, 1977 and no 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 December 28, 1977, is affirmed.

WCB CASE NO. 77-567 JUNE 15, 1978

LINDA J. HART, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Keith D. Skelton, Defense Atty.
Stipulation Disputed Claim Settlement

Come now the claimant, personally and by her attorney, and the employer, by its Worker's Compensation carrier, and their attorney, and hereby move the Board for an Order based upon the following recitals and stipulations of the parties:

Claimant filed the above numbered claim contending she injured her low back in the course of her employment with Lane Plywood on December 27, 1976, while pulling a pile of veneer out of a bin of the automatic stacker.

The claim was denied by the Liberty Mutual Insurance Company on January 14, 1977 on the ground that Claimant had not had an accident arising out of and in the course of her employment.

A hearing was held before Administrative Law Judge John F. Baker on May 24, 1977, and, by Opinion and Order dated the 31st day of May, 1977, the Administrative Law Judge affirmed the denial.

A Request for Board Review was timely filed and, by Order on Review dated the 4th day of January, 1978, the Workers' Compensation Board reversed the Order of the Administrative Law Judge and remanded the claim to the Liberty Mutual Insurance Company for acceptance and payment of benefits pursuant to law.

A Motion to Request Rehearing by Board was filed by the attorney for the employer and carrier and the same was denied by the Board by Order dated the 30th day of January, 1978.

A Petition for Judicial Review before the Court of Appeals, State of Oregon, was timely filed by the employer/carrier, through their attorney and the same has now been withdrawn.

CONTENTIONS OF CLAIMANT

Claimant contends that the low back condition arose out of and in the course of her employment with Lane Plywood and that she is entitled to benefits therefor.

CONTENTIONS OF EMPLOYER

The employer, through its carrier, contends that Claimant did not sustain an injury within the course and scope of her employment; that, based upon the testimony presented at hearing, the Order on Review of the Board should be reversed and the Order of the Administrative Law Judge, upholding the denial by the carrier, should be affirmed.

DISPUTE

The parties hereto realize that the contentions and positions involve a disputed and bona fide conflict, and, thus, a disputed claim, which, Claimant realizes, if further pursued, might well involve the lack of benefits to herself, and, therefore, the parties desire to compromise and settle the claim and all contentions and controversies therein involved pursuant to ORS 656.289(4) and that an Order be entered as follows:

1. The Liberty Mutual Insurance Company shall pay to Claimant and her attorney the sum of $7,200, in full and final settlement of the claim.

2. Claimant's Attorney shall receive 25% of the above sum, as and for a reasonable attorney fee.

3. The Liberty Mutual Insurance Company shall pay medical expenses incurred by Claimant, in addition to the above sum, including, but not limited to:

a) Eugene Hospital & Clinic in total amount of $2,829.72 for hospitalization and treatment by Dr. Robertson.

b) McKenzie Anesthesia Group in the amount of $81, payable to Coastal Adjustment Bureau, 280 East 17th Avenue, Eugene, Oregon 97401.

4. In consideration of the promise to pay said sum, Claimant agrees that the claim shall remain in a denied status; that there is no acceptance of the same, expressed or implied; and that no further sum shall now or hereafter be payable thereunder.

IT IS SO STIPULATED.

SAIF CLAIM NO. EC 264488 JUNE 15, 1978

JOSEPH W. JONES, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant sustained a compensable injury to his right leg on September 3, 1970 while employed by Tube Forgings of America, Inc., whose workers' compensation coverage was furnished by the State Accident Insurance Fund.

On November 16, 1970 Dr. Gill performed a medial meniscectomy and claimant returned to work on January 4, 1971, however, he had a recurrence of synovitis in the knee and was off work from August 23, 1971 to October 11, 1971. Dr. Gill, on February 3, 1972, reported claimant was medically stationary and the claim was closed by a Determination Order dated February 23, 1972 which granted claimant 30° for 20% loss of his right leg.

Claimant requested a hearing and, on September 12, 1973, after a hearing, the award was increased to 45° for 30% loss of the right leg. The hearing officer's order voided an administrative closure issued on September 13, 1970 and made the Determination Order of February 23, 1972 the initial closure from which claimant's aggravation rights would commence. This order was affirmed by the Board and by the circuit court.

On December 7, 1977 claimant was examined by Dr. Sirounian, complaining of a worsening of his knee condition. On April 13, 1978 the Board issued its Own Motion Order remanding claimant's claim to the Fund for acceptance and payment of compensation as of November 28, 1977.

On February 20, 1978 Dr. Sirounian stated there was no necessity for surgery nor further therapy and recommended claimant be evaluated by the Orthopaedic Consultants. The physicians at the Orthopaedic Consultants, after examining claimant on March 17, 1978, recommended no further treatment nor any increase in claimant's disability. On April 6, 1978 Dr. Sirounian agreed with that report but recommended rehabilitation if claimant's employer could not find suitable work for him.

On April 28, 1978 the Fund requested the determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommends that claimant's claim be closed with an award for temporary total disability from November 28, 1977 through April 6, 1978 but recommended no additional award for permanent partial disability.

ORDER

The claimant is awarded compensation for temporary total disability from November 28, 1977 through April 6, 1978.

This is in addition to any award for temporary total disability which claimant may have received as a result of his industrial injury suffered on September 3, 1970.

WCB CASE NO. 77-2996 JUNE 15, 1978

STEVE KNIGHT, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary, Claimant's Attys.
Roger Warren, Defense Atty.
Amended Order on Review

On May 12, 1978 the Board entered its Order on Review in the above entitled matter. In the first sentence of the second paragraph on page three of the order, the number "30" should be substituted for the number "20"; therefore, the order should be amended accordingly.

In all other respects the order entered on May 12, 1978 in the above entitled matter should be ratified and reaffirmed.

IT IS SO ORDERED.

SAIF CLAIM NO. FC 227876 JUNE 15, 1978

VIOLET B. McKINNON, CLAIMANT
Tooze, Kerr, Peterson, Marshall & Shenker, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On December 30, 1969 claimant, while working as a retail clerk for Fred Meyer, Inc., whose workers' compensation coverage was furnished by the State Accident Insurance Fund, suffered a compensable injury to her left foot. Initially, the claim was closed as a "medical only"; however, it was closed pursuant to ORS 656.268 on March 24, 1970 and claimant's aggravation rights have expired.

On May 10, 1971 Dr. Post stated that the injury had aggravated claimant's pre-existing neuropathic diabetic ulcer on the plantar surface of her left foot. The claim was reopened and closed with an award for time loss only. Claimant requested a hearing. After the hearing, the hearing officer ordered the claim reopened as of September 29, 1971 and claimant was treated by Dr. Post by surgical incision of the ulcer.

In 1972 claimant had a surgical fusion at L3-4 level; she had had an L4-S1 fusion many years previously. Although claim-

ant was medically stationary, according to Dr. Post, in November 1972, other medical factors than the foot injury made employment impossible. The claim was closed on January 12, 1973 with additional time loss only. Claimant requested a hearing and, on September 12, 1973, a hearing officer found that claimant had failed to prove that the back condition was involved in the original industrial injury. He denied her claim for her back problems but awarded her compensation equal to 60% loss of her left foot. The Board reversed the hearing officer's order and reinstated the Determination Order dated January 12, 1973 which had given claimant no award for permanent partial disability. A circuit court issued a judgment order on July 22, 1974 which reversed the Board's order and awarded claimant 67.5° for 50% loss of the left foot but found claimant had failed to prove any relationship between her back condition and her industrial injury.

The claim was reopened pursuant to a stipulation approved November 13, 1974 and closed by a fourth Determination Order issued February 12, 1975 which again granted additional temporary total disability benefits only.

On October 6, 1975 the claim was again reopened because claimant was hospitalized for amputation of the left great toe and ray resection of the first metatarsal because of chronic osteomyelitis of the metatarsal head. Claimant has been treated by Drs. Post, Belknap and Kimbrough for diabetes mellitus and has been hospitalized several times for complications including chronic osteomyelitis of the left foot. Claimant's last hospitalizations were in July and August 1977 for symptoms of recurrent osteomyelitis.

On January 4, 1978 Dr. Belknap reported that claimant continued to have what was felt to be a smoldering osteomyelitis in her foot, a chronically unstable condition which probably would never be cured until she had an amputation. Dr. Post reported on March 10, 1978 that claimant was doing poorly and Dr. Belknap's report of April 10, 1978 stated claimant's condition was medically stationary but she would need continual medical treatment. He agreed with Dr. Post that claimant was impaired at the equivalent of a below-the-knee amputation on the left and was unable to return to work in any capacity.

On April 18, 1978 the employer requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended that the claimant be awarded compensation for temporary total disability from October 6, 1975 through April 10, 1978 and an additional award of compensation equal to 54° for 40% loss of the left foot.

The Board concurs in these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from October 6, 1975 through April 10, 1978 and to 54° for 40% loss of the left foot. These awards are in addition to any previous awards received by claimant for her December 30, 1969 industrial injury.

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.

SAIF CLAIM NO. EB 99622 JUNE 15, 1978

MERLEN F. THOM, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury on December 16, 1964. Dr. Langston, an orthopedist, diagnosed a herniated intervertebral disc at L4-5 level and treated claimant conservatively through May 1965. Claimant's claim was closed and his aggravation rights have expired.

A myelogram, performed in August 1968, revealed a questionable defect at the L4-5 level and, on September 23, 1968, a laminectomy and disc removal were performed at that level by Dr. Langston. Claimant made excellent recovery and no work restrictions were placed upon him.

In October 1975 Dr. Melgard, a Salem neurosurgeon, examined claimant who was complaining of low back and left leg pain. In January 1976 Dr. Reilly, a neurologist, reported negative electromyography for the lower extremities. Dr. Melgard's myelogram in March showed some abnormality at L4-5 of questionable clinical significance.

On April 21, 1976 Dr. Poulson, an orthopedic surgeon, performed a laminectomy and spinal fusion at L4-5. The Orthopaedic Consultants, at the request of the carrier, examined claimant on September 26, 1976. It was their opinion that claimant was medically stationary, however, Dr. Poulson disagreed, stating that the recovery process takes longer and that he wished a longer active follow up. On March 13, 1978 Dr. Poulson's closing report indicated claimant had moderate loss of forward flexion in spinal bending, little significant reduction in other planes of motion; he has recurrent pain.

On April 5, 1978 the Fund requested a determination of claimant's present disability. The Evaluation Division of the Workers' Compensation Department recommended to the Board on May 18, 1978 that claimant be awarded compensation equal to 50% loss

function of an arm for his unscheduled disability. The records indicate that claimant has already been paid additional compensation for temporary total disability from March 2, 1976 through November 23, 1976.

ORDER

Claimant is awarded compensation equal to 50% loss function of an arm for his unscheduled low back disability. This award is in lieu of any previous awards which claimant may have received as a result of his injury of December 16, 1964.

WCB CASE NO. 77-5702 JUNE 15, 1978

WILLIAM TOWNSEND, CLAIMANT
Dye & Olson, 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 disapproved the denial, thereby directing it to continue to provide claimant benefits including medical expenses and hospitalization required by Dr. Moore, and assessed penalties and attorney fees 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 December 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 carrier.

WCB CASE NO. 76-4873 JUNE 15, 1978

CLARENCE R. WILLIAMS, CLAIMANT
Emily Lynn Knupp, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Order

On May 22, 1978 the Board received from claimant's counsel a request that it reconsider its Order on Review entered

in the above entitled matter on April 20, 1978. The basis for the request for reconsideration is that medical reports more current than the Orthopaedic Consultant's reports of 1976 cited in the Board's Order on Review indicate claimant's disability has increased since November 1976.

The Board finds that if there were more current medical reports which were available at the time of the hearing they should have been submitted to the Referee and made a part of the record. This was not done and the Board concludes that the request by claimant to reconsider its order should be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-4767 JUNE 16, 1978

JERRY J. JOHNS, CLAIMANT
David W. James, Jr., Claimant's Atty.
Jack L. 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 him compensation equal to 32° for 10% permanent disability for injury to his right eye. 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 December 21, 1977, is affirmed.

WCB CASE NO. 77-3516 JUNE 16, 1978

ELROY MINER, CLAIMANT
Bailey, Welch, Bruun & Green,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Vagt, Olson & Coon, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant seeks review of the Referee's Opinion and Order on Reconsideration which affirmed the denial by the State Accident

Insurance Fund of claimant's claim for a myocardial infarction.

Claimant suffered a myocardial infarction on April 18, 1977 while performing as a volunteer fireman for the city of Vernonia. The Referee was satisfied that, based on Dr. Ellerbrook's testimony, the heart attack arose out of and in the course of claimant's activities on that date as a volunteer fireman.

The State Accident Insurance Fund denied claimant's claim primarily because a review of the Fund's records failed to show claimant's name was on any of the lists furnished to the State Accident Insurance Fund on volunteer firemen to be covered as required by ORS 656.031.

The Referee found that the omission was inadvertent, that since September 1976 claimant had been one of the City of Vernonia's 23 volunteer firemen for whom the city had paid the Fund premiums for workers' compensation coverage. However, through ignorance of the importance of keeping the Fund promptly notified of changes in the list of volunteers the city recorder did not furnish the Fund a list with claimant's name on it until May 2, 1977. The city recorder did have claimant's name in her records as a voluntary fireman and had had it in her records since September 1976.

ORS 656.031(4) provides in part:

> "The county, city or municipality shall furnish the fund with a list of the names of those employed as volunteer personnel and shall notify the fund of any changes therein. . . . only those persons whose names appear upon such list prior to their personal injury by accident are entitled to the benefits of ORS 656.001 to 656.794 and they are entitled to such benefits if injured . . . while performing any duties arising out of and in the course of their employment as volunteer personnel . . .".

In 1977 the legislature amended ORS 656.031(4) to read:

> "The county, city or municipality shall maintain separate official membership rosters for each category of volunteers showing the date each volunteer became a member. The certified copy of the official membership rosters shall be furnished the Fund upon request . . . only those persons whose names appear on the official membership roster prior to their personal injury by accident are entitled to the benefits . . .".

The Referee found that it would be absurd and unreasonable to deny claimant benefits through a literal application of the statute prior to the 1977 amendment which, in his opinion, was in-

tended to eliminate such interpretation. He found that the sworn testimony of the City of Vernonia's recorder certainly equates to the certified roster contemplated by the 1977 amendment.

The Referee concluded in his original Opinion and Order that claimant's claim was not barred for lack of strict, literal compliance with ORS 656.031(4); however, on November 23, 1977 the Referee set aside his original order dated November 3, 1977 for the purpose of reconsideration and, on December 28, 1977, he entered his Opinion and Order on Reconsideration in which he concluded that the Workers' Compensation Board and the circuit court had already construed the applicable law contrary to claimant's position, therefore, the denial of claimant's claim by the State Accident Insurance Fund must be affirmed.

The Board, on de novo review, affirms the Referee's Opinion and Order on Reconsideration. The law in effect at that time of the injury is the law which covers the worker's rights.

ORDER

The Opinion and Order on Reconsideration, dated December 28, 1977, is affirmed.

SAIF CLAIM NO. A 47193 JUNE 16, 1978

PEMBROOK MONROE, CLAIMANT
Sid Brockley, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 17, 1978 claimant, by and through his attorney, requested the Board, pursuant to ORS 656.278, to reopen his claim for an injury suffered on July 22, 1947. The claim was closed on January 23, 1948 with an award for permanent partial disability equal to 32°. Enclosed with the request were medical reports and documents furnished claimant's attorney by the State Accident Insurance Fund which claimant contends justify the reopening of his claim for further medical care and treatment.

On February 9, 1977 claimant was hospitalized; he underwent surgery on February 17.

On March 22, 1978 the Fund was advised by the Board of claimant's request for own motion relief and furnished a copy thereof and asked to inform the Board within 20 days of its position with regard to the request. On March 23, 1978 the Fund responded, stating that after reviewing all of the medical reports in the file, it felt the back injury suffered in 1947 was of a minor nature and the claim has remained closed for 30 years with no record of complaints or treatment. Because of this the Fund

requested that claimant be examined by the Orthopaedic Consultants before the Board made a decision on claimant's request.

On April 19, 1978 claimant was examined by three physicians at the Orthopaedic Consultants and the consensus opinion was that claimant's present lumbar and sciatic symptoms are unrelated to his 1947 injury based on the history and findings.

The Board, after reviewing all of the medical reports submitted to it, concludes that they do not justify a reopening of claimant's claim for his 1947 industrial injury and, therefore, claimant's request that the Board, pursuant to ORS 656.278, reopen his claim for the industrial injury of July 22, 1947 must be denied.

IT IS SO ORDERED.

WCB CASE NO. 77-5794 JUNE 16, 1978

SUSAN PANSINE, CLAIMANT
Blair & McDonald, Claimant's Attys.
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 Fund's denial of her claim for a 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 December 20, 1977, is affirmed.

WCB CASE NO. 76-5492 JUNE 16, 1978

SHELVA WIESE, CLAIMANT
Harry R. Kraus, 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 compensation equal to 32° for 10% unscheduled

psychological disability for a total award of 112°. 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 December 7, 1977, is affirmed.

WCB CASE NO. 77-386 JUNE 16, 1978

CECIL L. WILLIAMS, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Attys.
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 approved the denial by the State Accident Insurance Fund on January 27, 1977 of claimant's claim for a myocardial infarction.

The Board, after de novo review, affirms and adopts as its own the Referee's findings and conclusions which relate to the compensability of claimant's claim and a copy of the Referee's order is attached hereto and, by this reference, made a part hereof.

However, the evidence indicates that the employer had notice on November 19, 1976 of claimant's claim for an industrial injury and did not deny the claim until January 27, 1977 nor did it pay claimant any compensation for temporary total disability within 14 days after it had notice of the claim.

Based upon the ruling of the Oregon Supreme Court in Jones v. Emanuel Hospital, 280 Or 147, the Fund's failure to pay claimant "interim compensation" subjects it to the payment of such compensation and also to penalties and attorney fees. Therefore, the Fund must pay claimant compensation, as provided by law, from November 19, 1976 until January 27, 1977 and also additional compensation, by way of a penalty, based on a percentage of the compensation due claimant for the same period of time and pay claimant's attorney a reasonable attorney's fee.

ORDER

The order of the Referee, dated August 19, 1977, is affirmed insofar as it relates to the compensability of claimant's claim filed on November 19, 1976.

The State Accident Insurance Fund shall pay claimant compensation, as provided by law, from November 19, 1976, the date the Fund had first notice of claimant's claim, and until January 27, 1977, the date the claim was denied.

The Fund shall pay claimant an additional sum equal to 15% of the compensation due claimant between October 26, 1976 and January 27, 1977 as a penalty for unreasonable delay in the payment of compensation and shall pay to claimant's attorney as a reasonable attorney's fee under the provisions of ORS 656.382 the sum of $150.

Claimant's attorney is granted as a reasonable attorney's fee for his services at Board level a sum equal to 25% of the increased compensation awarded claimant by this order.

SAIF CLAIM NO. A 435428 JUNE 20, 1978

ROBERT W. BROWN, CLAIMANT
Tom Hanlon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his right leg on July 30, 1954 while employed by Jess Mann Logging Company. Claimant's claim was closed on June 15, 1955 with an award equal to 35% loss of the right leg. Claimant's aggravation rights have expired.

Subsequent to claim closure claimant suffered several flare-ups of thrombophlebitis which required treatment and reopening of his claim for time loss compensation. The last time his claim was closed was on December 15, 1959.

On March 14, 1977 claimant saw Dr. Patrick, complaining of recurrent swelling of his right leg. Claimant stated this was related to his old 1954 injury. On August 19, 1977 the State Accident Insurance Fund denied reopening of the claim, indicating that the medical reports did not justify reopening for time loss or for medical treatment; also, it was the opinion of the Fund's medical staff that claimant's current leg condition was not related to his 1954 injury.

On January 26, 1978, pursuant to a stipulation, the claim was reopened as of March 14, 1977 for treatment by Dr. Patrick. On March 17, 1978 Dr. Patrick submitted a closing report stating that claimant had recovered as much as could be expected; claimant had only a minimal amount of swelling in the right leg.

On April 24, 1978 the Fund requested a determination of claimant's present condition. The Evaluation Division of the

Workers' Compensation Department recommended that claimant be awarded compensation for temporary total disability from March 14, 1977 through March 17, 1978, less time worked, but no additional award for permanent partial disability. Claimant had suffered an injury on December 20, 1976 for which he received compensation for temporary total disability from Employers Insurance of Wausau under claim no.165040 and Evaluation recommended that any compensation received by claimant from Wausau from March 14, 1977 through March 17, 1978 also be deducted from the compensation to be paid to claimant by the Fund for his 1954 injury.

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

ORDER

Claimant is awarded compensation for temporary total disability from March 14, 1977 through March 17, 1978, less time worked, and less any compensation paid to claimant during the same period of time by Employers Insurance of Wausau as temporary total disability in connection with claim no. 165040 which related to a compensable injury claimant suffered on December 20, 1976.

Claimant's attorney is 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 $500.

WCB CASE NO. 76-6710 JUNE 20, 1978

MARILYN CLEMONS, CLAIMANT
Doblie, Bischoff & Murray, Claimant's Attys.
Ronald Podnar, Defense Atty.
Order on Remand

The Oregon Court of Appeals remanded the above entitled matter to the Board for recalculation of claimant's permanent disability award in a manner consistent with its opinion filed on May 8, 1978. Clemons v. Roseburg Lumber Company.

Claimant sustained an industrial injury to her right shoulder and arm in 1971. Her claim was closed by a Determination Order dated November 3, 1976 which awarded claimant 32° for 10% unscheduled disability. Claimant requested a hearing and, after a hearing, the Referee affirmed the award made by the Determination Order, stating:

> "Her disability at this time obviously exceeds 10%, but on the basis of my interpretation of ORS 656.325(2) the employer cannot be penalized for the employee's refusal to mitigate her injury,

by accepting reasonable medical treatment. Accordingly, there is no alternative but to leave the award undisturbed."

The Board affirmed and adopted the Referee's order and claimant appealed.

The Court of Appeals, after stating that the test for determining whether a permanent disability award should be adjusted because of claimant's refusal to submit to recommended treatment is whether the refusal is reasonable, concluded it had been reasonable for claimant to forego the risks and pain of major surgery and her benefits should not have been reduced due to her refusal of recommended treatment.

The Board, therefore, remands the above entitled matter to Referee Raymond S. Danner for his reconsideration and the issuance of an Opinion and Order which is consistent with the opinion of the Court of Appeals, a copy of which is attached hereto.

IT IS SO ORDERED.

SAIF CLAIM NO. EC 18293 JUNE 20, 1978

ROBERT A. CUSHMAN, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On February 14, 1978 the Board received from claimant, by and through his attorney, a request to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for a compensable injury suffered on January 27, 1966 while employed by Western Transportation Company, whose workers' compensation coverage was furnished by the State Accident Insurance Fund.

Claimant's claim was closed initially by a Determination Order dated December 2, 1968 and his aggravation rights have expired. Claimant's claim has been reopened since the initial closing and the date of the last arrangement or award of compensation was January 13, 1971. Claimant contends his condition has worsened since that date.

Attached to claimant's request were medical reports from the Permanente Clinic, including a report from Dr. Satyanarayan, a psychiatrist, dated November 8, 1977, a report from Dr. Nag, a neurosurgeon, dated December 19, 1977, and Dr. Gerhardt, a psychiatrist, dated January 16, 1978.

The request alleges that the Fund responded on January

10 and again on February 1, 1978, both times refusing to accept further responsibility to provide claimant with the necessary treatment and compensation.

On February 16, 1978 the Board notified the Fund to state its position immediately inasmuch as it had been furnished a copy of claimant's request and on January 10, 1978 had advised claimant that, based on the information submitted to the Fund, it could find no worsening of claimant's condition as the result of the January 1966 injury. No response has been received from the Fund as of the date of this order.

The Board, after reviewing all the medical reports submitted to it, concludes that such medical reports are not sufficient to justify a finding that there has been a worsening of claimant's condition since January 13, 1977 nor that claimant's present condition is directly related to his injury of January 27, 1966. Therefore, the claimant's request that the Board, pursuant to ORS 656.278, reopen his claim for the injury suffered on January 27, 1966 must be denied.

IT IS SO ORDERED.

SAIF CLAIM NO. C 173367 JUNE 20, 1978

PAUL DOUGLASS, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On June 5, 1978 the Board was furnished a request from claimant to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered on February 25, 1969. At the time of the injury claimant was employed by Carter Manufacturing Company whose coverage was furnished by the State Accident Insurance Fund. The claim was accepted and closed on August 29, 1969 with an award equal to 16°. Claimant's aggravation rights have expired.

Claimant's request was supported by substantial medical reports and inasmuch as the Fund forwarded claimant's request and the medical reports to the Board with the statement that it would not oppose the reopening of the claim should the Board determine the medical evidence to be sufficient to justify its reopening, the Fund was not requested to make any further statement regarding its position on claimant's request.

The Board, after carefully reviewing all of the medical evidence relating to the initial injury and to claimant's present condition, concludes that claimant's present condition is directly related to his industrial injury of February 25, 1969, that such condition has worsened since his last award of compensation for

said injury and that claimant is in need of additional medical care and treatment.

The Board concludes that the claimant's request to reopen his claim for the February 25, 1969 industrial injury should be granted.

IT IS SO ORDERED.

WCB CASE NO. 77-4444 JUNE 20, 1978

MARIE EVERS, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
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 compensation equal to 160° for 50% unscheduled back disability. She 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 February 21, 1978, is affirmed.

WCB CASE NO. 77-1178-B JUNE 20, 1978

PHYLLIS GALASH, CLAIMANT
Lee Finders, Claimant's Atty.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
Request for Review by EBI Co.

Reviewed by Board Members Wilson and Phillips.

The Employee Benefits Insurance Company (EBI) seeks Board review of the Referee's order which directed it to accept claimant's claim for a bilateral carpal tunnel syndrome and for the payment of compensation, as provided by law, commencing September 19, 1976, less time worked, and until the claim was

closed pursuant to ORS 656.268 and further directed that EBI reimburse Northern Insurance Company (Northern) for all compensation it had heretofore paid to and on behalf of claimant.

The Referee found that prior to July 1, 1976 claimant's employer was insured by Northern; thereafter it was insured by EBI. Claimant suffered from a carpal tunnel syndrome in both of her wrists and both carriers concede that the injury was compensable. The sole issue before the Referee was which of the insurers of the employer was responsible for claimant's condition.

Claimant had experienced numbness in both hands on June 14, 1976 at which time she was working only six hours a day. On the following day she commenced working a regular eight-hour shift and noticed increased difficulty. On June 25 she called her doctor and was given an appointment to be seen by him on June 30, 1976. On September 19, 1976 claimant was hospitalized at Providence Hospital for surgery to correct the right carpal tunnel syndrome.

Claimant had lost no time from work prior to this surgery and when she was released to full time work on November 1, 1976 she continued working without any time loss except for plant shutdown and vacation. In July 1977 her left wrist commenced to bother her, however, she continued working until September 19, 1977 when she was again admitted for surgery, this time to correct the left carpal tunnel syndrome.

On February 17, 1977 the Board had issued an order pursuant to ORS 656.307, designating Northern as paying agent until the responsible party was determined.

Northern contends that claimant's condition is an occupational disease and that the liability therefor should be assigned to the carrier which was on the risk at the time the disease caused claimant to stop working. EBI contends that claimant's condition is an injury caused by repetitive trauma and that liability for her condition was that of the carrier furnishing the employer's coverage at the time claimant required medical services.

The Referee found that the claimant's testimony and the medical evidence indicated that her work as a sewer was the primary factor in the development of her bilateral carpal tunnel syndrome; claimant had been doing this work for the employer for over a period of ten years operating a sewing machine with her hands and wrist. This continuous activity gradually caused her condition to manifest in June 1976. Dr. Dennis stated unequivocally that the condition as it started was definitely aggravated by her work; when claimant was not working the problem subsided.

The Referee concluded that claimant's condition was the result of a situation to which she was not ordinarily subjected other than in the course of her regular actual employment and that

she had suffered an occupational disease, having found no evidence of an injury caused by repetitive trauma or any other manner.

Based upon his findings and conclusions he remanded the claim to EBI. The Referee did not award claimant's attorney any attorney fee.

EBI requested Board review of the Referee's Opinion and Order on November 29, 1977. On February 28, 1978 the Board was advised by claimant's attorney that prior to the hearing he had requested the attorneys for each of the insurance companies to agree that it would not be necessary for claimant to attend the hearing but met with no success. He requested that the Board, inasmuch as the Referee had been divested of jurisdiction upon the request for Board review by EBI, amend the Opinion and Order entered by the Referee on October 19, 1977 by awarding claimant's attorney an attorney's fee.

On March 7, 1978 the Board did amend the Referee's Opinion and Order by awarding claimant's attorney as a reasonable attorney's fee for his services before the Referee the sum of $400 payable by EBI.

Subsequently, the Board was advised that at the time of the hearing there was a discussion, off the record unfortunately, between the Referee, claimant's attorney and the attorney for each of the carriers concerning claimant's attorney's entitlement to an attorney's fee inasmuch as the only issue before the Referee was which carrier was responsible for the payment of compensation to claimant. There was no issue of compensability. The attorney for EBI advised the Board that he desired to file a brief on the question of whether claimant's attorney is entitled to an attorney's fee pursuant to the provisions of ORS 656.382(2) if there has been no denial of compensability and an order has been issued pursuant to ORS 656.307, designating one of two carriers as a paying agent pending determination of responsibility for payment of compensation to claimant. Later the attorney representing Northern joined in said request, as did claimant's attorney.

Therefore, on March 28, 1978, an Order of Abatement directed that the Board's order entered on March 7, 1978 be held in abeyance pending receipt by the Board of briefs from all parties concerned stating their respective positions with regard to this matter.

The Board, on de novo review, affirms the findings and conclusions reached by the Referee in his Opinion and Order dated October 19, 1977. The Board, after a thorough study and consideration of the briefs submitted by claimant's attorney, the attorney for EBI and the attorney for Northern, concludes that its order of March 7, 1978 which awarded claimant's attorney a reasonable attorney's fee of $400 should be vacated and set aside as should its Order of Abatement entered on March 28, 1978.

The Board finds it very difficult to determine if, and when, a claimant's attorney is entitled to an award for a reasonable attorney's fee at a hearing before a Referee where the sole issue is which of two carriers is responsible for the payment of compensation to claimant and an order has been issued pursuant to the provisions of ORS 656.307 designating one of the carriers as the paying agent pending determination of the responsible party.

If the claimant is advised by both carriers that the dispute is solely between them and it is not necessary that claimant be represented by an attorney because there is no question with respect to the compensability of claimant's injury and claimant will not be involved in any issue but may be called solely as a witness, then if claimant, notwithstanding this information, hires an attorney, claimant's attorney will receive no attorney's fee unless he actively and meaningfully participates at the hearing in behalf and in defense of claimant's rights.

ORDER

The Opinion and Order of the Referee, dated October 19, 1977, is affirmed.

The order entered on March 7, 1978 amending the Referee's Opinion and Order and awarding claimant an attorney's fee of $400 payable by EBI is hereby vacated and set aside.

The Order of Abatement entered on March 28, 1978 is hereby vacated and set aside.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review a sum of $50, payable by EBI, pursuant to ORS 656.382(2).

WCB CASE NO. 77-964 JUNE 20, 1978

ERNESTINE GRAHAM, CLAIMANT
Dye & Olson, Claimant's Attys.
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 she is entitled.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, a copy of which is attached

hereto and, by this reference, is made a part hereof.

ORDER

The order of the Referee, dated December 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 Fund.

WCB CASE NO. 77-1316 JUNE 20, 1978

JUNE A. HORKEY, CLAIMANT
Johnson, Harrang & Mercer, Claimant's Attys.
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 her aggravation claim to it for acceptance and payment of compensation to which she 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 January 23, 1978, 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. 77-5946 JUNE 20, 1978

WILLIAM HOWARD, CLAIMANT
Dye & Olson, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
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 31, 1977 Determination Order whereby he was granted compensation equal to 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 January 17, 1978, is affirmed.

WCB CASE NO. 77-6273 JUNE 20, 1978

ROBERT LYLE LAMBERT, CLAIMANT
Harold W. Adams, Claimant's Attys.
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 11, 1977 Determination granting no further compensation above the earlier award of 52.5° for 35% loss of use 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 February 2, 1978, is affirmed.

WCB CASE NO. 75-3780 JUNE 20, 1978

HOBART MANNS, CLAIMANT
Charles B. Guinasso, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
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 1, 1977 Determination Order granting

him compensation for 10% loss of the left foot. Claimant contends that this award is inadequate and that he is also entitled to compensation for his left leg and low back disabilities.

The Board, after de novo review, affirms and 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 that the medical evidence does not indicate any permanent disability in claimant's left knee. Although claimant does experience some occasional swelling, there is no significant loss of function.

ORDER

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

WCB CASE NO. 77-48 JUNE 20, 1978

DONALD T. MILLER, CLAIMANT
Starr & Vinson, Claimant's Attys.
Luvaas, Cobb, Richards & Fraser,
Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of the Referee's order which affirmed the Disability Prevention Division's decision to withdraw its referral for vocational rehabilitation and affirmed the January 17, 1977 Determination Order whereby claimant was granted compensation equal to 37.5° for 25% loss of the left leg and 37.5° for 25% loss of the right leg. Claimant contends that his vocational rehabilitation program should be reinstated and his compensation 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 November 7, 1977, is affirmed.

WCB CASE NO. 77-5816 JUNE 20, 1978

ROBERT L. MORRIS, CLAIMANT
Ackerman & DeWenter, Claimant's Attys.
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 192° for 60% unscheduled low back disability. Claimant contends he is permanently and totally disabled.

The State Accident Insurance Fund filed a cross-request for review, contending that the Referee was in error in awarding claimant a penalty because the Fund failed to provide claimant with documents from claims other than the present claim prior to the hearing. The Referee had awarded claimant the sum of $150 as additional compensation pursuant to ORS 656.262(8), finding that the claimant had made a timely request for documents relating to claims for industrial injuries suffered prior to the injury of May 1976, that such request was not honored by the Fund and entitled claimant to a penalty.

Claimant is a 51-year-old laborer who did not complete the sixth grade. He is almost illiterate. Prior to the 1976 injury claimant suffered two work connected back injuries. In the late 1950's claimant hurt his back while he was working in the woods. The injury required a fusion and claimant was unable to return to logging. In the early 1960's claimant reinjured his back while working in a service station. This injury resulted in a re-fusion and claimant's inability to work at the service station because of the walking requirements. He then worked as a custodian. Claimant has received 50% disability for the two back injuries.

In May 1976, while employed as a custodian, claimant again suffered a low back injury. He returned to work in September 1976 but in December claimant lifted a desk and suffered a recurrence of back pain plus radiating pain down the left leg. He was treated by Dr. Carter, an orthopedist, who restricted claimant's activities, e.g., no heavy lifting or repetitive bending or stooping.

On August 12, 1977 a Determination Order awarded claimant 80° for 25% low back disability. Subsequently, Dr. Stainsby, a neurologist, examined claimant and provided him with a transcutaneous stimulator. It did not eliminate claimant's continuing pain. Claimant has not returned to work since December 1976. He finds that a pain pill or resting for 15 or 20 minutes will ease his pain.

Claimant has also had prior right and left knee injuries for which surgeries were required and for which he had received awards of 20% and 50% respectively.

At the present time claimant's hands go to sleep; he has soreness of the fatty part of his thumbs which he did not notice until after the December 1976 injury.

The Referee, in order to determine the extent of claimant's unscheduled disability, must find how much loss of earning capacity he has suffered as a result of the injury. He must consider claimant's physical impairment, his ability to gain and hold work in the general labor market, age, education, training, trainability and motivation.

Claimant says he cannot return to any of his prior jobs. His easiest job was custodial work. He tried to return to that type of work in January 1977 but lasted only a half an hour and quit because of the pain.

The Referee found that the medical evidence indicated that claimant should avoid heavy strenuous work but he found no medical opinion that claimant is completely incapacitated from all work due to his injury. He found that claimant was on a leave of absence from his job and because of this had not sought other work even though he was of the opinion he could not return to custodial work when the leave expired. Claimant felt his lack of education was against him in obtaining work. The Referee found claimant had not sought any further education because he believed he could not sit as required nor walk from building to building to attend classes. The Referee found no medical evidence to support this belief.

Claimant contacted a vocational rehabilitation counselor twice but apparently no assistance was provided because of claimant's physical condition and his belief that no available services would be of help.

The Referee felt that claimant had "retired" with the state and is doing well on the various disability benefits he receives. Claimant was, at the time of the hearing, netting more money per month than he was when he was working.

The Referee concluded that claimant's present unemployment did not evidence his total inability to work and claimant had not established permanent total disability. He concluded, based upon the medical evidence, claimant was precluded from doing any heavy work and that when considered together with his age, education and work experience, entitled him to an award of 60% of the maximum for his unscheduled disability.

With respect to the penalty of $150, the Referee relies on OAR 436-83-460 which basically provides that on the de-

mand of any claimant requesting a hearing the Fund or the carrier shall, within 15 days after the demand, furnish claimant, without cost, copies of all medical and vocational reports and other documents relevant and material to the claim which are then, or come to be, in the possession of the Fund or the carrier and that failure to comply may be considered unreasonable delay or refusal under the provisions of ORS 656.262(8).

The Referee also cited OAR 436-83-020 which provides that the Board's policy is to expedite claim adjudications and amicably dispose of controversies and therefore the rules shall be liberally construed in favor of the injured worker to carry out the remedial and beneficial purposes of the workers' compensation law.

The Referee concluded that it was undisputed that the Fund had in its "closed file" section the records regarding claimant's prior injuries and disabilities; it was also undisputed that claimant had advised the Fund of his contention of permanent total disability when he requested the information on the prior injuries and that the Fund did not provide this information or indicate what would be withheld and why. In making a determination of permanent total disability under the provisions of ORS 656.206 the Referee shall take into consideration pre-existing disabilities. Therefore, when the Fund was advised that claimant was seeking permanent total disability it should have been aware that it was necessary for claimant to have possession of all the medical, vocational, and other documents relevant to his prior injuries and disabilities. The refusal to supply these to claimant constitutes unreasonable delay or refusal for which a penalty may be assessed.

The Board, on de novo review, finds that claimant, after the award made by the Referee of 192°, has received a total of 242° for unscheduled disability and also an award of 20% of the maximum for a right knee injury and 50% of the maximum for a left knee injury. Each time claimant suffered an injury to his back he had returned to a lighter type job. In May 1976, when claimant lifted some boxes, his back pain again became symptomatic and forced claimant to be off work for approximately three months. After returning to work claimant lifted a desk and again his back pain recurred; claimant has not been able to return to any type of work since that date.

Permanent total disability means the loss, including pre-existing disability, of use or function of any scheduled or unscheduled portion of the body which permanently incapacitates the worker from regularly performing work at a gainful and suitable occupation. Claimant has suffered both unscheduled and scheduled disabilities. Oregon case law recognizes two types of permanent total disability: (1) that arising entirely from medical or physical incapacity and (2) that arising from physical conditions combined with non-medical conditions, which together result in permanent total disability. Wilson v. Weyerhaeuser, 30 Or App 403.

The Board concludes that the evidence shows that claimant would be permanently and totally disabled under either type; however, the claimant's contention that he is permanently and totally disabled is strengthened by the fact that he has a very limited educational background, all of his work has involved manual labor, he is 51 years old, and his potential for retraining is practically nil.

The fact that claimant may be making more at the present time after taking into consideration the workers' compensation benefits and other disability benefits which he is receiving plus the possibility of Social Security benefits for which he is now applying is material in determining claimant's motivation to return to work. The Board finds that in this case motivation is not relevant because claimant, based on his physical disabilities alone, is permanently and totally disabled.

The Board concurs completely with the Referee's finding that the failure of the Fund to honor claimant's timely request for medical, vocational and other documentary evidence which it had that related to claimant's prior injuries and disabilities was a violation of OAR 436-83-460 and the Referee was correct in awarding claimant a sum of $150 as additional compensation pursuant to ORS 656.262(8).

The Fund contends that the Board rule is in derrogation of the statutory provisions of the workers' compensation law and is beyond the authority of the Board to enact. It cites ORS 656.268(2) which provides a copy of all medical reports and reports of vocational rehabilitation agencies or counselors necessary to make a determination of claimant's disability shall be furnished to the Evaluation Division and to the worker and to the contributing employer if requested by such worker or employer. The Fund contends this must be interpreted to exclude all reports not mentioned and that there is no proof in this case that Evaluation was furnished with reports from other claims nor that there was any requirement to so furnish them with such reports. The Fund further contends that the Board has no authority to impose a penalty for a violation of OAR 436-83-460, stating that there are specific statutory provisions which set out those cases where penalties are appropriate and nowhere is there any provision for a penalty to be awarded except in the case of unreasonable delay or refusal to pay compensation or unreasonable delay in acceptance or denial of a claim under ORS 656.262(8).

The Board finds that its rule is not in derrogation of the provisions of ORS 656.268(2); furthermore, the Fund had been advised that claimant was going to attempt to show that he was permanently and totally disabled and it was therefore put on notice that all of claimant's pre-existing injuries would have to be considered. Therefore, when the claimant's attorney requested all of the medical and vocational reports which the Fund might have with respect to claimant's previous industrial injuries, the Fund's refusal to honor that request cannot be counten-

anced. Although it may not be unreasonable delay or refusal to pay compensation or to accept or deny a claim it does interfere with the rights of claimant to be furnished the medical, vocational and documentary evidence which is necessary to enable claimant to attempt to prove that he is permanently and totally disabled. The cross-appeal by the State Accident Insurance Fund is dismissed.

ORDER

The order of the Referee, dated January 27, 1978, is modified.

Claimant is considered to be permanently and totally disabled as of the date of this order and entitled to compensation, as provided by law, for that disability. This is in lieu of the award made by the Referee in his 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.

WCB CASE NO. 76-6432 JUNE 20, 1978

JOHN A. MYERS, CLAIMANT
Moore, Wurtz & Logan, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks review by the Board of the Referee's order granting him an award of 288° for 90% unscheduled heart disability. Claimant contends that he is permanently and totally disabled.

Claimant suffered a compensable acute myocardial infarction on May 2, 1975 and on June 13, 1975 a triple by-pass surgery was performed by Dr. Hodam.

On July 23, 1975 Dr. Hodam stated that it would not be advisable for claimant to return to work in the woods and on November 28, 1975 Dr. Barlow stated that claimant should not return to his previous logging job, that he should do work of minimal exertion and avoid extreme temperatures. On March 5, 1976 Dr. Barlow advised claimant was totally unable to be a catskinner or operate machinery in a hi-lead logging operation.

On June 18, 1976 claimant's claim was closed with an award of 240° for 75% unscheduled heart disability.

On February 22, 1977 Dr. Barlow indicated that claimant has had a number of attacks of angina because of coronary inefficiency while at rest. He felt that claimant also had consistent chest discomfort which occurred, for example, after walking 1/2 block at a normal pace. Dr. Barlow was deposed on June 29, 1977; he stated that the last time he had seen claimant was on June 23, 1977 and he was of the opinion that claimant was totally disabled from his prior work and that anything he could do would have to be extremely sedentary. It was his opinion that claimant's condition was work related and he placed claimant in the "class 3" category which meant that claimant was limited to minimal activity. Any exertion such as walking or vacuuming could cause angina.

The Referee found that after Dr. Barlow had considered the AMA guide and claimant's history and limitations that he was a borderline "class 2 - class 3" and concluded claimant might be able to do sedentary work if he could find such work and if no stress was involved.

The Referee found that claimant, who was 51 years old at the time of the hearing, has a ninth grade education and his major work background has been in truck driving and logging equipment operation, more extensive in the latter type of work. He found claimant to be credible and well motivated but concluded that claimant's medical and physical incapacities were not sufficient to alone establish permanent total disability. He found that claimant, physically, could do sedentary work, therefore, it was necessary to take into consideration such factors as age, training, aptitude and adaptability to non-physical labor, mental capacity and emotional condition to establish whether claimant was permanently and totally disabled. Wilson v. Weyerhaeuser, 13 Or App 403.

The Referee, after giving full consideration to all of the non-medical factors, concluded that claimant had not established that he was a permanent total, but he did conclude that he had suffered a permanent loss of wage earning capacity beyond 75% and he increased it to 90% of the maximum allowable by law.

The Board, on de novo review, must determine whether claimant's industrial injury prevents him from selling his services on a regular basis in a hypothetically normal labor market. The non-medical factors when considered with claimant's physical incapacities are sufficient to establish that claimant is permanently and totally disabled.

The medical evidence indicates that claimant suffers angina pain with very limited activity; at times the pain occurs while claimant is sitting and at rest. He is required to take Digitalis and takes two or three nitroglycerin pills when he has angina. He tires easily and has to take daily naps.

Dr. Barlow testified that claimant was permanently and totally disabled for anything he was capable of doing. Granted,

he did state that claimant could do extremely sedentary or completely sedentary work but he also added that considering his own experience treating people with similar disabilities he thought it unlikely that claimant would be able to find such type of work.

The Division of Vocational Rehabilitation contacted claimant but they did not put him into any retraining program nor provide any suggestions as to job opportunities; presumably they agree with Dr. Barlow's conclusion.

The question of total disability is not whether there exists regular employment which is completely sedentary in nature and which requires no special vocational training; the question is whether, given a competitive labor market, a normal employer would fill such a position with a 54-year-old former logger with a ninth grade education who has had major heart surgery and suffers angina while at rest, has to take mid-day naps and can't walk more than a half a block at a normal pace without pain. The Board concludes that a typical employer would not hire such a person and, therefore, claimant, based upon the medical and non-medical evidence, is permanently and totally disabled.

ORDER

The Referee's order, dated October 26, 1977, is modified.

Claimant is to be considered as permanently and totally disabled as of the date of this order and entitled to compensation for such permanent and total disability, as provided by law.

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 granted claimant by this order payable out of said increased compensation as paid, not to exceed $2,300.

The Referee's award to claimant's attorney of a sum equal to 25% of the increased compensation awarded claimant by the Referee's Opinion and Order payable out of that increased compensation as paid, not to exceed $2,000, is affirmed.

WCB CASE NO. 77-5901 JUNE 20, 1978

EARL RICHMOND, CLAIMANT
Don G. Swink, 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 64° for 20% unscheduled abdomen and mental disability. Claimant's claim was originally closed on September 6, 1977 with awards of 48° for 15% unscheduled disability and

60° for 100% loss of hearing in the right ear.

Claimant is a 37-year-old cab driver who was held up and shot on August 13, 1976. One bullet entered his right cheek and resulted in claimant's loss of hearing in the right ear; bullet fragments remained in claimant's head and the doctors advised against removing them. Claimant was also shot in the abdomen, the bullet entering the right flank and penetrating the liver, colon, small bowel, duodenum and lateral peritoneal wall.

Claimant had surgical repair for the injuries, including a colostomy, and responded favorably, although he still has headaches frequently. Claimant also has mild discomfort in his abdominal area which is still draining, however, this is not enough to keep him from working although claimant is doubtful that he could perform heavy labor.

The Referee found that claimant is fearful of returning to cab driving. Dr. Colbach, a psychiatrist, said, "I suppose it could be said that he is having a mild anxiety neurosis regarding driving a cab".

Claimant has a high school education and a few college credits. He has done odd jobs but has never settled down to any one job. He was unable to make any progress with the Vocational Rehabilitation personnel and at the present time he is attempting to seek work on his own.

Dr. Colbach's opinion was that claimant has always been somewhat of a "drifter" who never found himself vocationally and has serious problems in interpersonal relationships; he has an average intelligence but is resistive to any psychological intervention. Therefore, Dr. Colbach recommended none.

The Referee felt that assistance should be given claimant in moving into something other than cab driving. However, Dr. Colbach did not encourage extensive efforts in vocational rehabilitation.

The Referee concluded that the impairments which resulted from claimant's compensable injury add up to a disability that lies within the range of mild. He increased the award for the unscheduled disability from 48° to 64°.

The Board, on de novo review, finds Dr. Colbach's statement that claimant could be said to have a mild anxiety neurosis regarding driving a cab to be somewhat of an understatement; any person who had been wounded to the extent claimant had been while driving a cab undoubtedly would be a bit reluctant to return to such a livelihood.

Although claimant may not be a good candidate for vocational rehabilitation, he could do other work and the Board

strongly urges the Field Services of the Workers' Compensation Department to contact claimant and attempt to assist him in obtaining a gainful and suitable job.

ORDER

The order of the Referee, dated January 19, 1978, is affirmed.

WCB CASE NO. 77-1947 JUNE 20, 1978
WCB CASE NO. 76-6990

DOROTHY TAYLOR, CLAIMANT
Allen G. Owen, 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 that portion of the Referee's order which remanded claimant's claim for her heart condition to it for acceptance and payment of compensation (Claim No. ED 179882). The Referee also affirmed the denial of the Fund of her 1975 heart condition (Claim No. ED 201549); however, this is not an issue on appeal.

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

ORDER

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

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

WCB CASE NO. 77-5258 JUNE 20, 1978

LUCILLE T. THOMPSON, CLAIMANT
Richard Roll, Claimant's Atty.
Rankin, McMurry, Osburn & Gallagher,
Defense Atty.
Order

On May 23, 1978 the Board received from the employer, Louisiana Pacific Corp., a request for Board review of the Opin-

ion and Order of the Administrative Law Judge which was entered on April 26, 1978. The request for review was timely filed.

On May 26 the Board received from claimant a motion to quash and dismiss the employer's request for review on the grounds that it was frivolous and there was no appealable issue. In support of the motion claimant states that there is no question of fact inasmuch as the facts were stipulated at the hearing and there is no question of law because ORS 656.313 is unambiguous and its clear mandate has been upheld by the Oregon Court of Appeals in Wishard v. Paul Koch Volkswagen, 280 Or App 513.

The Board, after due consideration of claimant's motion, concludes that it should be denied.

IT IS SO ORDERED.

SAIF CLAIM NO. HC 299528 JUNE 20, 1978

ANDREW TRAMMELL, CLAIMANT
Bailey, Welch, Bruun & Green,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 25, 1977 claimant, by and through his attorney, had requested the Board, pursuant to ORS 656.278, to reopen his claim for an injury sustained on March 24, 1971. He supported his request with two medical reports from Dr. Cherry.

On May 31, 1977 the Board informed the Fund that it had 20 days within which to state its position. On June 3, 1977, the Fund responded, stating it felt there was no justification to reopen claimant's claim.

The Board did not have sufficient evidence at that time to make a determination on the merits of claimant's request and referred the matter to its Hearings Division to hold a hearing and take evidence on the issue of whether claimant's condition had worsened since the last arrangement or award of compensation on October 18, 1976 and, if so, whether his worsened condition was the result of the industrial injury of March 24, 1971.

On May 15, 1978 a hearing was held before George W. Rode, Administrative Law Judge (ALJ). Upon conclusion of that hearing the ALJ submitted a transcript of the proceedings together with his recommendation to the Board.

The Board, after de novo review of the transcript of the proceedings, accepts and adopts as its own the ALJ's own motion recommendation, a copy of which is attached hereto and, by this

reference, is made a part hereof.

ORDER

Claimant's claim for an industrial injury sustained on March 24, 1971 is hereby remanded to the State Accident Insurance Fund for acceptance and the payment of compensation, as provided by law, commencing on December 15, 1976 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 a sum equal to 25% of any of the compensation which claimant shall receive as a result of this order for temporary total disability and permanent partial disability, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-3808 JUNE 20, 1978

LEONA A. WILSON, CLAIMANT
Merten & Saltveit, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The claimant seeks review by the Board of the Referee's order which reversed the employer's denial of responsibility for claimant's neck symptoms but sustained its denial of claimant's aggravation claim.

Claimant, a 51-year-old finished goods inspector, alleged she developed pain in her right shoulder and neck area from repetitive lifting. She saw her family doctor and other physicians and various types of conservative treatment were given claimant. It was generally agreed that claimant had a chronic strain of the neck and right shoulder.

Claimant was enrolled at the Disability Prevention Center and Dr. Van Osdel concluded that if claimant desired to return to work she probably could return to her former job without detriment to her health. Dr. Pasquesi, who performed a closing examination of claimant on October 13, 1975, was of the opinion that her condition was stationary and that her impairment, based on her cervical and dorsal pain was 5% of the "whole man".

Claimant's claim was closed on November 20, 1975 by a Determination Order which granted claimant 16° for 5% unscheduled shoulder disability.

In late October 1976 claimant was involved in an automobile accident and was treated by a Dr. Morita for headaches and neck pain. Subsequently, claimant accepted a settlement although her condition was not medically stationary. As a result of her accident claimant had developed severe headaches.

Claimant sought to have her claim reopened through Dr. Muderspach's request on December 7, 1976. Dr. Muderspach stated he had initially seen claimant on June 30, 1976 but is unclear whether he actually treated claimant. He last saw her on September 8, 1976 at which time he felt her condition was medically stationary and required no medical treatment.

On January 17, 1977 claimant was treated by Dr. Stumme, who felt claimant's symptoms were due to cervical spondylosis and that she had minimal deficit. He suggested that some of claimant's pain problem might be related to depression.

After Dr. Muderspach's report of December 7, 1976 claimant's claim was reopened but on May 2, 1977 the employer wrote claimant stating, among other things, that it was their impression, based on the medical evidence, that claimant's cervical problem was not related to claimant's industrial injury of the right shoulder on March 18, 1974 and "we therefore respectfully deny payment of any further benefits as a result of your current neck problems."

The Referee found that this "denial" letter was somewhat ambiguous but he interpreted it as stating that the medical evidence did not support a finding that claimant's cervical problem for which she was presently being treated was related to the industrial injury of March 18, 1974, therefore, the carrier denied responsibility for aggravation of the cervical problems.

It was the Referee's opinion that there were two questions before him, to wit: (1) Are claimant's cervical symptoms related to her compensable injury, and (2) Has her condition become aggravated since the Determination Order of November 20, 1975?

He found that claimant's cervical complaints were related to her compensable injury. The first medical report described complaints of pain in the right shoulder and neck area; one of the original treating doctors diagnosed a cervical vertebral strain and when claimant consulted Dr. Muderspach she was still complaining of pain in her neck, shoulders, upper arms, and across her shoulder blades. The Referee concluded that claimant had been voicing these same complaints ever since her claim was first filed and her employer never denied any responsibility for these neck symptoms until May 7, 1977, more than three years after the injury and more than a year after her claim was closed.

However, the Referee found that when Dr. Muderspach requested that claimant's claim be reopened he stated that she was medically stationary but could not return to any type of employment; in July 1977 Dr. Stumme's opinion was that claimant's neck and shoulder symptoms were related but he doesn't state to what they were related. He only implies that they were related to each other. Dr. Pasquesi was of the opinion claimant's condition did not improve after he had examined her in October 1975 and that part of claimant's additional impairment would definitely be due to her vehicular accident.

The Referee concluded that claimant's cervical problems were related to her industrial injury but that claimant had failed to present any medical evidence to support an aggravation claim. Therefore, although the "denial" of responsibility for claimant's neck symptoms was improper, he did sustain the denial of claimant's claim for aggravation.

The Board, after de novo review, affirms the Referee's findings and conclusions of fact.

ORDER

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

WCB CASE NO. 77-2306 JUNE 20, 1978

BEN WINDHAM, CLAIMANT
Pozzi, Wilson, Atchison, Kahn & O'Leary,
Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
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 right groin and leg 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 November 28, 1977, is affirmed.

SAIF CLAIM NO. NC 98169 JUNE 22, 1978

J. D. CARTER, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his shoulder and back on October 19, 1967. At the time of his injury he was employed as president and business agent for the I.W.A. Local 3-246. His claim was initially closed by a Determination Order dated November 20, 1967 which awarded neither compensation for temporary total disability nor permanent partial disability.

On May 27, 1969, pursuant to an Opinion and Order of Hearing Officer John F. Baker, who found that claimant had suffered an aggravation of his 1967 injury, the claim was remanded to the State Compensation Department for the medical care and treatment recommended by Dr. Cherry.

The claim was again closed by a Determination Order dated July 28, 1972 which granted claimant compensation equal to 35% unscheduled neck and back disability. Claimant returned to work and in May 1973 his claim was again reopened and he underwent multiple surgeries by Drs. Kloos and Cherry, the last being a lumbar laminectomy and fusion which was performed on September 10, 1974.

Since that date claimant has been seen by other physicians, all of whom state that he is still unable to return to work but is medically stationary.

On March 8, 1978 a determination of claimant's present condition was requested and on June 6, 1978 the Evaluation Division of the Workers' Compensation Department recommended that claimant be awarded additional compensation equal to 15% unscheduled neck and back disability and additional compensation for temporary total disability from May 1, 1970 through April 21, 1978, less time worked.

The Board concurs with these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from May 1, 1970 through April 21, 1978, less time worked and compensation equal to 15% unscheduled neck and back disability. These awards are in addition to any previous awards received by claimant as a result of his October 19, 1967 industrial injury.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in behalf of claimant 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. 77-4185 JUNE 22, 1978

CLARENCE R. HILL, CLAIMANT
Richardson, Murphy & Nelson,
Claimant's Attys.
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 compensation equal to 30° for 20% of the right arm. 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 January 16, 1978, is affirmed.

SAIF CLAIM NO. GA 351188 JUNE 22, 1978

HENRY E. LANDIS, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On April 24, 1953 claimant suffered a compensable injury when he slipped and fell from his truck landing on a tire chain spike. He suffered pelvic and abdominal internal injuries which were surgically repaired by Dr. Kuge. His claim was closed in 1953 with no award for permanent partial disability.

In June 1954 claimant again saw Dr. Kuge complaining of bowel problems and in September 1954 Dr. Laird revised and repaired the rectal area. In April 1955 the claim was again closed with an award of compensation equal to 25% loss function of an arm for unscheduled disability.

Claimant's problems continued and the claim was reopened

and closed again in March 1956 with an additional award of compensation equal to 50% loss function of an arm for his unscheduled disability.

On June 13, 1974 claimant was admitted to the medical school with rectal problems and, on November 18, 1974, he received a colostomy. In March 1975 a transverse colostomy diversion was performed and adrenal insufficiency was noted. Claimant had further surgeries in June and August 1975. On June 22, 1976 Dr. Holmes performed a total colectomy which was followed by a period of emotional instability.

On December 9, 1976 a stipulation was approved which reopened the claim as of June 20, 1975.

In January 1977 claimant had neurogenic bladder problems which were treated by Dr. Wedge. At the present time claimant had problems of hypertension, iatrogenic adrenal insufficiency and situational depression. His colectomy and urological problems are stable at the present time and Dr. Holmes has placed a practical limit of 30-pound weight for repetitive lifting on claimant whose prior work for many years was truck driving. Claimant is now 60 years old and has a fifth grade education.

The record indicates the Fund has accepted and paid for the treatment received by claimant from Dr. Wedge, and on April 12, 1978 it requested a determination of claimant's present condition. The Evaluation Division of the Workers' Compensation Department recommends that the Board find claimant to be permanently and totally disabled; claimant is not at the present employable nor can it be expected that he will be in the future. Evaluation also recommended that claimant be awarded additional compensation for temporary total disability from June 20, 1975 per stipulation, and until the date of the Board's own motion order.

The Board concurs in these recommendations.

ORDER

Claimant is awarded compensation for temporary total disability from June 20, 1975 through June 22, 1978 and shall be considered as permanently and totally disabled as of the date of this Own Motion Determination.

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 $2,300.

SAIF CLAIM NO. KC 120584 JUNE 22, 1978

HERBERT McCANN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On March 2, 1968 claimant suffered a compensable injury while lifting a roll of carpet. He was initially treated conservatively by Dr. Morgan and later referred to Dr. Donald Smith, an orthopedist, who performed a laminectomy in 1968 and, because of a congenital anomaly present there, added surgical fusion from L4 through L5 and S1. Subsequently, it was found that the fusion at L5-S1 was not solid and surgical repair of the psuedoarthrosis at that level was performed in November 1969. Claimant's claim was closed by a Determination Order, dated March 23, 1971, which awarded claimant 96° for 30% unscheduled low back disability.

Claimant's complaints continued and the claim was reopened for an electromyogram and myelogram. Surgery was performed by Dr. Grewe, a neurosurgeon, in March 1974. In August 1974 Dr. Grewe did a neurolysis of ilioinguinal and cluneal nerves superficially, bilaterally. The claim was then closed by a second Determination Order, dated November 19, 1974 which granted claimant 13.5° for 10% loss of the right foot.

In 1975 claimant again sought medical treatment from Dr. Smith and surgery was performed by him in May 1975. Claimant's claim was closed for the third time by a Determination Order, dated January 6, 1976, which awarded claimant 7.5° for 5% loss of his left leg and in lieu of the award granted claimant for his right foot granted claimant 15° for 10% loss of his right leg.

In March 1977 claimant was referred to Dr. Grewe's office and surgery on April 1, 1977 resulted in resolution of most of the leg symptoms. In August 1977 claimant was doing a very limited amount of work, however, by November he was working half days and was released for full time work at sales, but not installation (claimant is a part owner and worker in a floor covering sales and installation company).

The Determination Order of January 6, 1976 had also granted claimant an additional 32° for 10% unscheduled disability.

On February 1, 1978 the Fund requested a determination of claimant's disability. The Evaluation Division of the Workers' Compensation Department recommended no additional compensation for permanent partial disability. At the present time claimant has received compensation equal to 40% unscheduled low back disability, 10% right leg and 5% left leg. Evaluation recommended compensation for temporary total disability (appropriately adjusted for temporary partial disability) from March 30, 1977 through November 15, 1977.

The Board concurs in their recommendation.

ORDER

Claimant is awarded compensation for temporary total disability and/or temporary partial disability from March 30, 1977 through November 15, 1977.

WCB CASE NO. 77-1109 JUNE 22, 1978

JOANE RETZLOFF, CLAIMANT
Grant, Fergusen & Carter, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
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 she is entitled in addition to assessing 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 December 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 $350, payable by the carrier.

WCB CASE NO. 75-4098 JUNE 22, 1978

MATTHEW T. RUSSELL, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Order on Remand

The Oregon Supreme Court remanded the above entitled matter to the Court of Appeals for such further proceedings as it might order in accordance with the Supreme Court's opinion. Russell V. State Accident Insurance Fund, 281 Or 353 (1978). The Court of Appeals remanded the case to the Board.

The record indicates that the Referee at the original hearing had awarded claimant an award of compensation equal to 15° for partial loss of the left eye on the basis that it was a scheduled disability; he specifically excluded all evidence relating to claimant's wage earning capacity which is the criterion for determining unscheduled disability. Therefore, the Board must remand the above entitled matter to its Hearings Division to set for hearing and with specific instructions to the Referee to take evidence and make a determination of whether or not the injury has had a permanent effect upon claimant's wage earning capacity.

ORDER

Claimant's claim for an industrial injury suffered on December 30, 1974 is hereby remanded to the Hearings Division to set the matter for hearing with specific instructions to the Referee to receive evidence on the issue of whether or not claimant has suffered any loss of wage earning capacity as a result of his industrial injury.

The Referee has the right to rate claimant's permanent disability based upon the evidence received at the hearing and shall issue his opinion and order pursuant to the provisions of ORS 656.289.

WCB CASE NO. 77-1112 JUNE 22, 1978

GEORGE L. SCHIELE, CLAIMANT
Carney, Probst, Levak & Cornelius,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant
Cross-request by SAIF

Reviewed by Board Members Moore and Phillips.

The claimant seeks Board review of the Referee's order which awarded claimant 144° for 45% unscheduled low back disability. Claimant contends he is entitled to at least 68%. The Fund cross-appeals, contending the award was excessive.

Claimant, a 58-year-old truck driver, suffered a compensable injury on August 1, 1975 while loading a truck. He was first seen by a chiropractor and released to return to work on August 18; he returned to work on September 15. On December 9, 1975 his claim was initially closed with no award for permanent disability.

In February 1976 claimant was seen by Dr. Boyden, an orthopedic surgeon, who hospitalized claimant. In May 1976, he

was examined by Dr. Schuler and again in September he was examined by Dr. Pasquesi. The latter found pre-existing degenerative changes of the lumbar spine had been aggravated by the industrial injury; he also found sciatic nerve irritation without reflex changes or loss of sensation. Dr. Pasquesi rated claimant's permanent impairment at 22%.

Dr. Rollins, a vocational rehabilitation consultant, evaluated claimant in June 1977. Dr. Rollins measured the wages claimant was receiving previous to his injury against the wages he would now be able to obtain and determined that claimant had lost 68% of his earning capacity.

Unscheduled disability is evaluated by determining the effect of the injury on the injured person's earning capacity with due consideration of the worker's age, education, intelligence, adaptability and the impairment resulting from the compensable injury. In his opinion, Dr. Pasquesi did not measure disability; he only measured physical impairment. Dr. Rollins attempted to measure loss of earning capacity by measuring loss of earnings. Earnings are not a proper criteria for measuring loss of earning capacity; earning capacity must be considered in connection with a workman's handicap in obtaining and holding gainful employment in the broad field of general industrial occupations and not just in relationship to his occupation at that time. Ford v. State Accident Insurance Fund, 7 Or App 549. The Referee found that Dr. Rollins' assessment, being predicated on erroneous criteria, could not be given full weight.

Claimant is now 61 years old; he has a ninth grade education and his intelligence is in the average range as is his adaptability. Claimant testified to constant pain in his low back and left hip. He has not worked since February 28, 1976 nor has he sought other employment. It was the Referee's impression that claimant had elected to retire.

On January 18, 1977, after claimant's claim had been reopened, it was closed by a second Determination Order which awarded claimant 48° for 15% unscheduled low back disability.

The Referee concluded that claimant's earning capacity has been reduced 45% as a result of his August 1, 1975 injury and he therefore increased the prior award from 48° to 144°.

The Board, on de novo review, agrees basically with the findings and conclusions of the Referee, however, the medical evidence, when considered with the claimant's age, education, and other factors, indicates that claimant has suffered a greater loss in his potential wage earning capacity than is represented by the award of 45%.

The Board concludes that to adequately compensate claimant for his loss of earning capacity resulting from his industrial injury of August 1, 1975 he should be awarded 176° for 55% unscheduled disability.

ORDER

The order of the Referee, dated October 31, 1977, is modified.

Claimant is awarded 176° for 55% unscheduled low back disability. This award is in lieu of the award granted by the Referee in his order 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 increased compensation awarded claimant by this order.

WCB CASE NO. 76-6812 JUNE 22, 1978

DONALD E. SIMPSON, CLAIMANT
Bloom, Ruben, Marandas, Berg, Sly & Barnett, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith, Defense Attys.
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.

On October 19, 1976 claimant filed an 801 alleging he had suffered a "crack in anal wall" while "lifting cargo". Claimant testified that he had been loading 65-85 pound bales of apple wrappers over an extended period of time and that he had experienced a sharp pain in his tailbone area while lifting the bales; the pain was different than any he had ever experienced before. Claimant testified that he suffered pain every time he hit a bump on the road and he indicated that he found a three-inch circle of blood in his shorts when he arrived home. He called Dr. Foggia on October 13 and was seen by him the following day. Dr. Foggia, using a "short scope", gave claimant an examination. At that time nothing was said about the truck driving or lifting, however, on October 21, claimant was still bleeding and he saw Dr. Foggia again and, at that time, told him he had done some lifting and unloading of bales and had had pain after a bowel movement. Dr. Foggia testified that he found no hemorrhoids but only a small fissure. It was his opinion that, unlike hemmorhoids, fissures are not related to any type of strain but are usually due to glands which are ineffective in lubricating during a bowel movement. He felt the claimant's condition was not related to his work. Based upon this opinion the denial of the claim was made.

Claimant continued to have pain in the anal area and was seen by Dr. Yasui on November 8, 1976. Dr. Yasui obtained a history from claimant which included pain arising out of the driving and lifting and extended loading by claimant while on the job. Dr. Yasui did a full and complete examination using a 10-inch scope and concluded that claimant had proctitis, an inflammation of internal hemmorhoids. Dr. Yasui performed an internal/external hemmorhoidectomy and, on December 13, 1976, gave his opinion that, if claimant did indeed have hemmorhoids prior to the pain in his anal region, his job could very well have aggravated the hemmorhoids either by inflammation, a crack in the mucous membrane or even by causing marked protrusion.

The Referee gave more weight to the testimony of Dr. Foggia and concluded that claimant had failed to make his burden of proof that the anal and hemmorhoid condition of which he presently complained was causally related to his employment. No employment-related contention was made to the original treating physician (Dr. Foggia) and it was not until sometime later that claimant gave the eventual treating physician (Dr. Yasui) the history which he related at the hearing. The Referee concluded that claimant had changed the history when he found that the original treating physician did not feel that the employer should have to pay for his problem.

The Board, on de novo review, finds that Dr. Foggia was very equivocal in his deposition. He was unable to remember his chart notes. He said, "I can't quote claimant directly but the jist of it was that he wanted his employer to pay for it and I just couldn't justify it based on my findings". The Board finds that Dr. Foggia's examination was very cursory and gives more weight to the opinion of Dr. Yasui who not only found the hemmorhoids but found that they were so serious as to require surgery. Dr. Yasui's opinion was that the problem which claimant had was job related whether he had hemmorhoids before or not; he stated that "the point is the pain and the aggravation of the pain, in my opinion, was job related."

Dr. Yasui stated that the finding of an anal fissure did not negate a finding that weight lifting aggravated or caused hemmorhoids. He also stated that a doctor can only evaluate a claim of injury based upon how "intensive a history he took" and "on the type of exam he performed".

The testimony given by claimant was consistent with the history he related to Dr. Yasui and was not necessarily inconsistent with Dr. Foggia's recollection. Dr. Foggia treated claimant only for an anal fissure; he found no hemmorhoids using a short scope, therefore, Dr. Yasui's findings of symptomatic hemmorhoids and their job relation is unimpeached by any of the opinions expressed by Dr. Foggia.

The Board concludes that claimant's claim was compensable.

ORDER

The order of the Referee, dated October 12, 1977, is reversed.

Claimant's claim for an industrial injury suffered on October 12, 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 12, 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 at the hearing before the Referee a sum of $650 payable by the employer and its carrier.

Claimant's attorney is awarded as a reasonable attorney's fee for his services before the Board on review a sum of $350, payable by the employer and its carrier.

SAIF CLAIM NO. GC 78627 JUNE 22, 1978

LAMONTE SMITH, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant suffered a compensable injury to his left little finger on June 14, 1967. The claim was closed on November 24, 1967 with no award for permanent disability. Claimant appealed and a stipulation was approved on June 2, 1969 whereby claimant was awarded compensation equal to 35% loss of the left little finger.

On April 12, 1977 claimant was examined by Dr. Van Olst who reported a flexion contracture and requested that the claim be reopened for corrective surgery. This surgery was performed on October 11, 1977 but with unsuccessful results. Claimant returned for further surgery on November 15, 1977 at which time Dr. Van Olst amputated the left little finger through the neck of the proximal phalanx. Claimant was released to return to work on January 6, 1978.

On March 14, 1978 the Fund requested a determination of claimant's disability. The Evaluation Division, in accordance with the provisions of ORS 656.214(3), considered the loss equal to 75% of a finger and recommended that claimant be granted compensation for temporary total disability from October 11, 1977, the date of the first surgery, through January 5, 1978 and an additional award of compensation equal to 40% of the left little finger which would give claimant a total of 75% loss of said finger.

The Board concurs with this recommendation.

ORDER

Claimant is granted compensation for temporary total disability from October 11, 1977, the date of the first surgery, through January 5, 1978 and compensation equal to 40% of his left little finger. These awards are in addition to previous awards granted claimant for his June 14, 1967 injury.

SAIF CLAIM NO. C 330596 JUNE 22, 1978

KENNETH E. ZIMMERMAN, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On April 24, 1978 the Board received a request from claimant for it to exercise its own motion jurisdiction pursuant to ORS 656.278 and reopen his claim for an industrial injury suffered on August 1, 1971 while employed by the University of Oregon, whose workers' compensation coverage was furnished by the Fund. Claimant contends that he is now, and has been for the past six weeks, totally disabled due to aggravation of the industrial injury which he had previously suffered. More than 5 years have past since the claim was initially closed and claimant's aggravation rights have expired.

On April 21, 1978 the Board had received a copy of a letter addressed to Dr. Degge from the State Accident Insurance Fund and a copy of Dr. Degge's report to the Fund dated March 23, 1978.

Dr. Degge's report indicates that, after examining claimant on March 23, 1978, he found a suggestion of a recurrent lumbar disc evidenced by the paresthesia, radiation of pain on straining and the limited straight leg raising and cross pain referral on elevation of the left leg. The report states that claimant had had no major surgery other than a lumbar laminectomy in 1971 required as the result of the August 1971 industrial injury.

On April 27, 1978 the Fund was advised by the Board that it had received the request for own motion relief; also, the Fund's letter and Dr. Degge's report; the Fund was asked to inform the Board of its position with regard to the request for own motion relief. On May 23, 1978 the Fund responded stating it would not oppose the reopening of the claim.

ORDER

Claimant's claim no. C 330596 filed for an industrial injury on August 1, 1971 is hereby remanded to the State Accident

Insurance Fund for acceptance and for the payment of compensation, as provided by law, commencing March 23, 1978, the date claimant was examined by Dr. Degge, and until closed pursuant to the provision of ORS 656.278, less any time worked.

WCB CASE NO. 76-2677 JUNE 26, 1978

ROBERT E. BARNHARDT, CLAIMANT
Anderson, Fulton, Lavis & Van Thiel,
Claimant's Attys.
Jaqua & Wheatley, Defense Atty.
Order on Remand

On September 14, 1976 Referee William J. Foster entered his Opinion and Order in the above entitled matter whereby the disputed claim settlement issued on February 27, 1976 was set aside and all monies tendered on that agreement were directed to be returned to the defendant-employer; the appeal from the Determination Order entered on June 5, 1974 was ordered reinstated and the matter was to proceed to hearing on the adequacy of said Determination Order, and the denial issued by the defendant-employer of January 22, 1976 was also set aside.

The employer requested review and the Board, after de novo review, concluded that the disputed claim settlement of February 27, 1976 should not have been set aside, therefore, the Board reversed the order of the Referee and reinstated and reaffirmed in its entirety the disputed claim settlement.

The claimant appealed to the circuit court in Tillamook County and, on April 11, 1978, that court reversed the Board's Order on Review and reinstated the Opinion and Order of the Referee.

The employer had requested Board review of the Referee's order before a hearing was held on claimant's appeal from the Determination Order of June 5, 1974; the sole issue before the Board on review was the propriety of the disputed claim settlement. Therefore, the Board concludes that it is necessary to remand the above entitled matter to the Hearings Division, and more particularly to Referee William J. Foster, for a hearing on the merits of claimant's appeal from the Determination Order dated June 5, 1974.

IT IS SO ORDERED.

CLAIM NO. D53-69922 JUNE 26, 1978

RICHARD BARRETT, CLAIMANT
Coons & Anderson, Claimant's Attys.
Jaqua & Wheatley, Defense Attys.
Wayne Williams, Defense Atty.
Own Motion Order

Claimant, on December 6, 1977, requested the Board, pursuant to ORS 656.278, to reopen his claim for a compensable injury suffered on October 1, 1959. At that time claimant was employed by Mt. Canary Lumber Company whose carrier was Employers Insurance of Wausau (Wausau). The injury was to claimant's right knee and required surgical repair on November 5, 1959. Claimant alleges that since the injury his right knee has continued to worsen and that in February 1977 he underwent a total right knee replacement.

Wausau was advised of claimant's request and responded, stating that Workers' Compensation insurance was not mandatory under the law in existence at the time of claimant's injury and employers who chose not to be covered could, by appropriate contract, agree to provide industrially injured workmen benefits equal to those provided by the State Industrial Accident Commission and such contracts were not subject to the jurisdiction of the Commission; therefore, inasmuch as SIAC never had jurisdiction in the first instance, the Board could not now have continuing jurisdiction and the request should be dismissed.

The Board also received a request from claimant to reopen his claim for a compensable injury to his left knee suffered on July 21, 1966 while employed by Georgia-Pacific Corporation. Surgery was performed on the left knee on October 17, 1966; claimant returned to work the next month. He alleges he has had continuing problems with his left knee for which he has been treated intermittently by Dr. McHolick and that an arthrogram was performed in 1976 which revealed advanced degenerative changes in his left knee.

In response to this claim Georgia-Pacific informed the Board that it had no knowledge of claimant's 1959 injury to his right knee, however, based upon the information furnished it by claimant's attorney, it appeared that the injury to the right knee and the resultant total right knee replacement placed an increased load or strain on the left knee, therefore, claimant's left knee problems are now directly attributable to the affects of the prior right knee injury. If claimant was entitled to proceed at all it would be only against Wausau for the 1959 right knee injury.

The Board, at that time, did not have sufficient evidence upon which to make a determination on either request for own motion relief and, therefore, referred the matter to the Hearings Division with instructions to set both matters down to

be heard in tandem and, if necessary, join both carriers.

On April 13, 1978 a hearing was convened before William J. Foster, Administrative Law Judge (ALJ). Wausau moved to dismiss the request for own motion relief on the 1959 right knee injury, restating its position previously presented to the Board. The ALJ ruled that he did not have jurisdiction to continue this matter insofar as it affected Wausau and he granted its motion to dismiss.

The remaining issue before the ALJ was whether or not the Board should exercise its own motion jurisdiction and reopen claimant's claim for the 1966 injury to his left knee. The ALJ allowed evidence to be introduced to indicate whether or not claimant's injury to his right knee and the resulting right knee replacement had placed an increased strain on his left knee and also whether or not claimant's left knee problem could be attributable to the affects of his prior right knee injury.

The ALJ found after the July 21, 1966 injury to his left knee claimant received some conservative treatment to which he did not respond favorably. Claimant then was seen by Dr. McHolick who performed surgery to which claimant responded quite well. He found claimant continued to work after he had recovered from his surgery in 1976. Although in 1977 claimant had undergone a complete right knee replacement his left knee continued to deteriorate. A total left knee replacement was discussed between claimant and Dr. McHolick but although such an operation would have reduced claimant's pain it would also reduce knee flexibility and flexion of the leg.

The ALJ found that claimant had increased difficulty in both knees and that his left knee was probably in worse shape at the present time than it was prior to the total right knee replacement. At the present time claimant is working, however, his job plugging the cracks between the cords of plywood with putty is a relatively light type job which requires no lifting nor bending. The claimant has not lost any time from work because of his leg problem but he testified that he does have problems with his legs and that they are very tired at the end of his work shift.

Dr. McHolick indicated that claimant should have an easier job than he had prior to the injury and should stay off his feet as much as possible. Claimant testified he has held practically every job in the mill and the present job he has is about the easiest available.

Claimant admitted that his left knee commenced giving him more trouble after the total right knee replacement.

Dr. McHolick stated that claimant had never had good knees and that the left knee degenerated more after the surgery. Dr. McHolick also stated that in all probability claimant would

have, at his age, some signs of arthritic involvement but it would have been to a lesser degree if he had not had the injury and subsequent surgery. He was unable to attribute how much of claimant's difficulty in his knees was attributable to the injury and how much to degenerative changes.

Claimant's claim for the July 21, 1966 injury was closed by a Determination Order, dated April 10, 1967, which awarded claimant compensation equal to 10% loss function of the left leg. The ALJ felt that the evidence indicated there had been some increase of disability in the left knee, that claimant's right knee problem unquestionably added extra stress to his left knee; also, claimant's arthritic condition in both knees has worsened.

The ALJ concluded that since the Determination Order the disability in the left leg had increased and claimant's loss of function is greater than 10%, He found that the claimant, at the present time, is medically stationary with regard to his left knee and he recommended that the Board grant claimant an additional award of compensation equal to 30% loss function of the left leg.

The Board, after de novo review of the transcript of the proceedings and a study of the ALJ's recommendation, concurs in his recommendation. Inasmuch as the ALJ found claimant to be medically stationary at this time it is appropriate that claimant's claim for his 1966 injury be closed by this order with the recommended increase in the award for claimant's scheduled disability.

ORDER

Claimant is awarded compensation equal to 30% loss of function of his left leg. This award is in addition to the award granted by the Determination Order entered on April 10, 1967.

The ALJ is affirmed by the Board on his granting the motion to dismiss the request for own motion relief relating to claimant's injury to his right knee on October 1, 1969.

Claimant's attorney is awarded as a reasonable attorney's fee for his services in behalf of claimant a sum equal to 25% of the additional compensation granted claimant by this Own Motion Order payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-4471 JUNE 26, 1978
WCB CASE NO. 77-4472

CLINTON R. CHAMBERS, CLAIMANT
Bailey, Welch, Bruun & Green,
Claimant's Attys.
Cheney & Kelley, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which affirmed the 10% award granted by the July 1, 1977 Determination Order for his February 1974 injury and awarded him 160° for 50% unscheduled disability resulting from his January 1975 injury. 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 January 19, 1978, is affirmed.

WCB CASE NO. 76-5637 JUNE 26, 1978

In the Matter of the Compensation
of the Beneficiaries of
HARRY FUNK, DECEASED
Franklin, Bennett, Ofelt & Jolles,
Claimant's Attys.
SAIF, Legal Services, Defense Attys.
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 fatal heart attack suffered by the workman to be compensable and remanded the claim to it for acceptance and payment of compensation.

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

ORDER

The order of the Referee, dated October 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. 76-4883 JUNE 26, 1978

EGON GORECKI, CLAIMANT
Kitson & Bond, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Order on Remand From the Court of Appeals

On January 28, 1977 an Opinion and Order was entered by a Referee affirming the denial of claimant's claim for a low back injury. Claimant requested review by the Board which reversed the Referee's order and remanded the claim to the employer by an Order on Review, dated September 14, 1977. The employer appealed to the Court of Appeals which, after de novo review of the evidence, held that claimant's back injury was not compensable and that the order of the Referee, dated January 28, 1977, should be reinstated. Gorecki v. Barker Mfg. Co., (February 7, 1978).

The Board, having been served with a Judgment and Mandate from the Court of Appeals which, after indicating that the Supreme Court had denied review on May 16, 1978, remanded the matter to the Board for further proceedings consistent with its opinion, concludes that the Board's Order on Review entered September 14,1977 must be set aside in its entirety and the Referee's Opinion and Order entered on January 28, 1977 which affirmed the denial by the employer of claimant's claim for a low back injury should be reinstated.

IT IS SO ORDERED.

SAIF CLAIM NO. C 302518 JUNE 26, 1978

CLIFFORD HATHAWAY, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Determination

On April 28, 1971 claimant was struck directly in the left eye by a tarpaulin hook. The residuals noted at the time of the first closure were central acuity of 20/25-2 far and J2 near, with photophobia. No award was granted for photophobia but on March 23, 1972 the claim was closed with an award of 3° of partial loss of vision to the left eye.

On May 2, 1978 the State Accident Insurance Fund requested a re-determination of permanent impairment. Dr. Cowger's

report of March 22, 1978 indicated that there had been some worsening of the eye condition based upon his examination of March 1, 1978. He recommended no further active treatment.

The internal pressure of the left eye is slightly higher than the normal right eye but it is not impairing claimant's vision. It does not require treatment at the present time, however, long term observation is warranted. The photophobia remains but there is no evidence that it has caused any diminution of the claimant's wage earning capacity.

On May 2, 1978 the Fund requested a determination of claimant's present condition. The Evaluation Division of the Workers' Compensation Department found that the central visual acuity is now 20/30 (far) and J3 (near). This is a 10% impairment of vision in the left eye, therefore, Evaluation recommended that the Board grant claimant an additional 7% loss vision of the left eye. No recommendation for additional compensation for temporary total disability was made.

The Board concurs in the recommendation.

ORDER

Claimant is awarded compensation for 7° for partial loss of vision to the left eye. This award is in addition to the award of 3° granted claimant by the Determination Order of March 23, 1972.

WCB CASE NO. 77-131 JUNE 26, 1978

W. SCOTT LENHARD, CLAIMANT
Richardson, Murphy & Nelson, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant appeals the Referee's order which increased claimant's award of compensation to 112° for 35% unscheduled back disability. Claimant contends this award is inadequate.

Claimant, a 48-year-old journeyman meatcutter, sustained a compensable back injury on May 29, 1974 when he slipped on a piece of fat on the floor. Dr. Eubanks diagnosed a strained low back.

Claimant has an eighth grade education and obtained a GED in 1960. He cannot return to meat cutting because of the lifting. He enrolled at Vocational Rehabilitation in December 1974, taking a course in business management. Claimant could not find a job in the field and his vocational counselor felt claimant was unemployable.

Claimant suffers from high blood pressure, asthma, gout, possibly rheumatoid arthritis and degenerative intervertebral disc disease. Dr. Munsey found claimant had average or better intelligence. He felt claimant had moderate anxiety tension reaction with some depression due to his inability to return to work as a meatcutter.

Claimant was found medically stationary on May 14, 1975 by Dr. Berg, who examined claimant and felt claimant had suffered a strain of the lower lumbar region of his back and contusions to both elbows. He found claimant needed no further treatment.

On June 30, 1975 Dr. Eubanks concurred with Dr. Berg but felt claimant would require occasional treatments in the future.

Dr. Eubanks reported in October 1976 that claimant had had a back "flare up" in August 1976 but was medically stationary on October 13, 1976.

Dr. Berg, in November 1976, examined claimant and diagnosed chronic recurrent low back strains with degenerative arthritis and apparent functional overlay. He found claimant also suffered from marked nervous tension syndrome, chronic cardiovascular hypertension and chronic emphysema. He felt claimant could perform light work not requiring heavy straining or lifting on a more or less steady basis. He rated claimant's disability as mild as the result of his injury.

A Determination Order, dated December 23, 1976, awarded claimant temporary total disability benefits from May 30, 1974 through July 15, 1976 and from August 25, 1976 through October 13, 1976 and 64° for 20% unscheduled back disability.

Claimant started his own business sharpening knives in May 1977. He occasionally wears a back brace and uses pain medication sparingly. He stated he constantly was aware of back pain which increased with activity.

There is no evidence that claimant was entitled to compensation for time loss after October 13, 1976.

The Referee found claimant's loss of wage earning capacity entitled him to an award of 112° for 35% unscheduled disability.

The Board, after de novo review, finds that claimant, who is now 52 years old, has worked mainly as a meatcutter and now cannot return to this occupation. Claimant cooperated with Vocational Rehabilitation and has completed an authorized program, but has not successfully found work in the field for which he was trained. Claimant had been able, even with his other physical problems, to work full time as a meatcutter prior to his injury but now is unable to engage in employment.

The Board concludes, based on all the evidence, claimant has experienced a loss of wage earning capacity equal to 50% of the maximum allowable.

ORDER

The Referee's order, dated October 28, 1977, is modified.

Claimant is hereby granted an award of compensation equal to 160° for 50% unscheduled disability for his back injury. This is in lieu of the award granted by the Referee's order, which in all other respects is affirmed.

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 as paid, not to exceed $2,300.

WCB CASE NO. 77-295 JUNE 26, 1978

MILTON R. LONG, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Collins, Velure & Heysell, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Phillips.

The employer seeks Board review of the Referee's order which found the claimant was permanently and totally disabled as of January 6, 1977; the Referee allowed payment for permanent partial disability to be an offset against the payment of permanent total disability.

Claimant, a 51-year-old welder, injured his back on August 14, 1970 when he tried to support a 1000-pound boom to prevent it from falling off two saw horses. Dr. Larson reported claimant had a back strain with low back pain which radiated down his left leg. He suggested conservative treatment and felt claimant needed vocational retraining for a lighter job.

A myelogram done in November 1970 revealed a herniated nucleus pulposus left L4-5. Dr. Hockey performed surgery on November 25, 1970.

Dr. Norman Hickman reported in August 1971 that claimant had a GED and had taken some welding courses. Claimant has worked mainly as a welder, but has done some work as an auto mechanic, service station attendant and delivery truck driver. Dr. Hickman found claimant was experiencing a high level of psychological stress and was functioning in super to bright normal levels intellectually. He felt claimant's chance to return to employment was guarded.

Dr. Mason, at the Rehabilitation Center, reported on August 25, 1971 that claimant did not need any further treatment, either surgical or conservative. Claim closure was recommended. Claimant's permanent partial disability was rated as mild. On October 14, 1971 a Determination Order awarded claimant 48° for 15% unscheduled low back disability.

Claimant had suffered a prior back injury in 1950 for which he missed three years of work and had had two minor neck injuries in 1960 and 1967 and a fractured right leg in 1933.

Dr. Wilson, in August 1971, had suggested continued conservative treatment and a job change. He thought claimant was over exaggerating his symptoms and was able to do more than he let on.

Claimant's claim was reopened for further medical care and treatment and benefits by a stipulation dated June 9, 1972.

Dr. Wilson, on March 14, 1972, said claimant was in a situation in which he faced permanent total disability or surgery to enable him to perform lighter work. Dr. Wilson later reported claimant had a lot of emotional and tension problems due to his injury and the possibility of surgery which gave claimant a 50-50 chance to obtain relief and to return to reasonable functioning as a worker.

Dr. Kimberley stated in November 1972 that claimant was permanently and totally disabled. He recommended no surgery because it would not improve either claimant's physical or emotional state. However, Dr. Luce, in January 1973, performed a myelogram and hemilaminectomy and decompression left L5 and L4-S1 fusion. Claimant continued to have low back pain and right leg pain, but of a lesser magnitude than prior to this surgery.

Dr. Luce reported in February 1974 that claimant's pain would be permanent; he felt there was no work claimant could do which would be satisfactory to both claimant and his employer. He didn't think claimant could tolerate additional college work.

Claimant, in August 1974, completed the Pain Clinic program. His major problems were depression, physical disability and extreme pressures provided by his home situation. Claimant was referred back to the Pain Center in August 1975. Drs. Russakov and Seres both thought that claimant was mild to moderately disabled but able to do light to moderate work activity and the claim could be closed.

Dr. Wilson, in April 1976, concurred that claimant was medically stationary and was able to do light to moderate work activity but was a chronic low back cripple. He noted claimant had some overlying functional aspects which impaired his possibility of returning to work. Dr. Wilson, in September 1976, re-

ported any rehabilitation of claimant would be difficult because claimant could return only to the most sedentary types of occupation.

A Second Determination Order of January 7, 1977 awarded claimant an additional 112° for 35% unscheduled disability for his low back injury.

Dr. Matthews, in March 1977, said that considering claimant's mental status, previous employment, medical problems and his possibilities for employment, it might be best to consider him as totally disabled.

Dr. Gardner, a psychiatrist, in October 1977 said claimant was at least 50% disabled orthopedically but the psychiatric component of his disability was a lifetime continuum and he believed that the industrial injury contributed to it in the realm of 10%.

Dr. Henderson did psychiatric evaluations in April and May 1977 of claimant. He believed claimant had a traumatic mixed anxiety and depressive reaction, chronic in nature, obsessive compulsive personality with some obsessive compulsive reaction and chronic low back pain. He felt claimant's psychiatric status was fairly stabilized and claimant would only marginally benefit from any psychiatric care. He rated claimant's psychiatric impairment at 45%.

Claimant has done only heavy manual labor in the past and cannot return to any of his former lines of employment. He has attempted to obtain training as a real estate salesman and to attend college classes but without successful results. He testified he left college because he was unable to sit for more than 15-20 minutes without increasing pain.

The Referee found that claimant did not lack motivation to return to work. The Referee concluded, based on the weight of the evidence of psychiatric and physical damage, that claimant was permanently and totally disabled as of the date of Dr. Henderson's report of June 1, 1977.

The Board, after de novo review, finds claimant is not permanently and totally disabled. The medical evidence indicates claimant is capable of performing light to moderate work. The Board concurs with employer in its argument that the claimant is not motivated to return to work and is not an "odd-lot" permanent total disability. However, claimant does have a greater loss of wage earning capacity than that for which he has been awarded. The Board concludes that claimant should be granted 224° for 70% unscheduled low back disability.

ORDER

The Referee's order, dated January 16, 1978, is modified.

Claimant is granted 224° for 70% unscheduled disability for his low back injury. This is in lieu of the award made by the Referee's order which is affirmed in all other respects.

WCB CASE NO. 76-6975 JUNE 26, 1978

ASCENSION MATTHEWS, CLAIMANT
Lindstedt & Buono, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

The claimant seeks Board review of that portion of the Referee's order which denied claimant compensation for temporary total disability from September 16, 1976 through August 15, 1977.

Claimant, a 29-year-old assembler, sustained a back injury on December 30, 1975. Her claim was closed on October 22, 1976 with an award of compensation for temporary total disability from December 30, 1975 through September 16, 1976 and compensation equal to 16° for 5% unscheduled low back disability.

Initially, the employer had issued a partial denial of claimant's claim, denying responsibility for her psychological condition; however, later it accepted responsibility for such condition.

On September 15, 1976 claimant was examined by the physicians at the Orthopaedic Consultants who found that claimant was taking pain medication, receiving physiotherapy once a week and seeing her regular physician, Dr. Cherry. Claimant was found to be medically stationary as of that date and claim closure was recommended.

Claimant continued to see Dr. Cherry and continued to receive physiotherapy once a week and pain medication. However, no other medication for medical procedures were initiated by Dr. Cherry after September 16, 1976. Dr. Cherry, according to the evidence, apparently saw claimant on six occasions between September 16, 1976 and August 15, 1977.

On August 24, 1977 Dr. Cherry reported that claimant was entitled to temporary total disability until August 15, 1977;

that her condition was not medically stationary until that date.

The Referee found that the treatment which claimant received from Dr. Cherry between September 16, 1976 and August 15, 1977 was clearly palliative and he found no medical basis to support claimant's claim for additional temporary total disability benefits. He affirmed the Determination Order of October 22, 1976.

The Board, on de novo review, finds that claimant was examined on September 15, 1976 by three members of the Orthopaedic Consultants whose recommendation was that claimant was stationary and her claim should be closed. The loss of function of the neck as it existed on the date of the examination and which is due to the industrial injury is minimal. This report was dated September 16, 1975, and the receipt of a copy of it was acknowledged by Dr. Cherry on October 6, 1976.

Based upon the Orthopaedic Consultants' recommendation and without any further statement from Dr. Cherry, the claim was closed on October 22, 1976.

On February 15, 1977 claimant was again examined by the physicians at Orthopaedic Consultants. Their opinion, after this examination, was that her case was stationary and, as earlier stated, the degree of disability was minimal.

Dr. Cherry wrote several letters to claimant's attorney and gave him a final report on August 15, 1977; however, there is no evidence that Dr. Cherry ever advised the carrier that he agreed or disagreed with the recommendations of the physicians at the Orthopaedic Consultants.

Based upon Dr. Cherry's report of August 15, 1977, claimant now contends she should receive compensation for temporary total disability up to and including that date, despite the Determination Order which terminated such compensation on September 16, 1976.

The Board finds this is a classic example of procrastination which often increases the cost of processing claims. In this case, Dr. Cherry should have advised the carrier as soon as possible whether he agreed with their recommendation or whether he felt claimant's condition was not stationary from a medical standpoint and that treatment, other than palliative treatment, was required until her condition did become medically stationary. Instead, Dr. Cherry merely acknowledged receipt of the Orthopaedic Consultants report and did not dispute any of their findings until nearly a year later in response to an inquiry by the claimant's attorney.

The evidence indicates that Dr. Cherry's treatment of claimant's condition during the entire time in question was physiotherapy once per week and a continuation of the pain medication he had previously prescribed. This does not constitute

curative treatment; it is merely palliative in nature. Medically stationary means that the claimant is no longer receiving curative treatment and his or her condition has stabilized to the point that permanent disability may be assessed.

For the foregoing reasons, the Board concludes that claimant's entitlement to temporary total disability benefits terminated on the date that the physicians at the Orthopaedic Consultants found her condition to be medically stationary, i.e., September 16, 1976. Therefore, the Determination Order of October 22, 1976 must be affirmed.

The Referee did not reach the question of claimant's entitlement to vocational retraining for reasons set forth by the Referee in his Opinion and Order; however, this issue was not presented to the Board on review.

ORDER

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

WCB CASE NO. 77-4853 JUNE 26, 1978

PATRICIA WRIGHT, CLAIMANT
Merten & Saltveit, Claimant's Attys.
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 directed the employer to pay claimant 22.5° for 15% loss of the right arm. Claimant also contends that she sustained a compensable low back injury at the same time she injured her right wrist.

Claimant, a 49-year-old cook, sustained a compensable injury on November 16, 1976 when she slipped on water on the floor and fell, taking the full weight of her body on her right hand. Claimant finished her shift and was then treated by Dr. Kayser and by Dr. Zivin. Claimant was also examined, at the request of the carrier, by Dr. Schuler and by the physicians at the Orthopaedic Consultants. All of the medical reports are essentially in agreement and establish that claimant suffered a hairline fracture of the wrist and a mild sprain. No surgery was recommended.

Claimant's treatment for the wrist condition consisted of splinting and later physiotherapy. She complained about constant pain in her right wrist interfering with her work as a cook.

The Referee found that the medical evidence did lend some support to claimant's objective complaints of limitation in her right wrist and he concluded that she was entitled to more than the award of 7.5° for 5% loss of the right forearm. He granted her an increase of 15° for a total of 22.5° for 15% loss of the right forearm.

The Referee found that claimant had had intermittent mild back pain for some time prior to her industrial injury. She had fallen and hurt her back while rollerskating in March 1966. Claimant was under the impression that she had told Dr. Kayser about hurting her back following the November 16, 1976 injury but neither Dr. Kayser's report nor the report of the industrial injury mentions such low back involvement. Claimant has received some chiropractic manipulation at Western States Chiropractic College Clinic.

The Referee found no objective findings regarding claimant's low back had been made; several doctors commented upon her obesity as a contributing factor to a low back problem. He concluded claimant had failed to sustain the burden of proving a compensable low back injury.

The Board, after de novo review, finds that claimant did not file any claim for a back condition nor was there any evidence in the record to show that she had sustained any permanent disability to her back as the result of the November 16, 1976 injury. The fact that the carrier had paid for a good portion of the claimant's chiropractic bills cannot be construed as an acceptance of a claim which, in fact, was never filed. The Referee never should have dealt with the back problem; it was not a proper issue before him at the hearing.

With respect to the award for the scheduled injury, the Board agrees with the increase granted therefor by the Referee.

ORDER

The order of the Referee, dated November 29, 1977, is affirmed.

WCB CASE NO. 76-6352 JUNE 27, 1978

DOROTHY BARKER, CLAIMANT
Gary E. Norman, 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 she 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 January 13, 1978, is affirmed.

Claimant's attorney is hereby granted as a reasonable attorney's fee for his services in connection with this Board review a sum equal to $100, payable by the Fund.

WCB CASE NO. 77-2184 JUNE 27, 1978

CURTIS A. BURGESS, CLAIMANT
Dale R. Drake, 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 January 10, 1978, is affirmed.

WCB CASE NO. 77-3386 JUNE 27, 1978

KAY DUVALL, CLAIMANT
Bloom, Ruben, Marandas, Berg, Sly & Barnett, Claimant's Attys.
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 that all issues were resolved by a previous Opinion and Order, dated January 13, 1977, and thereby dismissed the matter. Claimant contends that the January 13, 1977 Opinion and Order should be modified to commence claimant's permanent total disability payments in May 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 2, 1978, is affirmed.

WCB CASE NO. 77-867 JUNE 27, 1978

KENNETH ELLIOTT, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which granted claimant compensation equal to 96° for 30% 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 January 30, 1978, is affirmed.

WCB CASE NO. 76-5090 JUNE 27, 1978

EARL O. GERBER, CLAIMANT
Vernon Cook, Claimant's Atty.
Rankin, McMurry, Osburn & Gallagher,
Defense Attys.
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 January 20, 1978, is affirmed.

WCB CASE NO. 77-2397 JUNE 27, 1978

EDNA HORTON, CLAIMANT
Dye & Olson, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Wilson and Moore.

The employer seeks Board review of the Referee's order affirming the Determination Order, dated April 12, 1977, which awarded claimant 15° for 10% loss of the right forearm and awarding claimant 160° for 50% unscheduled right shoulder disability. The order denied the employer the right to offset against payments of compensation for temporary total disability payments of unemployment benefits received by claimant.

Claimant, a bakery worker, suffered a compensable industrial injury on September 27, 1974.

Claimant was 43 years old, has a tenth grade education, and no further special education except some 90 hours of hospital training as a nurse's aide. She took some training at McMinnville High School under Chemeketa's supervision in 1976 but was unable to finish due to right hand numbness and shoulder problems which resulted from the September 1974 injury. She has passed all of her GED tests except mathematics. Claimant has had a varied work background which included working as a waitress, a dinner cook, a bartender, a nurse's aide, a construction worker, a saw shop sharpener, even driving a dump truck. The longest tenure at any job was about five years when claimant worked as a waitress. The Referee found that most of the work claimant had done in the past would require almost constant use of her hands and arms.

Claimant testified that when she applied for unemployment benefits in the fall of 1974 she informed the state agency that she was able to do light work. Claimant received unemployment benefits for 49 weeks.

A service coordinator found that claimant was not vocationally handicapped but had marketable skills and indicated that neither job placement nor referral to the Vocational Rehabilitation Division was necessary, although the service coordinator at the Disability Prevention Center stated she would work with claimant towards selective placement or job development.

The Referee, in his order, set forth with great detail the medical history of claimant which includes certain entries made early in the 1960's. The Referee also comments on the various evaluations of claimant's scheduled and unscheduled disabilities to the extent that it is not necessary to repeat these opinions expressed by the various doctors who examined and/or treated claimant.

Claimant's claim was first closed by a Determination Order in September 16, 1976 which awarded her 16° for 5% unscheduled right shoulder disability; on April 12, 1977 a Second Determination Order granted claimant an award of compensation equal to 15° for 10% loss of her right forearm.

Based upon the medical and lay evidence, the Referee concluded that the impairment to claimant's right forearm was quite mild. Dr. Nathan had found claimant had a very mild residual carpal syndrome at the right wrist but he thought she could be gainfully employed. He believed that therapy would minimize her residual symptoms. The Referee concluded that claimant had been adequately compensated for her loss of function of her right forearm by the award of 15° for 10% loss of the right forearm.

On the issue of claimant's unscheduled disability, the Referee; applying the test of loss of future earning capacity, found that claimant was unable to return to any of her previous occupations, that her physical limitations seriously impaired her earning capacity; she was unable to engage in any occupation requiring any extensive lifting, or working with her arms out in front of her, or above her head.

The Referee found that claimant's ability to now continue with nurse's aide training or do any typing was highly speculative. Taking into consideration claimant's age, education, adaptability, suitability and her permanent physical limitations of her right shoulder, the Referee concluded that her earning capacity had been reduced by 50%. Therefore, he increased the award of 16° to 160°. He had found the claimant to be very credible in her testimony.

The Referee stated that no credit was to be allowed the employer on account of any unemployment benefits received by claimant, stating that there was no evidence to show that claimant was not entitled to temporary total disability benefits from the Workers' Compensation Board from the time in question and it was not for the Board to determine whether or not

claimant was eligible for unemployment compensation at the time she was receiving benefits for temporary total disability.

The Board, on de novo review, finds that claimant has been adequately compensated for the loss of function of her right forearm by the award of 15° for 10% loss of function of that scheduled member of her body.

However, the Board finds that the medical opinions expressed by the various physicians who examined and/or treated claimant indicate very little, if any, permanent disability in the shoulder. When Dr. Treneman examined claimant in September 1974 (claimant did not seek medical aid for her injury until that time although, as set forth in the Referee's order, the actual traumatic injury occurred on January 12, 1973) stated that he felt, ". . . that her symptoms are from this particular type of injury but since she was not seen at that time, I have no definite way to say whether this is what happened or not". Later claimant was examined by Dr. Teal who also felt that claimant's problem was certainly nothing new and it was hard to pin any specific etiology. He felt that claimant was "somewhat 'compensation minded'." He suggested that she avoid heavy manual labor but anticipated only conservative treatment.

Dr. Hummel was the next physician to examine claimant. Claimant complained to him of shoulder and neck aches with numbness and weakness in the hands. She told him also she had been free of such symptoms until the January 12, 1973 accident. After examining claimant, Dr. Hummel found good neck mobility and it was his impression that there was no significant cervical or thoracic outlet abnormalities. The "fatty mass" at the base of claimant's neck was benign and was in no way related to her injury.

On December 20, 1976 Dr. Teal performed a median nerve decompression and three days later claimant stated that the forearm and shoulder discomforts seemed to have stopped altogether.

Most of the medical reports are more concerned with claimant's forearm disability than with the symptoms she expressed regarding her right upper extremity.

The only medical report that appears to be overly concerned with claimant's upper extremity disability is the report of Dr. Howard, a chiropractor, who, on June 6, 1977, evaluated claimant and diagnosed a chronic cervical sprain, thoracic and costalvertebral sprain, myofascitis of the right shoulder and carpal tunnel syndrome. He concluded that claimant could not reasonably be expected to return to her previous occupation, or any occupation that would require any extensive lifting, or working with her arms out in front of her or above her head.

Less than two weeks after the hearing claimant was again examined by Dr. Teal who said that claimant had stated her right hand was much better and he felt that claimant's only current symptomatology relates to pain above the right shoulder which seemed to have been present for quite some time, the etiology of which remains obscure.

The Board does not find claimant to have been a credible witness and, based upon the medical evidence in the record, concludes that claimant has failed to meet her burden of proving a compensable injury. Such proof must be made a preponderance of the evidence as a whole. Although the Referee felt that Dr. Howard's testimony was not challenged by any opposing evidence, the record indicates to the contrary. Dr. Nathan, in May 1977, stated that he believed that claimant might be gainfully employed even though she was having some symptoms regarding her right upper extremity. The service coordinator at the Disability Prevention Center concluded on February 8, 1977 that claimant did not have a vocational handicap but had marketable skills.

Based upon the medical evidence relating to claimant's unscheduled right shoulder disability, the Board concludes that the affect of this disability on claimant's potential wage earning capacity will not be very substantial and that claimant would be adequately compensated for any loss of wage earning capacity which she might sustain as a result of the injury to her right upper extremity by an award of 48° which represents 15% of the maximum allowable by statute for such unscheduled disability.

ORDER

The order of the Referee, dated February 3, 1978, is modified.

Claimant is awarded 48° for 15% unscheduled right shoulder disability. This award is in lieu of the award made by the Referee's order which in all other respects is hereby affirmed.

WCB CASE NO. 77-3038 JUNE 27, 1978

RICHARD THOMPSON, CLAIMANT
Dean M. Phillips, 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 on the ground that claimant was not a subject workman under the Oregon Workers' Compensation Law. Claimant contends that he was.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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 5, 1978, is affirmed.

SAIF CLAIM NO. KC 344239 JUNE 28, 1978

LYLE W. BAXTER, CLAIMANT
SAIF, Legal Services, Defense Atty.
Own Motion Order

On May 12, 1978 the Board received from the claimant a request that his claim for an industrial injury suffered on December 19, 1971 be reopened pursuant to the Board's own motion jurisdiction. Claimant's claim was initially closed on October 4, 1972 and his aggravation rights have expired.

In support of his request, claimant furnished the Board a report from Dr. Wells, dated February 28, 1978, and one from Dr. Caron, dated April 20, 1978. Dr. Wells felt claimant had a loose body in the joint of his left knee, probably a piece of cartilage, which should be removed. It was his opinion that the condition related directly to claimant's December 19, 1971 injury. Dr. Caron agreed with Dr. Wells' opinion.

On May 22, 1978 the Fund was advised that claimant had requested own motion relief and requested to inform the Board of its position within 20 days. The letters from Dr. Wells and Dr. Caron had been addressed to the Fund. On June 15, 1978 the Fund responded, stating that it had no objection to the knee surgery recommended by Dr. Wells.

The Board, after giving consideration to claimant's request and the supporting medical reports, concludes that claimant's claim should be reopened for the surgical treatment recommended by Dr. Wells and for the payment of compensation for temporary total disability from the date claimant enters the hospital and until the claim is again closed pursuant to the provisions of ORS 656.278.

IT IS SO ORDERED.

WCB CASE NO. 76-3058 JUNE 28, 1978

In the Matter of the Compensation
of the Beneficiaries of
MARVIN BRADLEY, DECEASED
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

The beneficiaries of the above named workman seek Board review of the Referee's order which affirmed the April 21, 1977 Determination Order. They contend that claimant was permanently and totally disabled as a result of his industrial injury or, in the alternative, that he was entitled to a greater award than that granted to him.

The Board, after de novo review, affirms and adopts the Opinion and Order of the 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, 1978, is affirmed.

WCB CASE NO. 77-4084 JUNE 28, 1978

ALLEN GULTRY, CLAIMANT
Cheney & Kelley, Defense Attys.
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 13, 1977 whereby claimant was awarded compensation for temporary total disability from April 12 through April 28, 1977, less time worked.

Claimant suffered a compensable injury on April 5, 1977 when he bumped his left knee on a squaring fixture. Claimant has been a production worker for the employer since January 1972 and during this period he had had two non-industrial injuries to his left knee; one in 1972 and the other in 1974, both requiring surgery.

On April 19, 1977 Dr. Brown diagnosed claimant's April 5, 1977 injury as a contusion; he found claimant was med-

ically stationary and able to return to regular employment and had no permanent disability.

The Referee found that the evidence was somewhat confused but apparently claimant was off work for about a week because of his industrial injury for which he was paid compensation for temporary total disability; he returned to light work for awhile and to his regular job on April 25, 1977. On April 25 claimant reinjured his left knee, he reported to the nurse and then saw Dr. Adlhoch at Kaiser Permanente; on the same day Dr. Brown again released claimant to return to his regular work and found him medically stationary without any residual permanent disability. Dr. Adlhoch, on April 27, 1977, reported that he recommended that claimant stay on a strict light duty (sedentary work) for the next ten days.

Claimant worked until May 1977 when he was requested to take a leave of absence, a medical leave, from "close to the first part of May" until July 29, 1977 (claimant did work one day, namely July 20).

Claimant was refused vocational rehabilitation and returned to work for the employer on August 29, 1977 performing at a lighter job.

The claim was closed by the Determination Order of June 13, 1977 mentioned in the opening paragraph.

The Board, on de novo review, feels that a much more complete record could have been made in this case; it finds that the award of compensation for temporary total disability made by the Determination Order is not supported by the evidence and, therefore, should not have been affirmed by the Referee. However, the Board does find, based on the record presented to it for review, that claimant failed to prove that he has suffered any permanent loss of function of his left knee as the result of the industrial injury on April 5, 1977.

ORDER

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

WCB CASE NO. 77-1573 JUNE 28, 1978

DANNY HOLMEN, CLAIMANT
Dye & Olson, Claimant's Attys.
Jones, Lang, Klein, Wolf & Smith,
Defense Attys.
Request for Review by Claimant
Cross-appeal by Employer

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which affirmed the February 18, 1977 Determination Order whereby he was granted compensation equal to 64° for 20% unscheduled low back disability. Claimant contends that this award is inadequate and that the Disability Prevention Division's non-referral for vocational rehabilitation should be reversed. The employer contends that this non-referral should be affirmed and that claimant is not entitled to any award 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.

ORDER

The order of the Referee, dated December 29, 1977, is affirmed.

WCB CASE NO. 76-2132 JUNE 28, 1978

BETTE JACOBS, 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 compensation equal to 144° for 45% unscheduled left shoulder and psychological 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 October 13, 1977, is affirmed.

WCB CASE NO. 77-3761 JUNE 28, 1978

KENNETH KOWALSKI, CLAIMANT
Keith D. Skelton, 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 January 13, 1978, 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. 77-2167-B JUNE 28, 1978

ALAN LAJIMODIERE, CLAIMANT
Pozzi, Wilson, Atchison, Kahn &
O'Leary, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.

Reviewed by Board Members Wilson and Phillips.

Liberty Mutual requests review by the Board of the Referee's order which approved the denial of claimant's claim by the State Accident Insurance Fund and ordered Liberty Mutual to accept claimant's claim for the injury sustained on December 1, 1976 and to pay compensation to claimant, as provided by law; directed Liberty Mutual to reimburse the Fund for all sums which it paid to claimant pursuant to the order designating it as paying agent issued on April 5, 1977; and awarded claimant's attorney a reasonable attorney's fee payable by Liberty Mutual.

This case involves two employers and two carriers; the question to be resolved is: which carrier is responsible for claimant's condition and treatment subsequent to December 1, 1976?

Claimant, a carpenter, suffered a compensable injury on November 26, 1975 when he slipped and twisted his back while lifting a heavy form while employed by Contractors, Inc., whose carrier was the Fund. Claimant was seen by Dr. Mumford on November 28 and his condition was diagnosed as a lumbar strain. On February 3, 1976 Dr. Adlhoch examined claimant and reported that he had returned to work on December 8, worked for three days, missed a day, and when he returned reinjured his back and has not been able to work since.

On December 14, 1975 claimant was involved in an automobile accident and injured his neck, but not his low back. Dr. Adlhoch thought that claimant might not be able to tolerate his usual work in heavy construction. Later claimant came under the care of Dr. Duff, an orthopedic surgeon, for his neck injury sustained in the automobile accident and, subsequently, for his low back problems. Dr. Duff stated that claimant had a rather bad record with low back trouble in the past and he would be a good candidate for further injury if he returned to heavy labor.

On June 15, 1976 Dr. Duff reported that claimant had shown substantial improvement and had recently participated in a 20-mile hike with only a minimal amount of back trouble. On July 2, Dr. Duff reported that claimant had had a rear end automobile accident and his symptoms had returned.

On July 6, 1976 claimant went to work for H.A. Anderson Construction Company as a carpenter. Claimant alleges that while on this job his back was sore and ached most of the time, however, he worked regularly; at times he did heavy work. On August 19, 1976, Dr. Duff reported claimant was still working and his back was no worse; claimant was taking medication because his back was stiff and sore in the morning upon awakening.

On September 9, 1976 a Determination Order awarded claimant compensation for time loss only for his November 26, 1975 injury.

In November 1976 claimant became employed as a carpenter for Kalman Floors, whose carrier was Liberty Mutual. On December 1 claimant was driving metal stakes into a compacted river bed with a sledgehammer when his back pain became so severe that he could not continue working. He reported to Dr. Duff who stated that the pain claimant had suffered that day was a rather sudden worsening of his low back pain. He diagnosed an acute low back strain and stated that " . . . this is a reaggravation of his previous injury of November 26, 1975".

Based upon Dr. Duff's reports, the Fund reopened claimant's claim for his November 1975 injury as of December 1, 1976. Claimant continued under the care of Dr. Duff and, on January 17, 1977, returned to work for Contractors, Inc., however, he only worked four hours lifting lumber before he had to quit because of his back pain.

On February 15 Dr. Duff recommended referral of claimant to the Disability Prevention Division to be retrained for a different type of occupation, stating that claimant's previous work activities had aggravated his back problems.

On March 22, 1977 the Fund issued a denial of any further responsibility for disability due to aggravation, contending that claimant's activities on December 1, 1976 constituted a new injury. At that time the Fund also asked the Board to issue an order designating a paying agent pursuant to ORS 656.307. This was done on April 5, 1977 and the Fund was designated as paying agent.

Claimant testified that since his November 1975 injury he has never had a period when he was completely free of back pain or not required to take pain medication. This testimony is supported by Dr. Duff's report of April 18, 1977 in which he stated that he felt claimant's problems dated from the initial injury in November 1975 and that he had aggravated the condition in December 1976.

The Oregon Court of Appeals in the case of Calder v. Hughes and Ladd, et. al., 23 Or App 66, has adopted the "Massachusetts-Michigan Rule" to be applied in successive injury cases. Briefly stated, this rule holds that in successive injury cases the carrier covering the risk at the time of the most recent injury that bears a causal relation to the disability is liable for the worker's condition but if the second injury takes the form of merely a recurrence of the first injury and does not contribute even slightly to the causation of the disabling condition, then the insurer on the risk at the time of the original injury remains liable for the second injury.

The Referee discussed several Oregon cases involving this question of liability for successive injuries and concluded that in this case claimant, initially, sustained an acute low back strain and thereafter, although he did not become completely asymptomatic, he was able to take long hikes and return to heavy labor. She found that his condition, although not completely asymptomatic, became relatively stable until December 1, 1976 when while doing heavy work with a sledge hammer he experienced what his treating physician, Dr. Duff, described as a rather sudden worsening of his low back pain.

The Referee found that claimant's work activity on December 1, 1976 was a material contributing cause to his subsequent need for treatment and disability, therefore, Liberty Mutual, which was on the risk at the time of the second injury, was responsible.

A remaining issue was presented to the Referee, to wit: is claimant's attorney entitled to a fee to be paid by the responsible carrier and not out of compensation to claimant? Both carriers contended that where an order has been issued pursuant to

ORS 656.307 and the dispute is between the two carriers on the issue of responsibility only, an attorneys' fee payable by the carrier is not appropriate as would be true in a denied case.

The Referee found that claimant's attorney was entitled to a reasonable attorney's fee for his services in representing claimant and protecting his rights at the hearing and that said fee should be paid by Liberty Mutual.

The Board, on de novo review, based primarily on Dr. Duff's reports and the testimony of the claimant, finds that the injury of December 1, 1976 was merely a recurrence of the injury suffered by him on November 26, 1975. Claimant testified that since the November 1975 injury he has never been free of pain and the pain was such that it necessitated taking medication therefor. Although claimant was able to return to work following the 1975 injury he was never completely symptom free. The claimant worked with pain primarily because he wanted to determine if he could earn a living as a carpenter. During the period between November 1975 and December 1976 claimant's symptoms gradually worsened until the rather heavy exertion which occurred while working for Kalman Floors resulted in so great an increase of these symptoms that claimant could no longer stand the pain and was unable to continue to work.

The Board concludes that the incident of December 1, 1976 was an aggravation of claimant's November 26, 1975 injury and the State Accident Insurance Fund is responsible for claimant's present condition.

On the issue of from where does claimant's attorney's fee come, the Board agrees with the Referee that in this particular case claimant's attorney was entitled to a fee to be paid by the responsible carrier.

The actions on the part of claimant's attorney both at the hearing before the Referee and at Board review where he filed a brief as an interested party which was of substantial assistance to the Board in arriving at its decision, represents an exception to the Board's general policy, to-wit: where the sole issue is which carrier is responsible for claimant's condition, no issue of compensability is involved nor is there any reason for claimant to be present or represented by an attorney, although claimant can be called by either carrier as a witness, claimant's attorney is not entitled to be paid an attorney's fee by the responsible carrier.

In this case claimant's attorney was an active participant at the hearing before the Referee and his actions were meaningful and beneficial to the claimant.

ORDER

The order of the Referee, dated November 14, 1977, is reversed.

The State Accident Insurance Fund is directed to accept claimant's claim of aggravation of his November 26, 1975 injury and for the payment of compensation, as provided by law, commencing December 1, 1976 and until the claim is closed pursuant to ORS 656.268.

Claimant's attorney shall be paid as a reasonable attorney's fee for his services before the Referee the sum of $300 to be paid by the State Accident Insurance Fund.

Claimant's attorney is awarded as a reasonable attorney's fee for his services on Board review the sum of $150, payable by Liberty Mutual Insurance Company.

SAIF CLAIM NO. C 296804 JUNE 28, 1978

JAMES LATTIN, CLAIMANT
Small & Winter, Claimant's Attys.
Peterson, Peterson & Peterson, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Own Motion Order

On September 27, 1977 the claimant, by and through his attorney, requested the Board to exercise its own motion jurisdiction and reopen his claim for a compensable injury suffered on December 21, 1970. The request was supported by reports from Dr. Mayon, dated February 28, 1977, and Dr. Magley, dated March 2, 1977.

On October 14, 1977 the Fund responded to claimant's request, stating it would not reopen claimant's claim; that the records indicated that claimant strained his low back on December 21, 1970 for which he had undergone surgery and his claim had been closed with awards of 32° for low back disability and 20° for loss of the right foot. On February 28, 1972 an order approving a stipulation was signed by Hearing Officer Page Pferdner whereby claimant was granted an additional 25° for a total of 57° for his unscheduled disability and an additional 7° for partial loss of the right foot for a total of 27° partial loss of the right foot.

The Board did not have sufficient evidence to determine the merits of claimant's request and remanded the matter to its Hearings Division with instructions to set for hearing to take evidence on the issue of whether claimant's present condition was related to his December 21, 1970 injury and the responsibility of the Fund.

A hearing was held on May 31, 1978 before Albert L. Menashe, Administrative Law Judge (ALJ), and as a result thereof the ALJ recommended that the Board grant claimant's request for own motion relief and reopen his claim.

The Board, after de novo review of the transcript of proceedings furnished to it by the ALJ, accepts and adopts as its own the findings and recommendation of the ALJ, a copy of which is attached hereto and, by this reference, made a part hereof.

ORDER

Claimant's claim for an industrial injury suffered on December 21, 1970 is hereby remanded to the State Accident Insurance Fund to be accepted and for the payment of compensation, as provided by law, commencing on February 28, 1977, the date claimant was examined by Dr. Mayon, and until the claim is again closed pursuant to the provisions of ORS 656.278, less any time worked.

Claimant's counsel is awarded as a reasonable attorney's fee for securing own motion relief for claimant a sum equal to 25% of any compensation which claimant shall receive as a result of this order, payable out of said compensation as paid, not to exceed $2,300.

WCB CASE NO. 76-7064 JUNE 28, 1978

GENE NEVUE, CLAIMANT
Flaxel, Todd & Nylander, Claimant's Attys.
Jaqua & Wheatley, Defense Attys.
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 to which he is entitled.

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

ORDER

The order of the Referee, dated December 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 $300, payable by the carrier.

WCB CASE NO. 77-1498 JUNE 28, 1978

LAMBERT REED, CLAIMANT
Luebke & Wallingford, Claimant's Attys.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Wilson and Phillips.

Claimant seeks Board review of the Referee's order which granted him compensation equal to 32° for 10% low back disability. Claimant contends that he is entitled to compensation for loss of function 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 November 30, 1977, is affirmed.

WCB CASE NO. 76-4416 JUNE 28, 1978

MERLE TETENS, CLAIMANT
Evohl F. Malagon, 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 compensability.

The Board, after de novo review, affirms and adopts the Opinion and Order of the Referee, and the subsequent order whereby it was reaffirmed, a copy of which are attached hereto and, by this reference, made a part hereof.

ORDER

The order of the Referee, dated December 2, 1977, as affirmed by the January 17, 1978 order, is affirmed.

WCB CASE NO. 77-5773 JUNE 28, 1978

TOMMY E. UHACZ, CLAIMANT
Jones, Lang, Klein, Wolf & Smith,
Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

Claimant appeals the Referee's order which denied claimant temporary total disability compensation from July 11, 1977 through September 6, 1977 and awarded him 80° for 25% unscheduled low back disability. Claimant contends he is entitled to temporary total disability compensation for this period and also to an additional award for permanent partial disability.

Claimant, at the age of 28, sustained a compensable injury to his low back on January 19, 1976 while lifting a chain. He received only conservative treatment for this injury which was diagnosed as dorso-lumbar strain. Claimant attempted to return to work but was unable to continue. On November 16, 1976 claimant was released for restricted work.

The consensus opinion of claimant's medical doctors was that claimant needed vocational rehabilitation or retraining. He was referred to a vocational rehabilitation service coordinator in March 1977.

Dr. Pasquesi reported, in July 1977, claimant was medically stationary and needed to be trained or aided in obtaining work not requiring repetitive bending, stooping and twisting, nor requiring him to lift more than 30 pounds. Claimant could not sit or stand throughout an eight hour shift without being able to change positions when he felt it was necessary. He rated claimant's impairment at 15%. Dr. Dixon concurred with this report except he felt claimant's impairment was 25% based on his instability and chronic low back pain.

The first Determination Order, dated September 1, 1977, granted claimant temporary total disability compensation from January 20, 1976 through July 11, 1977, less time worked and 48° for 15% unscheduled low back disability.

On September 6, 1977 claimant was referred for vocational rehabilitation. However, claimant had found modified work with his employer and was terminated from vocational rehabilitation on November 16, 1977.

The second Determination Order, dated December 5, 1977, awarded claimant additional temporary total disability compensation from September 6, 1977 through November 16, 1977 only.

Claimant has a high school degree and one year of general studies in college. His prior work experience includes being a manager of a fast-food business, assistant manager of a pharmacy and owner-operator of an auto retail business. Claimant is now 30 years old and working as a stock foreman.

Claimant testified he has trouble sleeping, playing with his children, being as active in sports and doing chores around his home. If he drives long distances his back aches. Claimant also has lost overtime work because such work requires lifting which he cannot do. His supervisor has noted that claimant now appears to tire more easily; also, walking up and down stairs is difficult for him.

The Referee found claimant was not entitled to temporary total disability compensation for the period of July 11, 1977 to September 6, 1977. The Referee relied on the present provisions of ORS 656.268 which provided temporary disability benefits will not be terminated if claimant is not medically stationary or if claimant is enrolled and actively engaged in an authorized vocational rehabilitation program. He found claimant was not enrolled and engaged in an authorized vocational rehabilitation program, therefore, he was not entitled to temporary total disability benefits after July 11, 1977.

The Referee found that claimant was entitled to an additional award for permanent partial disability based on the medical limitations placed upon claimant's ability to work. He increased the award to 80° for 25% unscheduled disability.

The Board, after de novo review, finds that ORS 656.268, as it was written at the time of the first Determination Order, provided temporary disability compensation could not be terminated until the worker was medically stationary and had completed any authorized vocational rehabilitation program. The evidence is clear claimant had not completed an authorized vocational rehabilitation program so he was not vocationally stationary at the time the first Determination Order was entered.

The Board concludes that the first Determination Order was premature and claimant is entitled to temporary total disability compensation from July 11, 1977 to September 6, 1977. The Determination Order of December 5, 1977 shall be the commencement of claimant's period within which to file a claim for aggravation.

The Board, based on all the evidence, finds that the award of 80° is not sufficient to compensate claimant for his loss of wage earning capacity. It increases the Referee's award to 112° for 35% unscheduled low back disability.

ORDER

The Referee's order, dated February 17, 1978, is reversed.

The Determination Order, dated September 1, 1977, is set aside and claimant's aggravation rights shall start on December 5, 1977, the date of the second Determination Order.

Claimant is granted temporary total disability compensation from July 11, 1977 through September 6, 1977.

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

Claimant is awarded 112° for 35% unscheduled low back disability. This award is in lieu of any prior awards received by claimant for his injury of January 19, 1976.

Claimant's attorney is granted as a reasonable attorney's fee a sum equal to 25% of claimant's compensation for permanent partial disability, payable out of said increased compensation as paid, not to exceed $2,300.

WCB CASE NO. 77-4508 JUNE 29, 1978

CLARENCE L. BROOKS, CLAIMANT
Bodie, Minturn, Van Voorhees, Larson & Dixon, Claimant's Attys.
SAIF, Legal Services, Defense Attys.
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 granted him compensation equal to 256° for 80% unscheduled low back disability. A subsequent order of the Board amended the Referee's order by granting claimant's attorney an attorney's fee equal to 25% of the additional compensation granted by the Opinion and Order. Claimant contends that he is permanently and totally disabled; the Fund appeals on the basis that the award is too high.

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

ORDER

The order of the Referee, dated November 29, 1977, as amended by the Board's order of January 12, 1978, is affirmed.

WCB CASE NO. 77-4074 JUNE 29, 1978

ZOLA DYER, CLAIMANT
Jones, Lang, Klein, Wolf & Smith,
Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant requests Board review of that portion of the Referee's order which related to claimant's entitlement to compensation for temporary 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 December 28, 1977, is affirmed.

WCB CASE NO. 76-4161 JUNE 29, 1978
WCB CASE NO. 75-4978

LOUISE FARNHAM, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
Don G. Swink, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Wilson and Moore.

Claimant seeks Board review of the Referee's order which assessed penalties and attorney fees against the carrier for its unreasonable delay in the payment of compensation. Claimant contends that she is entitled to temporary total disability compensation from either April 26 or June 28, 1976 to November 7, 1976 in addition to penalties and attorney fees for that period of time.

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

ORDER

The order of the Referee, dated September 27, 1977, is affirmed.

WCB CASE NO. 77-1068 JUNE 29, 1978

ALFRED MAY, CLAIMANT
Evohl F. Malagon, Claimant's Atty.
Souther, Spaulding, Kinsey, Williamson & Schwabe, Defense Attys.
Request for Review by Employer

Reviewed by Board Members Moore and Phillips.

The employer seeks review by the Board of the Referee's order which directed it to pay claimant an amount equal to 25% of the compensation payable under the Determination Order for that period from February 9 to March 30, 1977 and to pay claimant's counsel a fee in the amount of $500; set aside the Determination Order entered on February 9, 1977 and reopened the claim for additional medical care and treatment and for the payment of temporary total disability compensation until the claim is properly closed pursuant to ORS 656.268.

The Referee also directed that compensation paid for permanent partial disability prior to the date of his order should be offset against the compensation for temporary total disability otherwise payable pursuant to his order for the corresponding period and allowed claimant's attorney an additional attorney's fee equal to 25% of the compensation for temporary total disability paid subsequent to his order, not to exceed $500, payable out of said compensation as paid.

Claimant had appealed from a Determination Order dated February 9, 1977 which awarded him compensation for temporary total disability from February 5, 1975 to January 19, 1977, less time worked, and compensation equal to 35% for unscheduled neck disability. The employer contends that the compensation paid claimant was paid at an incorrect rate.

Claimant suffered a compensable injury on November 11, 1974 and in April 1975 Dr. Campagna diagnosed a cervical strain with moderate functional overlay; the following month surgery was performed by Dr. Campagna. Claimant has also been treated by Dr. Dunn and Dr. Wilson.

In April 1976 claimant was found not to be a feasible candidate at that time for vocational training or for competitive employment, based on an evaluation made by a vocational counselor with the Vocational Rehabilitation Division. This opinion was reaffirmed by the counselor at the hearing.

In September 1976 the Orthopaedic Consultants, after examining claimant, found him to be medically stationary with mildly moderate functional loss of the cervical spine.

Dr. Holm, at the Disability Prevention Center, examined claimant in December 1976. Vocational rehabilitation was not considered justified because of claimant's marketable skills in sales but he was referred to a field service coordinator for reemployment assistance.

Claimant's claim was then closed by a Determination Order, dated February 9, 1977, which awarded claimant time loss from February 5, 1975 through January 19, 1977, less time worked, and 112° for 35% unscheduled neck disability. On May 20, 1977 the service coordinator closed her files stating she was unable to assist claimant because of lack of the necessary contacts.

Claimant testified that he could not do any full time work because of the neck pain and a diminution in his gripping strength in both hands. Both hands had been severely impaired in an industrial injury in 1957.

The Referee found that the record did not indicate that claimant was medically stationary. Dr. Dunn, in his report of September 20, 1977, stated that claimant might eventually need a cervical fusion and at the present time he needed conservative treatment. The Referee requested a clarification from Dr. Dunn who replied, "The imminence of necessity for anterior cervical fusion is indeterminate - the patient is getting progressively worse. Obviously, I do not consider his condition stable". Dr. Dunn had previously advised that claimant was medically stationary at the time of the claim closure and the Referee concluded that if he now felt claimant's condition was not stable it was appropriate for him to set aside the Determination Order based on Dr. Dunn's prior report.

On the issue of unreasonable resistance of the payment of compensation, the Referee found that after the entry of the Determination Order on February 9, 1977 no compensation was paid claimant until March 30. This delay was apparently caused by the actions of the insurer in submitting to claimant on February 11, 1977 a proposed lump sum settlement which proposal included the comment, "If we do not hear from either you or the Board in 30 days, we will assume that you have not applied for a lump sum settlement and will begin making monthly payments". The Referee considered this to be unreasonable withholding of compensation then properly payable under the Determination Order.

On the issue of whether claimant had been paid at an inappropriate rate of compensation, there was no evidence offered to support this contention in the opinion of the Referee.

The Board, on de novo review, agrees with the conclusions reached by the Referee. The carrier has no right to submit to a workman a proposed lump sum settlement and state that if it does not hear from either claimant or the Board within 30 days it will assume that claimant has not applied for such a lump sum settlement and will begin monthly payments. Obviously,

as the Referee found, this is unreasonable resistance to the payment of compensation and subjects the carrier to payment to claimant of additional compensation by way of a penalty and also to pay claimant's attorney a reasonable attorney's fee.

ORDER

The order of the Referee, dated December 18, 1977, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum of $350, payable by the employer and its carrier pursuant to the provisions of ORS 656.382(2).

WCB CASE NO. 76-5337-B JUNE 29, 1978

MICHAEL PROPES, CLAIMANT
Emmons, Kyle, Kropp & Kryger,
Claimant's Attys.
SAIF, Legal Services, Defense Attys.
Souther, Spaulding, Kinsey, Williamson
& Schwabe, Defense Attys.
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 (1) affirmed the denial of claimant's claim by Liberty Mutual Insurance Company on September 16, 1976; (2) remanded claimant's claim for his 1976 disabling back condition to Mt. Springs Arabian Ranch, the employer, and the State Accident Insurance Fund, its carrier, for acceptance as an aggravation claim and for payment of compensation as provided by law, until the claim is closed pursuant to ORS 656.268; (3) directed the Fund to make such necessary monetary adjustments with Liberty Mutual to reimburse it for any compensation paid pursuant to the order designating paying agent dated October 5, 1976; (4) directed U.S. Plywood, the employer, by and through Liberty Mutual, its insurer, to pay claimant as additional compensation, by way of penalty, an amount equal to 25% of the time loss benefits considered due and owing and which remain unpaid from October 5, 1976, the date of the .307 order, to the date of compliance of the order by Liberty Mutual; (5) directed U.S. Plywood, the employer, by and through Liberty Mutual, its insurer, to pay claimant's attorney as a reasonable attorney fee $150, pursuant to ORS 656.262(8) and 656.382 and directed that Mt. Springs Arabian Ranch, the employer, by and through the Fund, its insurer, pay to claimant's attorney as a reasonable attorney fee $850 pursuant to ORS 656.386.

The Board, after de novo review, concurs in the findings and conclusions made and reached by the Referee in his order, a copy of which is attached hereto.

The Board also concurs in all of the directives contained in the Referee's order with the exception of the directive that U.S. Plywood, the employer, by and through Liberty Mutual Insurance Company, its insurer, pay to claimant as additional compensation, by way of a penalty, an amount equal to 25% of the time loss benefits considered due and owing and which remained unpaid, from October 5, 1976, the date of entry of the order designating paying agent, to the date of compliance with the order by Liberty Mutual Insurance Company and the directive that U.S. Plywood, the employer, by and through Liberty Mutual Insurance Company, its insurer, pay to Emmons, Kyle, Kropp and Kryger, claimant's attorneys, as a reasonable fee $150 pursuant to this order under ORS 656.262(8) and ORS 656.382.

The Board finds that the delay was caused solely by Liberty Mutual's failure to immediately comply with the order designating it as paying agent; it was not, to any extent, the fault of the employer. Therefore, the Board concludes that the penalty and the attorney's fee awarded claimant's attorney in the amount of $150 shall be paid by Liberty Mutual Insurance and said amount shall not be charged against the account of the employer, U.S. Plywood, nor shall the payment of said sums in any way affect the rate of the employer, U.S. Plywood.

ORDER

The order of the Referee, dated November 17, 1977, a copy of which is attached hereto, is affirmed in all respects except that the penalty shall be assessed directly against Liberty Mutual Insurance Company and the attorney's fee in the amount of $150 shall be paid by Liberty Mutual Insurance Company and neither amount shall be charged against the account of the employer, U.S. Plywood, nor shall it affect in any manner the rate paid by the employer, U.S. Plywood.

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

SAIF CLAIM NO. C 189782 JUNE 29, 1978

LELAND G. RHODES, DECEASED
SAIF, Legal Services, Defense Atty.
Own Motion Determination

Claimant had suffered compensable injuries to his left forearm, elbow and shoulder on June 12, 1969. The claim was

closed by a Determination Order dated July 20, 1970 which awarded no compensation for permanent partial disability.

On February 22, 1977 the claimant had requested the Board to reopen his claim pursuant to their own motion jurisdiction. On April 25, 1977 the Board remanded the claim to the State Accident Insurance Fund to pay compensation for temporary total disability from the date claimant was hospitalized for the treatment recommended by Dr. Wolpert and until the claim was closed pursuant to ORS 656.278.

On May 26, 1977 left shoulder surgery was performed by Dr. Wolpert. Claimant had been admitted to the hospital on May 2 and had been released to return to work on November 9, 1977. On November 8 the claimant had advised the Fund he was returning to his prior type of work the following day.

On December 8, 1977 the claimant died in an accident unrelated to his industrial injury. The records indicate that claimant had been paid compensation for temporary total disability from May 3, 1977 through November 8, 1977 but that no claim closure upon which an award could be based had been made at the time of his death from unrelated and non-occupational causes; therefore, the right to claim closure died with the claimant. Fertig v. State Compensation Department, 254 Or 136.

ORDER

The claim remanded to the State Accident Insurance Fund by the Board's Own Motion Order dated April 25, 1977 is hereby closed.

WCB CASE NO. 76-2379 JUNE 29, 1978

OLIVE E. SMITH, 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 denial of claimant's claim, granting no penalties or 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. However, under certain circumstances penalties and attorney fees are applicable regardless of whether the claim is compensable or not. Jones v. Emanuel Hospital, 280 Or 147. In this case the Referee properly found no justification to impose penalties and award attorney fees.

ORDER

The order of the Referee, dated October 10, 1977, is affirmed.

WCB CASE NO. 77-2929 JUNE 29, 1978

STEVEN SWENSON, CLAIMANT
Jones, Lang, Klein, Wolf & Smith,
Claimant's Attys.
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 dismissed his request for hearing and, by an amended order, awarded his attorney a fee equal to 25% of the compensation granted claimant between April 26, 1977 and June 24, 1977 for being instrumental in obtaining said compensation for claimant. Claimant contends that he is entitled to penalties and attorney fees for unreasonable delay in the payment of compensation for the same period of time.

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.

ORDER

The order of the Referee, dated September 13, 1977, as amended by the November 15, 1977 order, is affirmed.

WCB CASE NO. 77-1995 JUNE 29, 1978
WCB CASE NO. 77-4020

WILLIAM E. WEST, CLAIMANT
Becker & Siprell, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Request for Review by Claimant

Reviewed by Board Members Moore and Phillips.

The claimant seeks review by the Board of the Referee's order which affirmed the Determination Order of September 30, 1976 and also determined that claimant was not entitled to the relief he sought including Board sponsored vocational rehabilitation.

Claimant is a teaching golf pro; he receives commissions on his merchandise sales in the pro shop and he also receives a percentage of the fees for giving golf lessons. Claimant has been injured several times at work while lifting merchandise and on May 11, 1976 he filed a claim for such an incident. Claimant has not played golf since April 1976. He first sought treatment from Dr. Bell, a chiropractic physician, and Dr. Garber, an osteopathic physician. Eventually his back problem resolved into an "off and on" condition. Claimant would experience pain in his low back if he pursued any strenuous work or exercise.

A hearing had been held on May 20, 1977 before Referee Leahy who found that claimant's injury had affected his pro duties and reduced the hours of work as well as his income. Claimant's contract was not renewed in 1977 because he was not able to sell enough golf merchandise during the preceeding year. The Referee in that case concluded that had claimant not been fired he would not have filed his claim. At the last time claimant had been seen by Dr. Garber in September 1976, she had done all she could do and had referred claimant to a specialist; however, claimant did not see the recommended specialist, contending that it would interfere with his work. He did see Dr. Dow, a neurosurgeon, during March 1977.

The Referee, in his order of May 25, 1977, approved the Determination Order dated September 30, 1976 which awarded claimant compensation for temporary total disability only (WCB Case No. 77-1995).

Claimant sought Board review of Referee Leahy's order but in the meantime also sought review of the Disability Prevention Division's decision not to refer him for vocational rehabilitation (WCB Case No. 77-4020).

On September 21, 1977, pursuant to a stipulation of the parties, the Board remanded WCB Case No. 77-1995 to its Hearings Division to be consolidated with WCB Case No. 77-4020 for the taking of evidence on all issues and for the entry of a final order on both cases. (In the first case, Referee Leahy had stated that that case was closed on May 20, 1977 after claimant testified he was under DPD consideration for vocational assistance referral.)

At the consolidated hearing the questions presented were: (1) Have claimant's substantial rights been prejudiced by the DPD's decision for non-referral for vocational rehabilitation, (2) Has Referee Leahy's failure to rule on the extent of disability deprived him of an expedited hearing entitling him to either additional permanent partial disability from the dismissal or interest on any permanent partial disability awarded from the dismissal date on May 20, 1977, and (3) Is claimant entitled to an award for permanent partial disability.

The Referee found that claimant had a congenital deformity of his vertebra of which he first became aware in 1959;

that he had had intermittent back pains since that date. Claimant had been seen by both Dr. Bell and Dr. Garber; the latter treated claimant from May 14, 1976 to September 9, 1976. On September 30, 1976 the claim was closed with an award for time loss only. The Referee found that claimant had not received any medical treatments since his claim was closed and he had returned to his regular job as a golf pro on May 23, 1976 after being released by Dr. Garber for modified work on that day.

Dr. Garber found that claimant had sustained a lumbosacral strain to his unstable lumbosacral spine; he was medically stationary on September 9, 1976 and had sustained no permanent impairment as a result of the May 11, 1976 injury.

The Referee found that after claimant had returned to work his back hurt him intermittently, but nevertheless he was able to perform his jobs although not as well as prior to the 1976 injury. She found that his contract was terminated on January 1977 because of claimant's failure to sell enough golf equipment and at the time of the termination claimant did not attribute his inability to sell merchandise to his back problems. However, after being terminated, he filed a claim for the May 11, 1976 injury.

The Referee found that claimant had applied for vocational rehabilitation in April 1977 and his request was denied in June 1977 on the ground that the medical reports did not preclude claimant from returning to his former job as a golf pro. His request for reconsideration was denied in August on the ground that claimant had sales experience on which he could rely to obtain work. Claimant has attempted to look for work since ceasing to work as a golf pro but with very little success.

The Referee concluded that claimant's substantial rights have not been prejudiced because of the DPD's decision. There was no medical evidence that the claimant could not return to his former job as a golf pro; additionally, claimant has other selling skills upon which he could rely in seeking employment.

The Referee concluded that Referee Leahy had held the case in abeyance only to determine if claimant would be accepted for an authorized vocational rehabilitation program. His opinion, entered on May 25, 1977, was a decision on the merits and said order contained facts pertinent to a determination of claimant's extent of disability. Apparently, the evidence was not sufficient to satisfy Referee Leahy that claimant had any permanent disability, therefore, he approved the Determination Order. Only five days expired between the date of the hearing and the date of the Referee's order and Referee Neal concluded that claimant could not have been prejudiced by any time delay. Furthermore, even if Referee Leahy's order could not be construed as an opinion on the merits, there is no statute or regulation which allows for the relief requested by claimant as the result of a delay.

On the extent of disability, the Referee concluded that even though Referee Leahy had previously decided that the claimant had no permanent disability, she, based upon the Board's remand, would reconsider that issue. Referee Neal found the Determination Order was proper, based on Dr. Garber's report of September 9, 1976. She found no medical evidence that claimant could not return to his former job as a golf pro and concluded that claimant, voluntarily, excluded his former profession.

The Board, on de novo review, finds that claimant has failed to establish by a preponderance of the evidence that he has suffered any permanent disability as a result of the compensable injury of May 11, 1976, therefore, the Referee's order should be affirmed.

ORDER

The order of the Referee, dated November 18, 1977, is affirmed.

WCB CASE NO. 77-3561 JUNE 29, 1978

PEGGY E. WRIGHT, CLAIMANT
Emmons, Kyle, Kropp & Kryger, Claimant's Attys.
Cheney & Kelley, Defense Attys.
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 September 1, 1977 which awarded claimant compensation only for temporary total disability from January 14 through February 24, 1977. Claimant contends she is entitled to compensation for permanent total disability.

Claimant was a 58-year-old dishwasher who sustained a compensable injury to her back and right hip on January 14, 1977 when she slipped and fell. Her claim was closed based on a medical determination that claimant suffered no permanent disability as a result of the injury which was initially diagnosed as a simple contusion. Claimant had a full range of motion with no point tenderness over the spine; there was mild right S-1 joint pain and a slight right discomfort on rib compression.

Claimant was first seen by a naturopath who reported that she had a sprain in her sacroiliac region. Later claimant came under the care of Dr. Poulson, an orthopedic surgeon, who released her to return to work as of March 16, 1977.

On May 2, 1977 claimant was seen by a Dr. Stevens who

found mild degenerative arthritis of the lumbosacral spine with lumbago dating from acute strain on January 14, 1977; he suggested permanent restriction of lifting to 20 to 30 pounds with no bending and stooping and found her to be medically stationary as of that date.

On June 10, 1977 Dr. Poulson reported that claimant's range of motion was full, as it had been at the time of his earlier examination of claimant and there were no neurological changes in the lower extremities. He felt there was no impairment but there might be disability based on recurrent pain.

After the claim had been closed, claimant returned to see Dr. Stevens, complaining of headaches and low back pain. Upon an examination of claimant, Dr. Stevens was unable to find any neurological deficits, there was a moderate limitation of range of motion but there were no muscle spasms and no great amount of discomfort that he could ascertain. He questioned claimant's motivation to be medically assisted so that she could return to employment.

The Referee found that the medical evidence did not establish that the fall at work produced any permanent disabling condition which would actually reduce claimant's wage earning capacity. He found that the restrictions suggested by Dr. Stevens were prudent recommendations for a person as slight as claimant with degenerative arthritis, but did not imply that the work incident produced a permanent disabling condition.

The Board, on de novo review, agrees that a person as slight as claimant probably would have a normal restriction of lifting not more than 30 pounds. However, Dr. Poulson, who stated that he found no impairment, also said that there might be disability based on recurrent pain.

Claimant worked for a period of time with the Vocational Rehabilitation Division but then decided that she could work around her own home making and selling bread, boarding dogs and doing such other activities which would not bring on back pain. Claimant testified that the pain in the lower back prevents her from doing too much lifting; she tried to drive a taxi but had trouble driving any length of time. She also has trouble climbing stairs and performing other physical activities. At the time of the hearing, claimant had not returned to full time work although she had applied for jobs with several stores and also at the Stayton Hospital. Claimant's counselor testified that he was attempting to work with claimant but that she is only qualified for entry level positions since she has no skills.

The Board concludes that prior to the industrial injury claimant had been able to perform her work as a dishwasher, she had been able to work as a hospital aide and had been able to work at home in her garden. Now claimant is unable to perform any of these tasks.

Claimant, at best, had very little opportunities afforded to her in today's labor market, however, that segment has been further diminished by her industrial injury. Therefore, the Board concludes that claimant should be awarded 32° for 10% unscheduled back and right hip injury to adequately compensate her for this loss of wage earning capacity resulting from the industrial injury.

ORDER

The order of the Referee, dated January 30, 1978, is reversed.

Claimant is awarded 32° of a maximum of 320° for unscheduled back and right hip disability.

Claimant's attorney is awarded as a reasonable attorney's fee for his services before the Board on 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.

CLAIM NO. D53-135274 JUNE 30, 1978

FLORENCE GAIL MCCOMB, CLAIMANT
Harbison, Kellington & Krack, Claimant's Attys.
Own Motion Order Referring for Hearing

On April 18, 1978 the Board received a request from claimant to reopen her claim for a compensable injury suffered on April 4, 1970 while working as a grocery checker for Bazar, Inc. The claim was accepted and initially closed by a Determination Order dated May 15, 1972 which granted claimant 64° for 20% unscheduled low back disability. Claimant's aggravation rights expired on May 15, 1977 and claimant requested the Board to exercise its own motion jurisdiction pursuant to ORS 656.278 and grant her further relief.

On April 26, 1978 the employer's carrier, Employers Insurance of Wausau, refused claimant's request of it to reopen her claim on the grounds that the five-year aggravation period had expired. In its letter of denial the carrier advised claimant that it had received medical reports from Dr. Peterson which they were submitting to the Board together with their copy of the letter of denial.

On May 4 the carrier advised the Board that it was opposing claimant's request for own motion relief based upon certain comments made by Dr. Peterson in his reports and a written statement obtained from claimant by their claim representative on March 20, 1978 which indicated that claimant's back condition became worse after doing unusual and heavier housework.

On May 18, 1978 the Board received, in support of claimant's request, a report from Dr. Wilson which indicated that claimant's present condition was connected with the 1970 industrial injury. On May 23, 1978 the carrier was furnished by the Board a copy of this report and also a report from Dr. Peterson dated March 9,1978 and asked to advise the Board if its position remained the same.

No response was received as of the date of this order from the carrier and the Board, at this time, does not have sufficient evidence upon which to make a determination on the merits of claimant's request for own motion relief.

Therefore, the matter is referred to the Hearings Division to set an expedited hearing on the issue of whether claimant's present condition has worsened since March 27, 1974, the date of the second Determination Order which had granted claimant 15° for 10% loss of her right leg and was the date of the last arrangement or award of compensation and, if so, to determine whether such condition is attributable to claimant's industrial injury of April 4, 1970.

Upon conclusion of the hearing the Administrative Law Judge (ALJ) shall cause a transcript of the proceeding to be prepared and submitted to the Board together with the ALJ's recommendation on the merits of claimant's request for own motion relief.

SAIF CLAIM NO. EC 214030 JUNE 30, 1978

WILBUR M. SLATER, CLAIMANT
Galton, Popick & Scott, Claimant's Attys.
SAIF, Legal Services, Defense Atty.
Own Motion Order

On March 29, 1978 claimant, by and through his attorney, had requested the Board for own motion relief pursuant to ORS 656.278 which would reopen his claim for a compensable injury suffered to his left knee on October 27, 1969 while in the employ of O'Neill Transfer Company. Claimant's claim had been closed on May 6, 1971 and his aggravation rights have expired.

The Board did not, at that time, have sufficient evidence before it to judge the merits of claimant's request for own motion relief and it referred said request to its Hearings Division and, specifically, to H. Don Fink, Administrative Law Judge (ALJ), for the purposes of receiving evidence and making a determination on the merits of claimant's claim for own motion relief on his October 27, 1969 industrial injury.

The request for own motion relief was to be heard on a consolidated basis with claimant's requests for hearing on,

(1) denial of his claim for aggravation of his left knee injury suffered on October 27, 1969, and (2) denial of his claim for aggravation of his right knee injury of September 1975. The ALJ was directed, in addition to entering an order on the denials, to submit a transcript of the proceedings to the Board together with his recommendation on claimant's request for own motion relief relating to his October 27, 1969 injury.

The matters were heard by H. Don Fink, ALJ, on April 18, 1978. An Opinion and Order was entered which affirmed both denials and the ALJ recommended that the Board grant claimant's request for own motion relief and authorize payment of compensation, as provided by law, to claimant for the left knee surgery performed on March 28, 1978 together with appropriate pre-surgery and post-surgery medical expenses.

The Board, after reviewing the entire transcript of the proceedings and the Opinion and Order of the ALJ, concludes that, based upon Dr. Harris' unequivocal opinion that there was causal connection between the condition for which surgery was required on March 28, 1978 and claimant's industrial injury of October 27, 1969, that the recommendation of the ALJ should be accepted.

ORDER

Claimant's claim, identified as SAIF Claim No. EC 214030, relating to an industrial injury suffered on October 27, 1969, is hereby remanded to the State Accident Insurance Fund, for acceptance and for payment of compensation, as provided by law, commencing on the date claimant entered the hospital for the surgery performed on his left knee on March 28, 1978 and until his claim is again 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 this matter a sum equal to 25% of the compensation for temporary total disability and permanent partial disability which claimant may receive as a result of this order, payable out of said compensation as paid, not to exceed the sum of $2,300.

TABLE OF CASES

SUBJECT INDEX

Volume 24

AGGRAVATION

AOE/COE

COMPLIANCE

DEATH BENEFITS

HEART ATTACK

MEDICAL SERVICES

MEMORANDUM OPINION

Affirmed:	C. Culp	59
Affirmed:	J. Greenslitt	60
Affirmed:	J. Kammerzell	62
Affirmed:	D. Noble	65
Affirmed:	T. Cruchelow	68
Affirmed:	B. Hinzman	71
Affirmed:	L. Iverson	71
Affirmed:	W. Willette	74
Affirmed:	R. Johnson	80
Affirmed:	B. Augard	84
Affirmed:	C. Clark	85
Affirmed:	S. Raddatz	116
Affirmed:	T. Audas	130
Affirmed:	E. Leach	135
Affirmed:	R. Woodward	140
Affirmed:	L. Pesterfield	148
Affirmed:	I. Adams	151
Affirmed:	M. Schramm	161
Affirmed:	O. Amaya	165
Affirmed:	M. O'Niell	171
Affirmed:	L. Collins	178
Affirmed:	B. Radjenovic	185
Affirmed:	K. Samples	186
Affirmed:	E. Turpen	187
Affirmed:	D. Martin	200
Affirmed:	R. Heidt	220
Affirmed:	C. Couey	226
Affirmed:	D. Crawford	227
Affirmed:	G. Georges	227
Affirmed:	W. Hackney	228
Affirmed:	E. Copeland	230
Affirmed:	J. Phillips	232
Affirmed:	C. Rye	232
Affirmed:	I. Welty	233
Affirmed:	V. Lagge	233
Affirmed:	M. McGill	234
Affirmed:	H. Short	240
Affirmed:	R. Coonrod	279
Affirmed:	G. Haugen	282
Affirmed:	C. Lacombe	283
Affirmed:	R. Mathiason	283
Affirmed:	S. Nicholson	284
Affirmed:	J. Contreras	292
Affirmed:	I. Heath	292
Affirmed:	J. Johnson	293
Affirmed:	F. Tate	305
Affirmed:	E. Kelly	309
Affirmed:	M. Lash	310
Affirmed:	K. Leonard	310
Affirmed:	D. Monroe	312
Affirmed:	R. Carter	314
Affirmed:	H. Milks	317
Affirmed:	M. Paris	317
Affirmed:	E. Rogers	320
Affirmed:	R. Harper	325

OCCUPATIONAL DISEASE

OWN MOTION JURISDICTION

PENALTIES AND FEES

PERMANENT PARTIAL DISABILITY

(1) ARM AND SHOULDER

Arm and shoulder: 20% and 50% on reduction:
E. Richardson---------- 43
Shoulder: 15% on reduction from 50%: E. Horton --- 456
Shoulder: 30% on reduction from 40% for mild disability: J. Cooper ---------- 88

(2) BACK

Back: 5% for tailbone after fell out of chair:
M. Keenon ---------- 93
Back: 10% affirmed: W. Smith ---------- 129
Back: 10% affirmed: N. Barkley ---------- 219
Back: 10% on increase where want total: P. Wright 483
Back: 15% affirmed: H. Meyer ---------- 17
Back: 15% for minimal disability: B. Trow -------- 96
Back: 20% reduced to 0%: C. Perkins ---------- 29
Back: 20% reduced to 10%: L. Collins ---------- 86
Back: 20% affirmed: T. Reid ---------- 185
Back & arm: 20% and 20% on increase: K. Sharp ---- 320
Back: 25% affirmed: C. Daniels ---------- 110
Back: 25% affirmed: E. Martin ---------- 145
Back: 25% on reduction: J. Parvin ---------- 218
Back: 25% affirmed: C. Williams ---------- 222
Back: 25% said to be "about right" after laminectomy: L. Brown ---------- 228
Back: 25% on increase where no surgery:
D. Ehlinger ---------- 280
Back: 25% settled for $500 discount: M. Young ---- 314
Back: 25% on reduction for sore back: G. Madarus - 346
Back: 30% in 5 page opinion: B. Brown ---------- 270
Back: 35% affirmed: P. Zerr ---------- 19
Back: 35% for disability from minimal to moderate:
I. Aldridge ---------- 20
Back: 35% on reduction for mild symptoms:
L. Brooks ---------- 176
Back: 35% affirmed: E. Love ---------- 200
Back: 35% affirmed: W. Edmison ---------- 262
Back: 35% after two laminectomies: C. Nelson ----- 264
Back: 35% where seven defense doctors: M. Aarnas - 368
Back: 35%: T. Uhacz ---------- 471
Back: 40% where physicians say 25%: J. Henderson - 102
Back: 40% affirmed: D. Anderson ---------- 204
Back: 50% affirmed: R. Minor ---------- 28
Back: 50% on reduction: D. Midkiff ---------- 51
Back: 50% reduced to 40% where car salesman can return to work: R. Britz ---------- 76
Back: 50% affirmed: D. MacLeod ---------- 161
Back: 50% on reduction after fusion where employer keeps man on job: J. Lee ---------- 296
Back: 50% for mild disability: W. Lenhard -------- 445
Back: 55% on increase where Dr. Pasquesi says 22%: G. Schiele ---------- 433
Back: 60% for mildly moderate disability on increase: G. Mollers ---------- 103

Back and leg: 60% and 60% on increase where no plans to return to work: H. Shamblin ---------- 220
Back: 65% on reduction for mild disability: L. Root ---------- 267
Back: 70% on reduction for mild to moderate disability: M. Long ---------- 447
Back: 75% affirmed: W. Roofener ---------- 106
Back: 75% for mildly moderate disability after surgery: M. Sims ---------- 108
Back: 75% on reduction: D. Sawyer ---------- 163
Back: 75% on settlement: J. Clay ---------- 365
Back: 80% on increase from 30% where mild disability: R. Malson ---------- 62
Back: 80% for severe disability: J. Riley ---------- 187
Back: 100% affirmed: L. Tanniehill ---------- 129
Back: 100% increased to total: C. Ricketts ---------- 189

(3) FOOT

Foot: 15% affirmed: D. Sherlock ---------- 107
Foot: 30% where must avoid standing: S. Knight ------ 294

(4) FOREARM

Forearm: 15% for mild sprain: P. Wright ---------- 452

(5) HAND

Hand: 5% on increase: D. Arnspiger ---------- 257
Hand: 30% for multiple finger injuries: S. Guinn ---- 35

(6) LEG

Leg: None for sore knee on reversal: E. Powell ------ 115
Leg: 15% on reduction from 20%: G. Patterson -------- 73
Leg: 15% for knee on increase: D. Arnspiger --------- 259
Leg: 20% affirmed: L. McKinnon ---------- 138
Leg: 65% after total knee replacement: W. Paul ------ 298
Leg: 90% affirmed: J. Holmes ---------- 127

(7) NECK AND HEAD

Neck: 5% affirmed: L. Tompkins ---------- 222
Neck: 50% on increase: O. Koehler ---------- 230

(8) UNCLASSIFIED

Depressive neurosis: 20% where can't stand sawmills: H. Christoffersen ---------- 121
Ears: 5.75% and 28.70%: V. Allen ---------- 193
Heart: 90% increased to total: J. Myers ---------- 419
Lungs: Oust trigers asthma: D. Toon ---------- 55
Lungs: 30% affirmed: N. Keuter ---------- 207
Mental disability: 20% affirmed: E. Richmond -------- 421

PROCEDURE

REQUEST FOR HEARING

REQUEST FOR REVIEW

Employer not served with request: R. Schwab ---------- 301
Service by board cures failure of claimant to
make service: J. Metcalf ---------- 311
Withdrawn: H. Johanntoberns ---------- 11
Withdrawn: J. Mongeon ---------- 17
Withdrawn: B. Brockman ---------- 22
Withdrawn: L. Ducat ---------- 60
Withdrawn: J. Cline ---------- 68
Withdrawn: K. Murphy ---------- 84
Withdrawn: O. Poplin ---------- 139
Withdrawn: D. Johnson ---------- 144
Withdrawn: W. Cross ---------- 155
Withdrawn: B. Erb ---------- 169
Withdrawn: B. Lewis ---------- 169
Withdrawn: O. Chada ---------- 178
Withdrawn: M. Patten ---------- 251
Withdrawn: B. White ---------- 253
Withdrawn: H. Loughmiller ---------- 256
Withdrawn: J. Ragsdale ---------- 287
Withdrawn: F. Propes ---------- 312
Withdrawn: C. Pinkerton ---------- 318
Withdrawn: F. Stiehl ---------- 323

SECOND INJURY FUND

Denied: D. Walters ---------- 12
File lost for year ---------- 345
Reimbursement of 40%: L. Fritz ---------- 143
Relief allowed: D. Duveneck ---------- 69

TEMPORARY TOTAL DISABILITY

Allowed for interim before vocational rehabilitation
began: T. Uhacz ---------- 471
Denied in confusing opinion: A. Gultry ---------- 461
Disputed closing: A. Matthews ---------- 450
Payable pending denial: R. Garza ---------- 156
Pending denial: F. Heinrick ---------- 8
Pending denial: G. Knoetzel ---------- 180
Pending denial: C. Williams ---------- 403
Premature closure: C. Carroll ---------- 276

THIRD PARTY CLAIM

Reimbursement denied: R. Seymour ---------- 107
Settlement where appeal pending: F. Jangula ---------- 387
Unrelated recovery: R. Seymour ---------- 287

TOTAL DISABILITY

Affirmed: J. Rust ---------- 11
Affirmed: E. Bea ---------- 14
Affirmed: G. Rowley ---------- 18
Affirmed: J. Sulentich ---------- 18
Affirmed: A. Keevy ---------- 24
Affirmed: L. Matheus ---------- 114
Affirmed against non-complying employer: B. Branton -- 119
Affirmed: E. Reeves ---------- 208

VOCATIONAL REHABILITATION

ALPHABETICAL INDEX

VOLUME 24

ORS CITATIONS